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TAX REVIEW INTERNATIONAL
(Weekly Tax Journal)

Editor-in-Chief
Dr. Ikramul Haq
Editor
Mrs. Huzaima Bukhari

Case Laws

Vodafone India Services Pvt. Ltd.
v.
1. Union of India
2. Addl. Commissioner of Income Tax
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Commissioner of Income Tax II
v.
Gujarat State Road Transport Corporation

Commissioner of Income Tax-TDS
v.
DHTC Logistics Ltd.

Samsung Heavy Industries Co. Ltd.
v.
The Director of Income-tax -1 International Taxation, Delhi and another

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Tax News

Kind regards

Mrs. Huzaima Bukhari
Editor

Online Update is a special e-mail service that is part of your online subscription
AA Consultants & Publishers
Suite # 14, 2nd Floor, Sadiq Plaza, Regal Chowk, Mall Road,
Lahore, Pakistan
Phone. 042-36365582 & 042-36280015 Fax 042-35310721
Email: sales@aacp.com.pk website: http://aacp.com.pk

Austria

Austria set to block Germany's motorway toll

Austrian Transport Minister Doris Bures has underlined her determination to oppose Germany's plans for a "foreigners'" motorway car toll, using any available means, if necessary.

While conceding that Germany is fully at liberty to introduce a toll system, Transport Minister Bures nevertheless underscored the importance of ensuring equal tax treatment and fairness. The same regulations must apply to everyone, Bures stressed. Highlighting the success of Austria's own vignette system, Bures pointed out that the scheme is not only widely accepted, but also serves to finance a modern and safe road network.

Underscoring that Austria is not alone in its opposition to Germany's plans, Bures emphasized that the European Commission also shares the Government's scepticism, deeming the envisaged provisions to be incompatible with basic principles enshrined in European Union (EU) law.

Bures warned that she would simply not allow Austrian motorists to have to pay the future levy, while German drivers are exempt from the contribution. The idea that German motorists will either not have to pay the toll charge, or will be able to claw back the tax, violates the principle of equality in the EU, Bures argued, referring to the proposal as an "impermissible trick and unacceptable."

Concluding, Transport Minister Bures explained that she now intends to await a concrete proposal from Germany. If it transpires that the measures that have already been announced are confirmed, then the Government will act in the interests of Austrian motorists, if necessary submitting a challenge to the European Court of Justice, Bures ended.

The Austrian Minister's reaction followed renewed criticism from the European Commission. The Commission reportedly aims to put forward its own proposal for a motorway car toll in Germany. It is said to prefer the idea of a more efficient and suitable distance-based charge, rather than a vignette system, differentiated according to both emission levels and motorway use.

German Transport Minister Alexander Dobrindt has recommended that the planned EUR100 (USD136) motorway toll charge be differentiated, with a rebate accorded for low-emission vehicles. Dobrindt has also suggested that weekly, monthly, and annual vignettes be made available, for occasional motorway use. – *Courtesy tax-news.com*

Canada

CRA clarifies stance on gifting tax shelters

Legislative reforms will give the Canada Revenue Agency (CRA) greater powers to tackle the use of gifting tax shelter schemes.

The reforms, introduced in Finance Minister Jim Flaherty's 2013 Budget, affect taxpayers who have been denied, in whole or in part, a tax credit for donations made under a gifting tax shelter, and have filed an objection to the decision. The CRA has been authorized to collect or withhold 50 percent of the amount in dispute.

The Agency has now clarified that for the 2013 tax year, it will not assess taxes owed or provide a refund to taxpayers who claim a tax credit under a gifting scheme until it has audited the shelter in question. A taxpayer can have their tax return assessed before the auditing process begins if they agree to remove the claim from their return.

If a taxpayer receives a charitable donation receipt for an amount higher than the value of property donated, the receipt will be deemed invalid and cannot be used to claim a tax credit.

Canada's Income Tax Act defines a tax shelter as an investment in property (other than a flow-through share or a prescribed property), or a gifting arrangement under which a gift is made to a qualified donee or registered body or an individual incurs a limited-recourse debt that can be considered to relate to a gift to a qualified donee or to a monetary contribution. Generally, the investment in property or the gifting arrangement is considered a tax shelter if it is promoted as offering income tax savings and it is reasonable to expect that the buyer or donor will have losses, deductions, or credits within the first four years.

