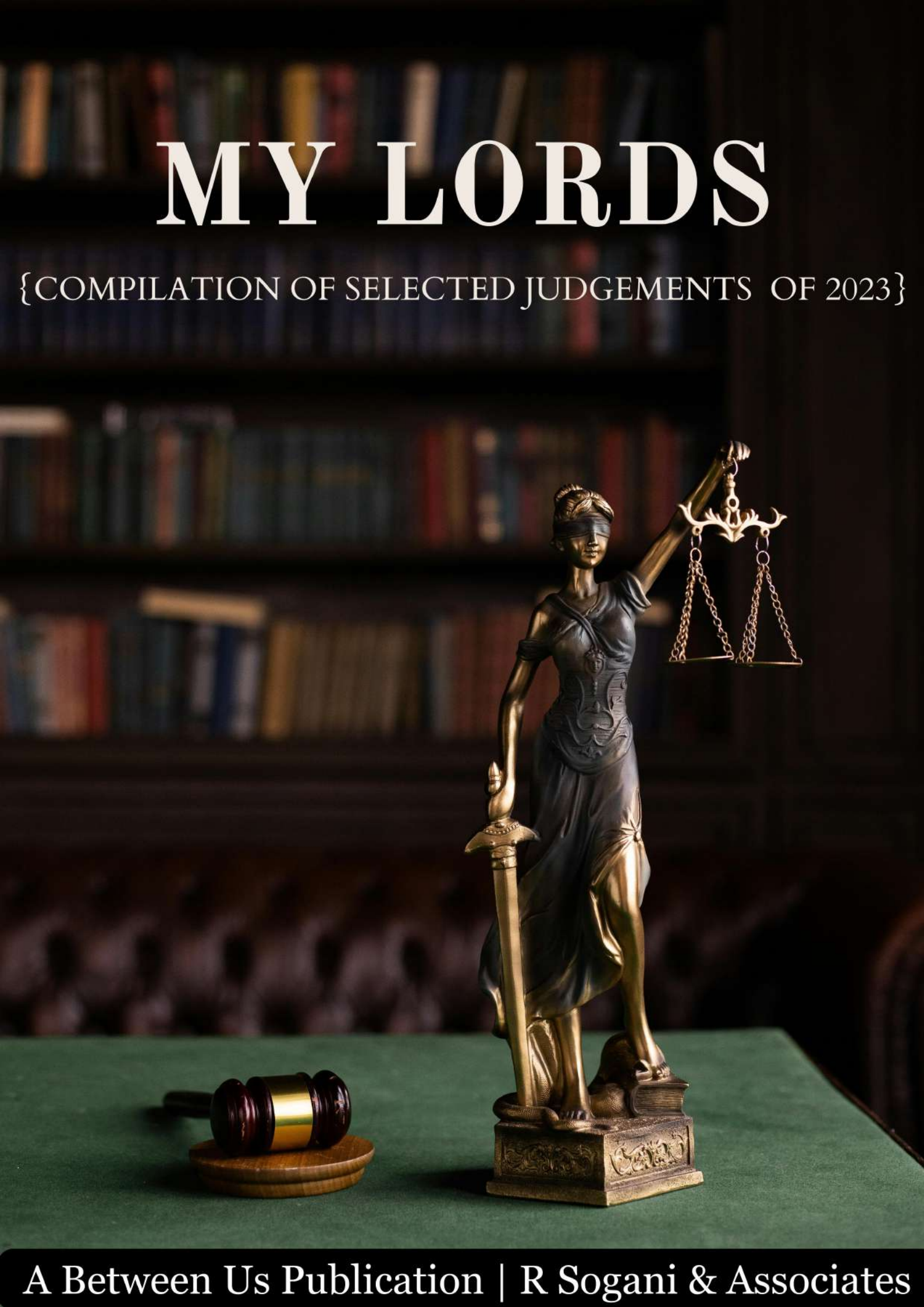
MY LORDS

{COMPILATION OF SELECTED JUDGEMENTS OF 2023}



A Between Us Publication | R Sogani & Associates

Dear Readers

With an ever- evolving legal landscape, where staying informed is not just an advantage but a necessity, we bring to you the 4th Edition of My Lords- A Between Us Publication.

We find immense privilege in presenting this journal to you where we embark on a journey through the dynamic realm of Direct Tax Laws. Through this journal, we aspire to give it our best shot in tracing the comprehensive analysis of some recent groundbreaking emergences in the Country reshaping the law via judgements of the Hon'ble Supreme Court. We aim that our modest effort will not only benefit the aspiring CA students but also practitioners who are deeply entrenched in the intricate workings of Direct Tax Laws, ensuring that our publication serves as a valuable resource for individuals at all stages of their careers and expertise levels.

We express our deepest gratitude to our mentors for providing their unwavering guidance, support and wisdom throughout this path. The willingness and inquisitiveness of our fellow Tax Team members, who along with their own perspectives embarked on this pursuit of veracity with us is truly appreciated.

May the insights shared within these pages resonate with you as deeply as they have resonated with us during the crafting of this publication.

Let us engage in constructive discourse, respectful disagreement, and collective action to chart a course towards evaluating a more equitable, transparent and efficient tax regime.

The true sign of intelligence is not knowledge but imagination...

Tax Team

R Sogani & Associates

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- **Cases reviewed by Adv. Ruchika Sogani.**

1. ALP determined by ITAT can be subject to scrutiny; no absolute proposition of law that its decision is final.

Sap labs India (P.) Ltd

v.

Income Tax officer

[2023] 453 ITR 121 (SC)

April 10, 2023

Law Involved

- **Section 92C(1) of the Income Tax Act, 1961 ("IT Act")**
  "The Arm's Length Price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely : –

  (a) comparable uncontrolled price method;
  (b) resale price method;
  (c) cost plus method;
  (d) profit split method;
  (e) transactional net margin method;
  (f) such other method as may be prescribed by the Board."

- **Section 260A(1) of IT Act**
  It states that *"an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law."*

Factual Background

Does the determination of the Arm's Length Price by the Tribunal always become final, preventing the High Court from reviewing it under Section 260A of the Act?

In this case, the High Court **("HC")** dismissed an appeal that challenged the determination of the Arm's Length Price **("ALP")** by the Tribunal. The HC relied on the decision of the Karnataka HC in the case of **Pr. CIT v. Softbrands India (P.) Ltd. [2018] 406 ITR 513 (Kar.)**, that the determination of the ALP by the Tribunal is final and cannot be subject to scrutiny under section 260A.

Issues Involved

Whether in every case where the Tribunal determines the ALP, the same shall attain finality and the HC is precluded from considering the determination of the ALP determined by the Tribunal, in exercise of powers under section 260A of the Act.

High Court

The appeal filed by the revenue before the HC was dismissed by HC, by relying upon the decision of the Karnataka HC in the case of Pr. CIT v. Softbrands India (P.) Ltd. *(supra)* holding that the determination of the ALP by Tribunal is final and cannot be subject to scrutiny under section 206A.

Supreme Court

Revenue's Contention:
The HC of Karnataka in the case of Softbrands India (P.) Ltd. (2018) 406 ITR 513 (Kar.) held that the determination of the ALP by the Tribunal is final and cannot be subject to scrutiny under section 260A of the IT Act. However, this

view is erroneous and should be corrected by the Supreme Court. There cannot be any absolute proposition of law that against the decision of the Tribunal determining the ALP, there shall not be any interference by the HC in an appeal under section 260A of the IT Act.

Under the scheme of transfer pricing, the ALP is to be determined taking into consideration the guidelines stipulated under the aforesaid provisions of the IT Act and the Rules. Therefore, it is always open for the HC to consider and/or examine whether the guidelines stipulated under the Act and the Rules have been followed by the Tribunal while determining the ALP. If the ALP is determined by the Tribunal de hors the guidelines stipulated under the Act and the Rules, more particularly Rules 10A to 10E of the Rules, the determination can be said to be perverse, which is always subject to the scrutiny by the HC in an appeal under section 260A of the IT Act.

Assessee's Contention:

Once the ALP is determined by the Tribunal following relevant guidelines, challenging it as a substantial question of law in an appeal under section 260A of the IT Act is not permissible unless there is demonstrated perversity in the Tribunal's findings. The HC can only intervene if there is a substantial question of law, which arises when a question of law is debatable. The Tribunal's role as a final fact-finding authority stands unless there is proven perversity in its findings. In transfer pricing matters, issues like the definition of 'international transaction' or 'associated enterprises' can raise substantial questions of law. The HC can review cases based on perversity allegations supported by evidence, ensuring adherence to legal guidelines

Judgement:

The Supreme Court ruled that the HC can review the determination of the ALP by the Tax Tribunal, as per Chapter X of the IT Act. This review includes assessing if the guidelines under sections 92, 92A to 92CA, 92D, 92E, and 92F of the Act and rules 10A to 10E of the Rules are followed. The HC can scrutinize the comparability of companies, selection of filters, and proper consideration of comparable transactions. The decision in Pr. CIT v. Softbrands India (P.) Ltd. *(supra)* was not accepted, emphasizing adherence to

guidelines. The HC can remit cases back for fresh decisions based on whether the Tribunal's findings on ALP are perverse or not. Recent rulings highlight that ITAT decisions on Arm's Length transfer price are subject to legal scrutiny by the HC, ensuring compliance with established guidelines.

Analysis

From the above judgement it can be inferred that anything that de hors the relevant provisions of the guidelines, can be considered as perverse and it may be considered as a substantial question of law as perversity itself can be said to be a substantial question of law.
Therefore, the HC has to examine in each and every case whether the guidelines laid down under the Act and the Rules, are followed while determining the ALP by the Tribunal or not and to that extent whether the findings recorded by the Tribunal while determining the ALP are perverse or not.

-Kavita Das

2. Section 271C penalty cannot be imposed for belated or non-payment of TDS.

US Technologies International (P.) Ltd.

v.

Commissioner of Income Tax

[2023] 453 ITR 644 (SC)

October 04, 2023

Law Involved

- **Section 271C of Income Tax Act, 1961 ("IT Act")**

  It talks about the penalty for failure to deduct tax at source or to collect tax at source. It states that if any person fails to deduct the required amount of tax at source, or fails to collect tax at source, then such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax that he failed to deduct or collect. The penalty is in addition to the tax that is required to be deducted or collected. However, if the person proves that there was reasonable cause for such failure, then the penalty may not be levied.

- **Section 201(1A) of the IT Act**

  It talks about the interest on a person or company if they don't deduct or pay taxes as required under the Act. They will owe simple interest on the unpaid amount, calculated monthly. Interest starts from when the tax should have been deducted until it's paid, and from the deduction to the payment date. It also talks about when interest is due and exceptions.

❖ **Section 276B of the IT Act**

It deals with the offense of failure to pay tax to the Government. It imposes penalties for such offenses, including rigorous imprisonment which shall not be less than three months but which may extend to seven years along with fines.

Factual Background

The Assessee is a software company engaged in the business of development of software. Assessee had deducted tax at source in respect of salary, contract payments, professional fees for technical services, rent, etc but deposited the same belatedly.

Out of Rs. 1,10,41,898/- TDS of Rs. 38,94,687/- was remitted in March and balance of Rs. 71,47,211/- was remitted later.

Issue Involved

Whether the interpretation of the words "fails to deduct" under section 271C includes a person who has deducted tax at source but has failed to remit the same to the Government.

Assessing Officer ("AO")

The Assessing Officer levied the penalty under section 271C upon the Assessee of Rs. 1,10,41,898/- equal to the amount of tax recovered at source and withheld by the Assessee without remittance to the Department on due dates.

CIT (A) & Tribunal

On appeal, both, the Commissioner (Appeals) and the Tribunal, upheld the order of the Assessing Officer.

High Court

The High Court dismissed the appeal preferred by the Assessee by holding that failure to deduct/remit TDS would attract penalty under section 271C.

Supreme Court

Assessee's Contention:

Section 271C is applicable only in cases of non-deduction of tax, not for deduction of tax but remitted belatedly to the Government. The Assessee contended that the belated remittance of TDS does not warrant penalty under section 271C, and instead, only penal interest under section 201(1A) shall be applicable. A penal provision should be construed strictly and literally, and so far as the belated remittance of the TDS is concerned, the statute already provides for penal interest for belated remittance under section 201(1A). Words used in section 271C are "fails to deduct the whole or any part of the tax" therefore it is submitted that it does not speak "fails to deduct and remitted belatedly."

Wherever the Parliament wanted to provide for the consequences on non-payment of the TDS, the same is provided like in section 276B of the Act where it talks about the liability of the assessee to be prosecuted and punishable with rigorous imprisonment for 3 months to seven years with fine if he "fails to pay" the tax deducted at source to the Government- the words which are missing in section 271C of the Act.

Further, he contended that section 273B exempts imposition of penalties for any failure if reasonable cause for failure is proven.