The CRA has denied more than CAD5.9bn (USD5.4bn) in donations and reassessed over 182,000 taxpayers who have participated in such shelters. It has also revoked the charitable status of 47 organizations and assessed CAD137m in third-party penalties against the promoters and tax preparers involved.

The Agency encourages taxpayers to seek advice from independent professionals before engaging in a tax shelter. – *Courtesy tax-news.com*

Belgian

Belgian union fears regionalization of property taxation

Olivier Hamal, President of Belgium's national union of owners and co-owners (SNPC), has warned of the potential danger of regionalizing the taxation of real estate in Belgium in future, fearing the impact of decentralization on future property lessors and owners.

Belgium's Federal Parliament is due to vote shortly on plans to regionalize the country's Leasing Act (residential, commercial, and farm), and a substantial part of real estate taxation.

Citing the findings of a recent Eurostat study, "Taxation trends in the European Union" 2013, Hamal noted that the total weight of real estate taxes in Belgium corresponded to 3.2 percent of gross domestic product (GDP) in 2011, compared to just 0.9 percent in Germany, and 1.1 percent in the Netherlands, and to the eurozone average of 1.3 percent. According to Hamal, this high burden is primarily due to the weight of registration and inheritance taxes in Belgium.

While conceding that the current fiscal situation is far from perfect, Hamal nevertheless emphasized that it is at least balanced. However, the union is concerned that the Regions will decide to "revolutionize" the system once in charge, despite the fact that the real estate market needs stability, Hamal explained.

Hamal insisted that property owners in Belgium have a great deal to lose if the situation changes and the fiscal burden on leases is increased, given the number of Belgians investing in rental property. For many, income from a rental property is used to supplement pension income, Hamal noted. Furthermore, Hamal pointed out that a consistent rental supply ensures that rent prices are maintained at a fairly stable, low level, in which case everyone benefits.

In its 2013 publication, Eurostat revealed that property tax revenues in Belgium in relation to GDP in 2011 (3.2 percent) were the second highest in the EU (EU-27 average of 2.1 percent), after the UK (4.1 percent). The property tax represented 7.3 percent of the total tax revenue in 2011, above the EU average of 5.3 percent. – *Courtesy tax-news.com*

Argentina

Argentina imposes withholding tax on exports

Through resolution No 3,577, the Argentine tax authority (AFIP) has introduced a 0.5 percent withholding tax on exports in "triangular operations" made on or after January 7, 2014. An additional withholding tax of 1.5 percent will be applicable for exports to low-tax jurisdictions.

The tax will be imposed solely for transactions where the country of physical destination is different from the country shown in the invoice. In other words, the tax will apply only if there is an intermediary that is not the final recipient. AFIP's objective is to deter certain transfer pricing practices where a fictitious intermediary buys the goods for a low price, and then resells them for a higher price. The only way to avoid the withholding tax is to make sure the goods are actually shipped to the country wherein the intermediary is established.

The withholding tax will normally be collected from the exporter as the goods are processed by the Argentine customs authority. It should merely serve as an advance corporation tax payment, which creates a cash flow disadvantage for the Argentine taxpayer. Given that Argentina generally has double-digit inflation rates, one would expect the tax to be quite punitive.

It should be noted that only "definitive exports for consumption" are covered. Special regimes, such as temporary admission, therefore remain excluded.

This new mechanism is expected to reduce the risk of tax evasion and improve tax collection, despite being unconventional by international standards. This tax is without prejudice to AFIP's ability to adjust prices under general transfer pricing legislation. – *Courtesy tax-news.com*

Bulgaria

Bulgaria court to consider tax on renewable energy producers

Bulgaria's Constitutional Court is to consider whether a new 20 percent tax on renewable energy producers is unconstitutional, after Prime Minister Rosen Plevneliev fulfilled his promise to lodge a legal challenge.

The Ministry of Economy and Energy said in December that producers of renewable energy had enjoyed a preferential tax regime due to the risks of investing in new technology, but that this was no longer necessary. However, Plevneliev argued that the tax would damage the business environment, put off foreign investors, and contravene constitutional principles of free enterprise. Plevneliev also complained that the tax was being introduced without transparency.