Revenue's Contention:

The revenue argued that the purpose of insertion of this section is to impose penalties for failure to deduct tax at source including such person who has deducted tax at source but not remitted the same to the Government. Previously, there was no penalty for this failure, but prosecution was possible under section 276B, which prescribed punishment for failure to deduct tax at source or after deducting failure to remit the same to the Government. Section 271C was added to levy penalties for failure to deduct tax at source.

Revenue asserts that even if tax has been deducted but not remitted to the government, or remitted belatedly, penalties under section 271C shall apply on such person. He referred to the CBDT Circular Number 551 dated 23.01.1998 to support the interpretation of the purpose behind this section.

Judgement:

The Supreme Court concluded that the words "fails to deduct" does not include such a person who has deducted the tax at source but has failed to remit/remit the same belatedly. Therefore, the Assessee shall not be liable to pay any penalty under section 271C. Upon non- payment/ belated remittance of TDS to the Government, the Assessee shall be made liable under section 201(1A) and section 276B of the Act, 1961.

Further it was established that any question on applicability of section 273B of the Act is not required to be considered since there is no liability to pay penalty under section 271C of the IT Act.

Analysis

Though the law under section 271C has been amended by omitting and inserting certain phrases, the changes have no impact on the basis by which the judgement has been concluded of the case under discussion.

If the Assessing Officer instead of imposing penalty under section 271C on the Assessee, made the Assessee liable under section 201(1A) of the IT Act at the initial stage only, the Assessee could have been prosecuted as well under section 276B as assessee in default along with interest under section 201(1A) of the IT Act.

-Khushi Agarwal

3. Scope of Assessment under section 153A.

Principal Commissioner of Income-Tax, Central-3

v.

Abhisar Buildwell (P.) Ltd. & Others

[2023] 454 ITR 212 (SC)

April 24, 2023

Law Involved

This judgment deals with following sections of the Income-tax Act, 1961 **("IT Act")** primarily:

- **Section 153A**
  This section establishes the mechanism of assessment in case of a person being searched.

- **Section 132**
  This section empowers Income Tax Authorities to carry out a search and seizure.

Factual Background

The core issue in this appeal was the scope of assessment under Section 153A. The competence of Assessing Officer **("AO")** to consider all available material, including that found during a search, for assessing 'total income' was contested. The Assessee argued that if no assessment was pending at the search initiation date, only incriminating material from the search could be considered.

Issue involved

The main issue revolved around the jurisdiction of AO under Section 153A regarding completed assessments/unabated assessments. Whether the AO's assessment scope is limited to incriminating material from search or requisition under sections 132 or 132A respectively.

High Court

Various High Courts held that no additions can be made in completed assessments without incriminating material from searches or requisitions under sections 132 or 132A. Assessments must align with the purpose of section 153A to tax undisclosed income detected during searches.

Supreme Court

Revenue's Contention:

As referred in section 2(24) of the IT Act, Section 5 includes all income from whatever source derived in the 'total income' of a resident in any previous year. Therefore, if any taxable income is left out, the resultant figure would be 'partial income' and not 'total income'. The erstwhile scheme of block assessment under section 158BA involved regular assessment/reassessment falling under section 143/147 respectively, and the assessment on undisclosed income for block period would constitute together the total income. The current section 153A regime introduces a single assessment of the 'total income', encompassing undisclosed income found during a search and income from any source. The term "undisclosed income" is no longer defined, and the focus is on assessing the total income under section 153A for six

assessment years. The provision doesn't restrict assessment to undisclosed income or incriminating material seized during a search; it hinges on the initiation of a search under section 132 or requisition under section 132A.Excluding income found from sources other than the search would prevent taxing it. Since section 153A is plain and unambiguous, assessment of **'total income'** has to be made.

Assessee's Contention:

Section 153A assessment differs from the regular section 143(3) assessment. Allowing Revenue to assess issues without incriminating material during a search renders "search" and "requisition" in section 153A meaningless, misusing searches to extend the limitation for regular assessment under section 143(3). 'Total income' under section 153A for unabated assessments, interpreted with sections 132 and 132A, is unaffected by the omission of "undisclosed income." Literally construing "total income" contradicts legislative goals and risks arbitrary interference in completed assessments, bypassing the limitation for regular assessment. For completed assessments under section 153A, 'total income' means income as assessed under section 143(3) or total income as per the return if no earlier assessment and time limit for section 143(2) notice has expired. Thus, it encompasses originally assessed income and income discovered during the search.

Judgment:

The Supreme Court concluded that under a search (section 132) or requisition (section 132A), the AO has jurisdiction for block assessment under section 153A. All pending assessments/reassessments are abated. If incriminating material is found, the AO can assess or reassess the 'total income' for unabated/completed assessments, considering the unearthed material and other available data. However, if no incriminating material is found during the search, the AO cannot reassess completed/unabated assessments based on other material. In such cases, re-opening assessments under sections 147/148 is allowed, subject to fulfilling the conditions specified, ensuring the Revenue's remedial powers are preserved.

The Supreme Court agreed with the decisions of **Delhi High Court in CIT v. Kabul Chawla [2016] 380 ITR 573 (Delhi)** and **Gujarat High Court in Pr. CIT**

v. Saumya Construction (P.) Ltd. [2016] 387 ITR 529 (Guj.), along with other High Courts, asserting that no additions can be made to completed assessments without incriminating material. On 23.08.2023, CBDT issued Instruction No. 1 of 2023, providing guidelines for implementing the judgment and outlining further steps.The instruction aims to ensure a uniform practice among tax officials regarding the reopening of past cases under the IT Act. Notably, the Board has determined that no action is deemed necessary under section 147/148 of the IT Act for cases (excluding lead and tagged cases mentioned in this judgment) where the decisions of the appellate authorities have attained finality, as they have not been further contested in appeal.

Analysis

The Supreme Court ruling restricts AO from making additions to completed assessments without specific incriminating material from searches or requisitions. However, it also preserves the right of AO by allowing assessments to be reopened under sections 147/148, provided conditions are met.

Further, attention is drawn to the fact that based on various judicial pronouncements, sections 153A/153C and section 147/148 are considered as mutually exclusive sections, implying that if some incriminating material is found, then reassessment proceedings can be initiated through recourse to section 153A/153C only as these are non-obstante sections to section 147/148. Thus, as per the Supreme Court judgment it can be interpreted that in absence of incriminating material in case of completed/ unabated assessments, recourse to section 153A/153C is not available. Therefore, no conflict among sections 147/148 and 153A/153C directly arises. Therefore, Supreme Court has ruled out that in such scenario, section 147/148 recourse can be duly available, provided conditions therein.

Presently, the scheme of assessment under sections 153A and 153C has been extinguished for search or requisitions made after 01.04.2021.

- Nikita Tinker

4. Loss due to confiscation of smuggled stock-in-trade is not allowable under section 37.

Commissioner of Income Tax

v.

Prakash Chand Lunia (D)*

[2023] 454 ITR 61 (SC)

April 24, 2023

Law Involved

- **Section 37(1)** i.e. Allowability of Business expenditures read with **Section 69A** that deals with unexplained money of the Income Tax Act, 1961 are main sections on which light is casted on.

  Section 69A-Unexplained money, etc.

  "Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year."

Section 115BBE

It deals with levy of tax on income as mentioned in Sections 68,69 and 69A to 69D.

Factual Background

- The Assessee (Prakash Chand Lunia) was engaged in the business of trading of silver.
- A search was conducted in his premises by Directorate of Revenue Intelligence **("DRI")** and 144 slabs of silver as well as 2 silver ingots recovered.
- Collector of Customs vide order dated 18.12.1990 ordered absolute confiscation of unaccounted silver on ground that the confiscated silver was of smuggled nature since no details were found in the Assessee's books of accounts regarding the same.
- The Assessee claimed that loss on account of confiscation would be allowable as trading loss incidental to the business but the Assessing Officer **("AO")** denied the said claim and made additions under section 69A.

Issues Involved

- Whether main business of Assessee was dealing in silver and his business could be said of smuggling of silver bars and decision in the case of CIT v. Piara Singh [1980] 124 ITR 41 would be applicable.
- Whether assessee can claim the business loss of the value of silver bars confiscated.
- Whether word **'any expenditure'** mentioned in section 37(1) would take in its sweep loss occasioned in course of business.
- Whether a penalty or confiscation was a proceeding in rem and loss in pursuance to same would be available for deduction.

Assessing Officer

During the assessment, the AO held that Assessee was not able to explain the nature and source of acquisition of silver of which he is held to be the owner,

therefore the deeming provisions of section 69A of the Income Tax Act, 1961 would be applicable. Therefore, AO passed an assessment order and made an addition of Rs 3,06,36,909/- under the said section.

CIT(A)

On appeal to CIT(A), the appeal of the Assessee was dismissed and order of the AO was upheld.

ITAT

ITAT upheld the decision of CIT(A) and confirmed that addition shall be made and the loss by confiscation cannot be allowed.

High Court

High Court decided in favour of Revenue regarding making the addition but along with that held that loss of confiscation by the DRI official is a business loss while relying on the decision in the case of CIT v Piara Singh *(supra)* and accordingly, the loss by confiscation of silver was required to be allowed.

Supreme Court

Revenue's Contention

The Revenue vehemently submitted that the High Court has materially erred in relying upon the decision of this Court in the case of Piara Singh *(supra).* It is submitted that as such the AO, CIT(A) and ITAT have correctly distinguished the judgement as the same pertained to an assessee who was engaged in the business of smuggling of currency notes and for whom confiscation was a loss occasioned in pursuing his business i.e. a loss which sprung upon directly from carrying on of his business and was incidental to it. Also, the decision of this court in **Haji Aziz and Abdul Shakoor Bros v. CIT [1961] 41 ITR 350 (SC)** case, of the Andhra Pradesh High Court in the case of **Soni Hinduji Kushalji& Co. v. [1973] 89 ITR 112** and of the Bombay High Court in the case of **J.S. Parkar v. V.B. Palekar [1974] 94 ITR 616 (Bom.)** shall be applicable with full force to the facts where it was held that the amount

paid by way of penalty for breach of law was not a normal course of business carried on by it and cannot be allowed as a business loss.

A case of Dr. T.A. Quereshi *(supra)* was also followed wherein the assessee was engaged in the business of manufacturing and selling of heroin and business loss was allowable as he in the business of the same.

On the other hand, **Apex Laboratories (P.) Ltd. v. Dy. CIT [2022] 442 ITR 1 (SC),** distinguishes the judgement in Dr. T.A. Quereshi *(supra)* and states the case relating to the assessee bribing doctors, did not deal with business loss but business expenditure which was disallowable to under Explanation 1 to section 37(1).

Assessee's Contention

Assessee argued that he was engaged in the business of trading of silver and absolute confiscation of the said silver slabs would result in loss of stock in trade and Assessee having no option of redeeming the goods for further trade vesting with Central Government, so this value should be available as deduction as business/ trading loss. The decision of Court in case of **Dr. T.A. Quereshi v. CIT [2006] /287 ITR 547 (SC)** and Piara Singh *(supra)* shall be clearly applicable where the benefit of set off of loss shall be entitled to the assessee.

He claimed that the loss on account of confiscation would be allowable as a trading loss being incidental to the business and hence, deductible.

Judgment

Supreme Court, ongoing through the impugned judgement and order passed by the High Court concluded that it has materially erred in relying upon the decision of this court in the case of Piara Singh*(supra)* since the assessee was found to be in the business of smuggling of currency notes and confiscation was a loss which sprung directly from carrying on of his business and incidental to it. Therefore, this court distinguished the decisions in this case.

On the other hand, the case of Haji Aziz & Abdul Shakoor Bros.*(supra)* was followed since it was concluded that penalty for breach of law was not a normal business carried out by it and cannot be allowed as deduction.

The aforesaid two cases of Soni Hinduji Kushalji & Co. *(supra)* and J.S. Parkar v. V.B. Palekar *(supra)* were also considered with the same contention that assesses are not entitled to deductions claimed as business loss.

It was observed that confiscation was an action in rem and not a proceeding in personam and thus a proceeding in rem in the strict sense of the term is an action taken directly against the property (i.e. smuggled goods).

Besides, in the present case, the ownership of assessee cannot be disputed and even the assessee is not disputing the same. So therefore, there is no ambiguity as regards to ownership and even if owner is not known, the authorities have power to confiscate the goods.

Hence, the Apex Court **quashed the order passed by the Division Bench of Rajasthan High Court** and restored the order passed by the AO, CIT(A) and ITAT **rejecting the claim of the Assessee to treat silver bars confiscated as business loss.**

Analysis

- In the present case, judgement has been given by two judges namely, M.R. Shah and M.M. Sundresh wherein the decision is the same but the reasoning differs.
- As per my opinion, the ratio laid down by both of them is correct but the reasoning given by M.R. Shah, J. was more relevant, since he focused upon the fact that Assessee business was not of smuggling of silver and he was carrying on an otherwise legitimate business which ultimately proves the fact a penalty or a confiscation is a proceeding in rem and therefore a loss in pursuance of the same cannot be claimed as deduction as the same cannot be said to incidental to any business.