News of Plevneliev's move provoked criticisms from the Socialists and a threat of strike action by miners.

Plevneliev became President in 2011 as a candidate of the center-right GERB party, while the current Prime Minister, Plamen Oresharski, is an independent technocrat backed by the Socialist Party. The tax on renewable energy was put forward by Volen Siderov, who heads the nationalist Ataka party, and 116 out of 182 Bulgarian MPs voted in favor of imposing the hike.

The post of President in Bulgaria carries little real power, but Plevneliev said that referring the tax to the court was his "democratic right." – *Courtesy tax-news.com*

China

China simplifies export tax exemption for e-commerce

China's State Administration of Taxation and the Ministry of Finance have issued a joint circular that specifies the simplified conditions under which, from January 1, 2014, e-commerce exporters can receive an export tax exemption or refund.

For example, to benefit from the tax break, businesses need to have been granted the exemption by the relevant tax authority, and to be general value added tax payers. The e-commerce exporter will need to have obtained an export declaration form, but only for export tax exemption purposes.

It is hoped that the new regulations will encourage a further increase in China's cross-border e-commerce. Currently, with e-commerce often involving large quantities of small value items, businesses are unable to access tax rebates without incurring uneconomical costs.

According to official statistics, the value of Chinese cross-border e-commerce grew by 25 percent from RMB1.6 trillion (USD265 billion) in 2011 to RMB2 trillion in 2012, as is expected to have shown a further 30 percent increase last year. It has been predicted that its total value will reach RMB6.4 trillion in 2016, when it would account for 18.5 percent of the value of China's total international trade. – *Courtesy tax-news.com*

Honduras

Honduras raises its VAT rate

Honduras has raised its headline VAT rate from 12 percent to 15 percent, with effect from January 1, 2014. This came through Decree No 278/2013, which included many other tax measures in order to increase tax revenue.

About 1,000 people have reportedly taken to the streets in order to protest against the recent tax rises.

Regarding VAT itself, this painful move hasn't come without problems. Not only has the VAT rate been hiked, but also a number of VAT exemptions have been removed by the reform. In addition, the VAT rate for alcoholic beverages is now 18 percent.

VAT exemptions previously concerned about 300 types of items. As of now, only 72 of these products are still not subject to VAT, restricting exemption to the most basic items, such as, among others: milk; fruits; vegetables; fish; chicken; coffee; white cheese; eggs; sugar; flour; bread; corn; and rice. One piece of good news for consumers though: this is better than the smaller list of 35 items initially planned by the Government.

Although this list shows the Government has tried to spare the poorest, Hondurans' already low purchasing power is likely to be badly affected. In fact, the tax reform introduces stiff tax rises for other previously exempt essential items, such as energy.

From a practical point of view, Honduran retailers will have to systematically review the receipts they issue. This is because these receipts are pre-printed and they are based on the previous 12 percent VAT rate. Thus, retailers must manually apply the 15 percent rate on their receipts, and they will have to do so until they exhaust their existing stocks of receipts. Thus even from an administrative point of view, the VAT increase is proving painful. – *Courtesy tax-news.com*

Andorra

Andorra creates new tax and border department

Andorran Finance Minister Jordi Cinca and Tax Affairs Director Albert Hinojosa have presented details of the decree governing the functioning of the Principality's new Tax and Border Department.

Attached to the Finance Ministry, the department will be responsible for application of both the general administration tax system and the customs system, following the merger of the Tax Department and the Customs Department.

Cinca and Hinojosa explained that the Andorran Tax and Border Department will be tasked with ensuring efficient implementation of the tax and customs systems, including management, assessment, collection, inspection and enforcement of the country's tax penalty regime, control of revenue collection, participation in the drafting of legislation, and responding to tax queries.

Finance Minister Cinca described the new body as "a transitory and necessary step" towards the creation of the future Tax and Border Agency, an autonomous unit intended to manage all state taxes.

The objective is to establish the taxes, the new organizational structure, and computer applications in 2014, to guarantee that the system functions correctly, Cinca revealed, noting that no new taxes are due to enter into force in Andorra this year. – *Courtesy tax-news.com*

Cyprus

Cypriot VAT hikes take effect

Cyprus's headline and intermediate value added tax rates were increased by one percent, as scheduled, from January 13, 2014.