-Shivi Akar

5. 'Bitumen' is not a 'valuable article'. No section 69A addition if the transporter does not deliver it to the Government.

D.N. Singh

V

Commissioner of Income –Tax

[2023] 45 ITR 595 (SC)

May 16, 2023

Law Involved

Section 69A of the Income Tax Act, 1961 ("IT Act")

"*Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year."*

Factual Background

Assessee is a Carriage Contractor **("CC")** for bitumen, transporting bitumen from Oil Companies to the Road Construction Department of Bihar. It was alleged that the carrier is not delivering the quantity loaded by it from oil companies.

Issues Involved

There are two issues involved in the present case-

- Whether having mere possession without legal ownership or title over goods would be covered within the ambit of section 69A? **"Ownership".**
- Whether an article under section 69A was to be considered valuable if said article was a high-priced article commanding a premium price? **"Other Valuable articles".**

Assessing Officer

The Assessing Officer **("AO")** relied on the statements of junior engineers who denied their signatures allegedly on challans, which were meant to demonstrate the correct quantity of bitumen delivered. On this basis, AO made the additions by invoking Section 69A of **IT Act**.

CIT (A)

On appeal to CIT(A), additions were deleted on the ground that all junior engineers except two had accepted the delivery.

ITAT

On appeal to ITAT by Revenue, additions were sustained on the ground that all executive engineers of the consignee (road construction department) presented a case of non and short delivery before AO.

High Court

On the issue reaching the High Court **("HC")**, it was held that-

- **"Ownership"**
  Lifted bitumen and supplied, Assessee liable to pay tax on **lifted and not supplied.**

- **"Other valuable articles"**
  Any article which has value would be covered.

Thus, section 69A would be applicable on the Assessee ruled in the favor of the Revenue.

Supreme Court

Assessee's Contention:

- Bitumen cannot be treated as an "Other valuable article".
- Appellant cannot be treated as an owner, as he was a carrier.
- No complaint from the consignor as well as consignee regarding short delivery.

Revenue's Contention:

Revenue countered the submissions of the Assessee and submitted that no case was made out. The view taken by the HC represents the correct position in law.

Judgement:

- If an individual holds possession of goods without legal ownership or title, they would not fall under the scope of section 69A, indicating that the Assessee is not considered the owner.
- Bitumen cannot be considered a "valuable article" solely based on its large quantity or mass, especially if it is otherwise an ordinary and common-place item.

Thus, the decision was rendered in the favour of the Assessee.

The judges by relying upon the following, reached the above verdict-

❖ **Ownership**

a) Unless the contrary is established, the title always follows possession.

b) **Carriers Act,1865-**
According to sections 6, 8, 9, and 148 of the Carriers Act, 1865, when goods are under the contract of carriage, the bailee (carrier) does not become the owner of the goods. Even if goods are entrusted to the carrier without a sale contract, the carrier's possession does not confer ownership rights.

c) **The Carriage by Road Act, 2007-**
As per section 15, a sale by a carrier is permitted and it can convey good title to the buyer.

d) **Sale of Goods Act, 1930-**
As per section 27 of the act, if goods are sold by someone who is not the owner and lacks authorization from the owner, the buyer doesn't obtain a superior title to the goods beyond what the seller possessed. However, if the owner's conduct suggests consent to the sale, they may be prevented from denying the seller's authority to sell the goods.

e) **Can a Thief be an owner?**
- The liability under section 69A of the IT Act cannot be imposed solely because the assessee remains silent or fails to disclose the owners of the goods. To be liable under section 69A, the assessee must be proven to be the actual owner of the goods in question.
- Considering a thief as the rightful owner of stolen property would effectively deprive the actual owner of their ownership rights, constituting a highly unlawful act.
  Assessee placed reliance on **CIT v S.Pitchaimanickam Chettiar [1983] 147 ITR 251.**

f) **Circular 20 of 1964, dated 07.07.1964-**
The Minister of Finance justified the inclusion of section 69A by explaining that its purpose was to target wealthy individuals who attempt to conceal their black money or unaccounted wealth by converting it into forms such as gold jewellery or other valuable items.

Other Valuable Articles

a) If the article is found to be valuable, then in small quantity, it must not just have some value but it must be **'worth a good price'** or **'worth a great deal of money'**.

b) **Principle of Ejusdem Generis-**

This principle of interpretation of statutes states that where general words follow the enumeration of words, the meaning of general words to be derived from that enumeration only.

c) **Principle of Noscitur a sociis-**
This principle of interpretation of statutes states that the meaning of a words is to be judged by the company it keeps. **State of Bombay v. Hospital Mazdoor Sabha [1960] 2 SCR 866.**

Analysis

In my opinion, decision held by the Apex Court is justified, as, in the case of **ownership,** one needs to refer the various laws to reach out on a decision that a person is an owner of particular goods. Further, if we talk about **valuable articles,** one has to read the law in continuation of its previous words to reach out the lawmaker's true intention.

-Nandini Gupta

6. Mutuality does not exempt interest income of clubs even if banks are corporate members.

Secundrabad Club etc.

v.

Commissioner of Income-tax

[2023] 457 ITR 263 (SC)

August 17, 2023

Law Involved

❖ **Section 2(24):**

It states that the "income" as per the Income-tax Act, 1961 **("IT Act")**, encompasses various sources, including "income from other sources." The interest income earned by the clubs was categorized under this section.

❖ **The Principle of Mutuality:**

This principle, while not directly outlined in legislation, has been acknowledged by courts in specific circumstances. It posits that income generated by a non-profit organization and solely distributed back to its members in the form of benefits or services shouldn't be considered taxable. However, the Principle of Mutuality applies till the stage where there is complete identity between the Contributors and the Participants and would lose its application, once there are transactions being carried out with the third parties.

Factual Background

The Assessee Clubs deposited surplus funds by way of bank deposits in various bank and claimed interest earned on said deposits was exempt on the Principle of Mutuality.

Issues Involved

- Whether the surplus funds deposited by the Assessee Clubs by way of bank deposits in various banks and the claim that interest earned on said deposits was exempt on Principle of Mutuality or not.
- Whether in relation to transactions, namely, deposit of surplus funds earned by clubs, in banks which are members of club, Principle of Mutuality applies till stage of deposit of funds and would lose its application, once funds are deposited as fixed deposit in banks.
- Whether Principle of Mutuality would not apply to interest income earned on fixed deposits made by Assessee Clubs in banks irrespective whether banks are corporate members of club or not; thus, interest income earned on fixed deposits made in banks by Assessee Clubs had to be treated like any other income from other sources within meaning of section 2(24) of the IT Act.
- Whether if any income is earned by clubs through its assets and resources, from persons who are not members of clubs, such income would also not be covered under Principle of Mutuality and would be liable to be taxed under provisions of IT Act.

High Court

On appeal, the various High Courts held that the interest earned on the bank deposits made by the Assessee Clubs was liable to be taxed in the hands of the Clubs and the Principle of Mutuality would not apply.

Supreme Court

Assessee's Contention:

The main contention of the Assessee, represented by senior counsel Sri Arvind Datar and others, revolves around challenging the binding precedent set by the two-judge Bench Judgment in **Bangalore Club v. CIT [2013] 350 ITR 509 (SC) [14.01.2013]**. They argue that this decision overlooks the earlier order in **CIT v. Cawnpore Club Ltd. [2004] 140Taxman 378 (SC) [05.02.1998]** also passed by a two-judge bench, which favoured the Assessees, thereby necessitating a reconsideration of the Bangalore Club *(supra)* judgment. They emphasized that income earned by Clubs, including interest from fixed deposits, should be exempt from income tax based on the Principle of Mutuality, as such earnings are generated without a profit motive and utilized exclusively for the benefit of club members. They highlighted inconsistencies between Bangalore Club *(supra)* and Cawnpore Club *(supra)* judgments, urging for a referral to a larger bench to establish the correct legal interpretation concerning the taxability of club income.

Revenue's Contention:

The Revenue, represented by senior counsel Sri Balbir Singh, contended that the judgment in Bangalore Club *(supra)* correctly analyses the nature of transactions involving surplus income invested by clubs in banks, post offices, or similar deposits, arguing that the Principle of Mutuality does not apply once funds are invested. They asserted that such investments expose the funds to commercial banking operations, rupturing the Principle of Mutuality by engaging in commercial activities with third parties. The Revenue emphasized that the interest earned on these deposits bears a commercial nature and lacks the essential identity between contributors and participators, essential for invoking the Principle of Mutuality. They argued that the clubs' activities cannot be devoid of a profit motive when engaging in banking transactions, thus rendering them liable to pay taxes on income earned. Furthermore, they highlighted dissenting views from other High Courts regarding the applicability of the Principle of Mutuality. Therefore, the Revenue urged the court to dismiss the appeals as lacking merit and uphold the judgment in Bangalore Club as appropriate and justified.

Judgement:

The court, after considering the submissions of both Parties, concluded that the Order in Cawnpore Club *(supra)* does not establish a precedent as it did not address the larger question regarding the taxation of interest income earned on fixed deposits by Clubs. The judgment in Bangalore Club *(supra)* stands, asserted that the Principle of Mutuality does not apply to interest income earned on fixed deposits made by clubs in banks, regardless of whether the banks are corporate members of the club or not. Therefore, interest income earned by clubs from fixed deposits is treated as any other income under the IT Act, while income earned from non-member sources is liable to be taxed.

Analysis

The analysis of the aforementioned discussion envisages the Principle of Mutuality:

- Complete identity between the contributors and participators;
- Action of the participators and contributors must be in furtherance of the mandate of the associations or the Clubs. The mandate of the Club is a question of fact which has to be determined from the Memorandum or Articles of Associations, Rules of Membership, Rules of the Organization, etc., which must be construed broadly.
- There must be no scope for profiteering by the contributors from a fund made by them which could only be expended or returned to themselves.

This principle was affirmed in the case of Bangalore Club, where it was clarified that once funds contributed by club members are deposited in banks and exposed to commercial transactions, the Principle of Mutuality no longer applies, as the identity between contributors and beneficiaries is compromised. Therefore, income generated from such transactions becomes taxable. The analysis emphasizes the importance of understanding the context and specific provisions of law involved in each case to determine the applicability of the Principle of Mutuality.

The question asked therefore is - at what point does the relationship of mutuality end and that of trading begin. If there is an entry of a third party or

non-member to deal with the contributions of or funds of the club or to utilize the funds of the club and return the same with interest, then, the relationship of the parties is not on the basis of a privity of mutuality. The essential condition of mutuality, i.e., identity between the contributors and participators would end. The relationship would then be like any other commercial relationship such as that between a customer and a bank where the fixed deposit is made by the customer for the purpose of earning an interest income.

-Ayush Agarwal

7. Non-banking Co-operative offering credit facilities to members eligible for section 80P relief.

Kerala State Co-operative Agricultural & Rural Development Bank Ltd.

v.

Assessing Officer

[2023] 458 ITR 384 (SC)

September 14, 2023

Law Involved

- **Section 80P(2)(a)(i) of Income Tax Act ("IT Act")–**

  It states that If a co-operative society is engaged in carrying on the business of banking or providing credit facilities to members, then such society is eligible for claiming deduction of its income.

- **80P(4)of IT Act–**

  It states that the provisions of section 80P shall not apply in relation to any co-operative bank other than a Primary Agricultural Credit Society or a Primary Co-operative Agricultural and Rural Development Bank.

- **Section 5 of Banking Regulation Act, 1949 ("BR Act")-**

  This section defines the terms 'banking' and 'banking company'.

❖ **Section 56 of BR Act-**

This section defines the term 'Co-operative Bank'.

Factual Background

Kerala State Co-operative Agricultural & Rural Development Bank Limited ("**Assessee**") is a state level Agricultural and Rural Development Bank governed as co-operative society under the Kerala Co-operative Societies Act, 1969. The Assessee is engaged in providing the credit facilities to its members, which are other co-operative societies only. It can be said that Assessee is acting as the apex co-operative society in the State. The Assessee filed its return of income for the assessment year 2007-08 and claimed deduction under section 80P(2)(a)(i) of the IT Act.

Issues Involved

Whether Assessee is a 'Co-operative Bank' for the purpose of section 80P (4) and eligible for claiming deduction under section 80P(2)(a)(i) of IT Act?

Assessing Officer

Assessing officer **("AO")** while passing the order under section 143(3) disallowed the deduction under section 80P as claimed by Assessee in his return of income filed for the relevant assessment year stating that the Assessee is a 'Co-operative Bank' and neither a Primary Agricultural Credit Society nor a Primary Co-operative Agricultural and Rural Development Bank. Thus, covered under the exception as provided in section 80P(4) of IT Act and not eligible for claiming such deduction.