The headline rate, levied on 80 percent of goods and services, rose from 18 percent to 19 percent. The 8 percent reduced rate was increased to 9 percent. This reduced rate applies to accommodation services, food and drink sold by restaurants and eateries, catering services, and the transportation of passengers and their luggage within Cyprus.

The two hikes were agreed as part of the bailout negotiated with the troika of lenders in March 2013. Cyprus earlier increased its headline rate from 15 percent to 17 percent from March 1, 2012, and again to 18 percent with effect from January 14, 2013. The territory's other reduced rate, set at the EU minimum of 5 percent, has remained unchanged.

Even after the two hikes, Cyprus retains one of the most competitive headline rates in the European Union, bettered only by Luxembourg (15 percent) and Malta (18 percent). – *Courtesy tax-news.com*

Germany

Germany lowers taxable pension threshold

The German Finance Ministry has confirmed a reduction in the taxable pension threshold, noting that in 2014 tax will be due on gross monthly pension income in excess of EUR1,225 (USD1,669) for single taxpayers (EUR2,450 for married couples).

This taxable amount is now EUR41 below the so-called standard pension (*Eckrente*) in Germany of EUR1,266, based on 45 insurance years and average earnings.

This is the first time that the taxable pension portion has fallen below the standard pension amount, and is as a result of provisions governing the taxation of pensions, fixed in 2005, which have progressively increased the taxable amount.

In 2005, the taxable pension portion was 50 percent of income. At the time, tax was therefore imposed on pensioners with gross monthly pensions above EUR1,599. The taxable pension portion now stands at 68 percent of income.

By 2040, pensions in Germany will be subject to taxation in full. – *Courtesy tax-news.com*

Ireland

Irish home renovation tax break 'Working'

Home building in Ireland last month grew at its fastest rate in almost nine years, prompting a politician to claim that the new Home Renovation Incentive (HRI) is "already working well for homeowners and builders at [a] local level."

Ulster Bank's latest Construction Purchasing Managers' Index shows that construction activity rose throughout 2013, with home building establishing itself as the strongest sub-sector. Firms remain optimistic that this improvement will be sustained throughout 2014, believing that "their industry has turned the corner following what has been a brutal downturn for the sector."

The HRI scheme was introduced to grant tax relief for homeowners having repair, renovation or improvement work done to their primary residence by qualifying contractors. The 13.5 percent income tax credit effectively nullifies VAT imposed on these contracts, which are subject to Ireland's reduced VAT rate of 13.5 percent.

The amount spent on qualifying works must exceed EUR4,405 (before VAT at 13.5 percent), with qualifying expenditure capped at EUR30,000 (before VAT). Therefore, the lowest tax credit amount is EUR595 (EUR4,405 at 13.5%) and the highest tax credit is EUR4,050 (EUR30,000 at 13.5%).

Carpets, furniture, white goods (such as fridges, dishwashers,) and services (such as architect's fees) that are subject to the headline 23 percent VAT rate do not qualify. Likewise, materials a homeowner buys such as paint, tiles, etc., are excluded.

Labour TD Eamon Maloney welcomed the figures, claiming that: "the new tax break in particular drove a jump in the number of home renovation projects."

According to Maloney, the aim is to "incentivize homeowners to spend money on their own home … and jumpstart activity in the building sector." This is clearly happening, he added, "with employment being generated for small-scale builders, carpenters, plumbers, and other workers."

Looking forward, Maloney hopes that "this positive news encourages more homeowners to avail of this smart and innovative measure, and that it continues to pay dividends for the construction sector, which has recorded its fourth straight month of growth." – *Courtesy tax-news.com*

Australia

ATO to fast track disaster-related refunds

The Australian Taxation Office (ATO) has pledged to fast track refunds for those directly affected by bushfires.

Tax Commissioner Chris Jordan explained that taxpayers will not need to apply for a deferral or a quick refund if their business or residential address is located in one of its identified affected postcodes.

For those in the Western Australia suburbs of Stoneville and Parkerville, the ATO has automatically deferred the lodgement and payment dates (excluding those for large pay-as-you-go withholders) for income tax returns and activity statements due between January and March. The new lodgement date is April 28, 2014.

The ATO will add further postcodes to its list as needed, and is encouraging taxpayers to check its website for updates. It will also make arrangements on a case-by-case basis, as and when contacted by affected taxpayers.