CIT(A)

On appeal, CIT(A) held that Assessee is a Development Bank and is in the business of banking as it satisfies all the conditions which are required to

qualify as 'Co-operative Bank'. Thus, CIT(A) confirmed the disallowances made by AO. Consequently, the appeal was dismissed.

ITAT

ITAT upheld the decision of CIT(A) and confirmed that Assessee is a 'Co-operative Bank' and the deduction claimed was rightly denied.

High Court

The appeal of the Assessee was dismissed on the ground that no substantial question of law was involved.

Supreme Court

Assessee's Contention

Assessee argued that sub-section (4) of section 80P, which excludes 'Co-operative Banks' from certain provisions, doesn't apply to them as they are not a cooperative bank but rather a cooperative society providing credit facilities to its members, who are other cooperative societies. They asserted that they are not a banking company as defined by section 5(c) of the BR Act, 1949, which requires entities engaging in banking to obtain a license from the Reserve Bank. They further referenced the NABARD Act, 1981, stating that they do not fit the definition of a central or state cooperative bank outlined in the act. The argument concludes that they are not subject to the provisions applicable to cooperative banks and should therefore qualify for certain benefits.

Revenue's Contention

The Revenue strongly argued that the Assessee should be considered a co-operative bank, not just a land mortgage bank. They claimed that section 80P(2)(a)(i) of the Act applies to co-operative societies engaged in banking or providing credit facilities to members, which they asserted the Assessee does. They contended that the Assessee qualifies as a cooperative bank under Part V of the BR Act, 1949, and disagreed with the Assessee's assertion that it is not a

cooperative bank. They further argued that any central or state cooperative bank falls under the definition of a cooperative bank according to section 56 of the BR Act, 1949, and thus, the Assessee, being a state cooperative bank, is excluded from certain deductions under sub-section (4) of section 80P. They argued that the orders under review are just and should not be interfered with, as the appeal lack merit and should be dismissed.

Judgment

Supreme Court analyzed the meaning of the term '**Co-operative Bank'** for concluding the issue involved in the case. Section 80P stipulates that the definition of 'Co-operative Bank' should align with the BR Act, 1949. This act defines three types of banks as Co-operative Banks: State Co-operative Bank, Central Co-operative Bank, and Primary Co-operative Bank. These terms are defined under different acts, and the Assessee does not fall under any of these definitions. The term 'Banking Company' as defined in the BR Act, 1949 refers to a company engaged in banking business in India. 'Banking' refers to the acceptance of deposits or lending of money to or from the public. Consequently, a Banking Company refers to a business entity engaged in accepting deposits or lending money to the public. Therefore, for a co-operative society to be considered a co-operative bank, it must engage in banking business as per the above definitions. Subsequently, it must obtain a license from the Reserve Bank of India ("**RBI**") under section 22 of the BR Act, 1949, to conduct such transactions.

In the present case, the Assessee is neither a Central Co-operative Bank nor a State Co-operative Bank under NABARD Act, 1981. Further it is not engaged in any banking business as it transacts with its members only, which are other Co-operative societies. The Assessee doesn't deal with the public for transactions of accepting deposits or lending money.

Hence, the Apex Court held that Assessee is not a 'Co-operative Bank' within the meaning of section 80P(4) and eligible for claiming deduction under section 80P(2)(a)(i).

Supreme Court relied on the following judgements of **Mavilayi Service Co-operative Bank Ltd. v. CIT [431 ITR 1 (SC)]**, **A.P. Varghese v. Kerala State**

Co-operative Bank Ltd. [AIR 2008 Ker 91] and Citizen Co-operative Society Ltd. v. CIT [397 ITR 1 (SC)].

Analysis

From a legal perspective, this judgment appears to provide clarity on the interpretation of tax laws concerning co-operative societies engaged in banking or credit activities. The judgment seems to aim at ensuring that tax deductions are availed by co-operative societies that genuinely fulfill the criteria set forth in the IT Act, which is the ultimate aim of all the Income based deductions.

Further, it can be observed that the exception as provided in sub-section 4 of section 80P is to exclude only those co-operative banks that function on par with the commercial banks, i.e. which lend or deposit money to or from public.

-Mohit Sharma

8. Annual licence fee paid by Bharti Hexacom Ltd. to DoT is a capital expenditure amortizable under section 35 ABB.

Commissioner of Income Tax

v.

Bharti Hexacom Ltd.

[2023] 453 ITR 593 (SC)

October 16, 2023

Law Involved

- **Section 35ABB read with section 37(1) of Income Tax Act, 1961 ("IT Act")**

  Section 35ABB of the Act operates when the expenditure itself is of capital nature and is incurred for acquiring a right to operate telecommunication services or is made to obtain a licence for the said services.

- **Section 37(1) of the IT Act**

  It provides for deduction of expenditure incurred for business and profession, not in the nature of capital expenditure described in section 30 to 36 and personal expenditure, while computing the income chargeable under the head 'Profits and gains of business or profession'.

Factual Background

The Assessee filed its return of income on 01.11.2004 for the assessment year 2003-2004 declaring Nil income. The National Telecom Policy, 1994 was substituted by the new Telecom Policy, dated 22.07.1999. As per the new Telecom Policy, the licencee was required to pay one time entry fee i.e. fees payable up to 31.07.1999 along with licence fee as percentage of gross revenue w.e.f. 01.08.1999. Accordingly, the Assessee complied with the provisions of the new policy and claimed the licence fees paid w.e.f. 01.08.1999 as revenue expenditure.

Issue Involved

Whether the annual licence fees paid by the Assessee under the Policy of 1999 is revenue in nature and is to be allowed deduction under section 37 of the Act or same is of capital nature and is accordingly required to be amortized under section 35ABB of the Act.

Assessing Officer ("AO")

The case was selected for scrutiny and a notice was issued to the Assessee under section 143(2) of the Act. It was found that licence fee based on gross revenue amounting to Rs. 11,88,81,000 was claimed by the Assessee as revenue expenditure. Thus, AO intends to disallow Rs. 10,89,74,250 which should have been amortized over the remainder of the licence period i.e. 12 years as per section 35ABB.

CIT(A)

Against the order of AO, the Assessee preferred to file an appeal before CIT(A). The CIT(A) dismissed the order of AO and affirmed that annual licence fee paid on the basis of Annual Gross Revenue **("AGR")** would be considered as revenue expenditure under section 37 of the Act.