Jordan said of the initiative: "We understand that for many people their tax affairs are the last thing on their minds right now. When people are ready, we will make sure they are supported in dealing with their tax obligations."

The ATO is also offering tax deductions to those donating to "bucket appeals" and other disaster relief funds this financial year. Deductions can be claimed without a receipt if the donation in question was AUD10 (USD8.82) or less. – *Courtesy tax-news.com*

Oaktree

Oaktree capital management opens office in DIFC

Global asset management firm Oaktree Capital Management has opened an office in the Dubai International Finance Center (DIFC), a financial free zone, according to a press release from the DIFC.

In line with the company's expansion plans in the region, the addition of this new office will allow Oaktree to now serve clients globally across 15 cities in 12 countries.

The Oaktree Capital Management office in DIFC will be headed by Senior Vice President, Yusef Al-Kudsi, who has been with the company for over five years and has extensive experience in managing institutional client relationships.

Oaktree is headquartered in Los Angeles and specializes in alternative investments. As of September 30, 2013 it had USD79.8bn in assets under management.

The DIFC offers firms 0 percent income tax guaranteed for 50 years, 100 percent foreign ownership, no exchange controls and a legal system based on English common law. It currently has 1,000 active registered firms. – *Courtesy tax-news.com*

European Union

EU11 tobin tax may not hit derivatives

The so-called EU11 are debating whether certain categories of derivatives should escape their proposed financial transaction tax (FTT).

Reuters claims to have seen a document prepared for a two-day meeting of the group which note derivatives' "nexus with the government bonds market." Were the states to press ahead with an FTT on derivatives, their taxation may nevertheless be postponed.

According to the newswire, the documents are unclear on when a derivatives contract should be taxed. Options include when it has been "written, traded or comes to the end of its life."

Also considered for exclusion are corporate bonds. The aim would be to avoid "negative effects on the financing capability of companies, considering also the difficulties of receiving funding from the banking sector in the present environment."

The European Commission had intended for its FTT plans to be implemented this month. Under the original proposals, a 0.01 percent levy would have been imposed on derivatives. Last June, Tax Commissioner Algirdas Šemeta was forced to deny that a "scale back" was on the cards, after it was reported that only shares would be taxed at first, with bonds scheduled to come under the regime from 2015, and derivatives at an unspecified later date.

France, Germany, Belgium, Spain, Portugal, Italy, Austria, Estonia, Greece, Slovakia, and Slovenia are the eleven countries to sign up to use the Commission's "enhanced cooperation" procedure as a means of introducing the FTT. Enhanced cooperation allows those European Union member states that wish to work more closely together, to do so. – *Courtesy tax-news.com*

United States

IRS gets 2014 budget cut that could affect taxpayers

Within the 2014 Omnibus Appropriations Bill, which will provide a total of over USD1 trillion in funding for the United States Federal Government for the fiscal year, the Internal Revenue Service (IRS) has been allocated USD11.3bn, more than USD500m below its 2013 budget.

The IRS appropriation is also much less than the almost USD13bn originally requested by the Obama Administration and significantly less than the budget the new IRS Commissioner John Koskinen said the agency would need to tackle tax collection, identity and return fraud, and the tax provisions within the Affordable Care Act (ACA).

The Bill maintains the majority of the sequestration funding cuts for the IRS, bringing its budget down to below 2009 appropriation levels. While, within this amount, USD92m in IRS funding is set aside to improve taxpayer services and address refund fraud, identity theft and overseas compliance, the bill includes no additional funding for the ACA tax provisions.

With reference to the continuing criticism of the IRS for its previous targeting of enforcement action on contributions to tax-exempt entities, the Bill also prohibits the IRS from using funds to target groups for regulatory scrutiny based on their ideological beliefs or to target citizens for exercising their First Amendment rights. In addition, the legislation will require the IRS to spend time on extensive reporting to Congress on its spending, training and bonuses.

In what the National Treasury Employees Union (NTEU) said will be “another difficult year for the nation’s revenue-producing agency,” its President Colleen M. Kelley added that “continued underfunding of the IRS means refunds will be delayed, taxpayers will sit on hold and tax help will be available to fewer and fewer Americans.”