ITAT

The Revenue challenged the order of CIT(A) before the Tribunal. The Tribunal dismissed the Revenue's appeal based on its past order in case of Bharti Cellular Ltd. V. Dy. CIT [IT Appeal No. 5335 (Delhi) of 2003].

High Court

On appeal to the High Court by the Revenue, it was held that the expenditure incurred towards licence is partly revenue and partly capital. Licence fee payable upto 31stJuly 1999 should be treated as capital expenditure and licence fee on revenue sharing basis after 1st August 1999 should be treated as revenue expenditure. Expenditure to be treated as capital expenditure will qualify for deduction as per section 35ABB of the Act.

Supreme Court

Revenue's Contention:

- The schedule of payment whether in lump-sum or periodic, is immaterial in determining the classification under Income Tax Act.
- There could not have been a shift in the tax treatment thereof upon migration to a new regime, wherein merely the payment schedule was revised while preserving the character of the payment.
- The payment towards the same purpose i.e., payment of licence fee, cannot be characterized partly as capital and partly as revenue in nature by artificially defining one part as an entry fee and the remainder, payable annually, when both types of payment was towards licence fees.
- The payment by way of **entry fees** and **annual licence fee**, was made for acquiring any "right to operate telecommunication services" during the previous year. Therefore, the mode and manner of payment becomes irrelevant.

Assessee's Contention:

- The payment of licence fee prior to migration to the policy of 1999 was for obtaining the licence which is one time event, and fees payable w.e.f. 01.08.1999 is percentage of the AGR and same is incurred for continuing the licence.

- Application of section 35ABB will give a ballooning effect, with the amortized amount substantially increasing in later years. It will result in claiming the deduction under section 35ABB more than the actual payment, made for that year.
- The fact that the Department of Telecommunication shall rescind the licence due to non-payment of variable licence fees, does not mean that payment is for acquiring the licence.

Judgement:

- The decision of the Hon'ble Delhi High Court was considered not right in apportioning the expenditure incurred partly as revenue and partly as capital, before and after 31.07.1999 respectively.
- The nomenclature and the manner of payment is irrelevant. An alteration in payment format cannot challenge the essence of payment. Such payment is mandatory and non-payment would tantamount in ousting of licencee from the trade. Thus, it is intrinsic to the existence of licence as well as trade which can be regarded as capital expenditure only and amortized as per section 35ABB of the Act.
- Cases relied upon: **Assam Bengal Cement Co. Ltd. v. CIT [1955] 27 ITR 34 (SC); CIT v Jalan Trading Co. (P.) Ltd. [1985] 4 SSC 59 (SC) and Pingle Industries Ltd. v. CIT [1960] 40 ITR 67 (SC).**
- Cases set aside: **CIT v. Bharti Hexacom Ltd. [2013] 417 ITR 250 (Delhi);** Judgments passed by the High Courts of Delhi, Bombay and Karnataka, following the foregoing judgment of the Delhi High Court.

Analysis

The characterization of payment, aimed at acquiring a capital asset, remains consistent regardless of changes in the payment method or amount.

To summarize, whether a particular expenditure is revenue or capital in nature must be determined on a consideration of all the facts and circumstances of the case and by applying the principles upheld in various decided rulings.

This ruling will undoubtedly result in higher tax payments by the telecom companies. Considering that this legal dispute, of classifying variable licence fee as revenue expenditure or capital expenditure, concluded after almost 24 years from the introduction of new telecom policy, the interest liability could be equivalent to or even more than the tax amount itself. Besides, there could also be potential penalty implications on the taxpayers.

It is pertinent to note that this ruling will not only impact the companies in telecom sector, but also companies engaged in any other sectors (for example mining sector) who may have adopted similar licensing model.

-Naman Jhanwar

LIST OF LATIN TERMS:

S. No.	Terms	Meaning
1	Ab initio	From the beginning
2	Ad hoc	For this specific purpose
3	Ad hominem	Directed against a person rather than the position they maintain
4	Ad valorem	According to value; in proportion to the value
5	Amicus curiae	Friend of the court; a person or organization that is not a party to a case but offers expertise or insight
6	Apropos	Relevant to the current topic or situation
7	Bona fide	In good faith
8	Caveat	A warning about a potential problem
9	Caveat Emptor	Let the buyer beware, the principle that the buyer is responsible for checking the quality and suitability of goods before purchase
10	Consensus ad idem	Mutual agreement on terms of a contract
11	De facto	In fact, actual
12	De jure	Legally valid or entitled
13	De novo	Anew; from the beginning
14	Dicta	Judge's comments in a previous case, not essential to decision
15	Ejusdem Generis	Interpreting a list to include similar items
16	Error in facto	Claiming the court made a factual error
17	Error in judicio	Claiming the court misinterpreted the law
18	Ex parte	On one side only (often referring to court proceedings)
19	Ex post facto	Applying a law retroactively
20	Habeas corpus	That you have the body; a writ requiring a person under arrest to be brought before a judge or into court
21	Infra	In a later section of a document or argument
22	Inter alia	Not an exhaustive list
23	Interlocutory	Provisional, temporary
24	Ipse dixit	Appeal to authority without justification
25	Ipso facto	By the fact itself
26	Jurisdiction	Legal authority, power
27	Laches	Failure to act promptly, affecting legal rights
28	Locus standi	The right to bring an action or to be heard in court
29	Mandamus	Order from a higher court to a lower court to

		perform a specific duty
30	Mens rea	Guilty mind, criminal intent
31	Modus operandi	Method of operation
32	Mutatis Mutandis	Applying precedents with adjustments
33	Obiter dictum	Incidental remark, opinion not essential to the decision
34	Pari passu	Arguing for equal treatment with other taxpayers
35	Per curiam	By the court (often refers to a decision issued collectively by a court)
36	Per se	Emphasizing a single fact or provision holds independent legal weight
37	Prima facie	At first sight, based on first impression
38	Pro bono	For the public good, done without charge
39	Quid pro quo	Something for something
40	Quoram	Minimum number of members required for a meeting
41	Ratio decidendi	The reason for the decision
42	Res juducata	Matter already judged
43	Sine die	Without a day; without assigning a day for a further meeting or hearing
44	Sine qua non	Without which it could not be
45	Stare decisis	To stand by things decided
46	Supra	Above, earlier in the document or discussion
47	Ultra vires	Beyond one's legal power or authority
48	Vis-a-vis	In relation to, compared with

HOW TO READ A CITATION:

(2024) 454 ITR 61 (SC)

- (2024) – Year of order reported
- 454 – Volume
- ITR – Journal where judgement is reported
- 61 – Page
- (SC) – Court (Supreme Court)

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