It was disclosed that, from 2010, IRS funding and staffing have been cut by 8 percent, despite a steady increase in the agency’s workload. Overall, from budget cuts and sequestration, IRS funding has been reduced by some USD1bn over the past three years, leading to a decline of more than 8,000 employees.

In the NTEU’s opinion, the IRS’ appropriation in FY 2014 “is woefully inadequate to allow the agency to deliver the critical services taxpayers expect and deserve.” Kelley called for “a true investment in the IRS,” which collects 93 percent of all government revenue, and stressed that “it must have sufficient resources and staffing to do this critical job effectively.”

It was also pointed out that the National Taxpayer Advocate Nina Olson had recently reported to Congress “on the serious toll underfunding and insufficient IRS staffing is taking on America’s taxpayers.”

In her annual report, Olson made clear that she primarily attributed deficiencies in taxpayer service to a lack of IRS resources. The report stated that "it is a sad state of affairs when the Government writes tax laws as complex as ours – and then is unable to answer any questions beyond 'basic' ones from baffled citizens who are doing their best to comply."

She found, for example, that the IRS was able to answer only 61 percent of calls from taxpayers seeking assistance from a customer service representative – a number than left 20m taxpayers unable to get through on the phone – and that there was an 86 percent drop in tax law questions answered, from 795,000 10 years ago to only 110,000 in the 2013 filing season.

She concluded that "the logic behind budget cuts simply does not apply to the funding of the IRS. The IRS collected USD255 for each dollar it received in appropriated funds in 2013." – *Courtesy tax-news.com*

2014 TRI 46 (H.C. Bom.)

HIGH COURT OF BOMBAY

Mohit S. Shah, Chief Justice and M.S. Sanklecha, J.

Vodafone India Services Pvt. Ltd.
v.
1. Union of India
2. Addl. Commissioner of Income Tax
3. Dy. Commissioner of Income Tax

FACTS/HELD

Transfer Pricing: Existence of income is a jurisdictional requirement for the applicability of transfer pricing provisions. AO must deal with it after giving personal hearing before making reference to TPO. The dept should not treat the assessee as an adversary who has to be taxed, no matter what

1. The assessee, an Indian company, issued equity shares at the premium of Rs.8591 per share aggregating Rs.246.38 crores to its holding company. Though the transaction was reported as an "international transaction" in Form 3 CEB, the assessee claimed that the transfer pricing provisions did not apply as there was no income arising to it. The AO referred the issue to the TPO without dealing with the preliminary objection. The TPO held that he could not go into the issue whether income had arisen or not because his jurisdiction was limited to determine the ALP. He held that the assessee ought to have charged the NAV of the share (Rs. 53,775) and that the difference between the NAV and the issue price was a deemed loan from the assessee to the holding company for which the assessee ought to have received 13.5% interest. He accordingly computed the adjustment for the shares premium at Rs. 1308 crore and the interest thereon at Rs. 88 crore. The AO passed a draft assessment order u/s 144C(1) in which he held that he was bound u/s 92-CA(4) with the TPO's determination and could not consider the contention whether the transfer pricing provisions applied. The assessee filed a Writ Petition challenging the jurisdiction of the TPO/AO to make the

adjustment. On the merits of the adjustment, the assessee filed objections before the DRP. Before the High Court the assessee argued that (i) it was a precondition before the transfer pricing provisions apply that there has to be income arising to the assessee. As the allotment of shares at a premium does not give rise to income, the transfer pricing provisions do not apply, (ii) there was a breach of natural justice because neither the TPO nor the AO had heard the assessee on, or decided, the fundamental issue as to whether the transfer pricing provisions applied at all, (iii) the DRP does not offer an alternative remedy because the DRP has no power to quash the draft assessment order even if it is satisfied that the same is without jurisdiction & (iv) the DRP cannot take an unbiased view because one of its members is the DIT (TP). HELD by the High Court:

(i) The assessee's contention that the DRP does not offer an alternative remedy because it does not have the power to quash the assessment order even if it is satisfied that the same is without jurisdiction is not acceptable because in Vodafone 37 taxmann.com 250 it was held that the DRP's power to confirm would include the power not to confirm and to annul the draft assessment order;

(ii) It is clear from s. 92(1) that there must be income arising/ potentially arising by an international transaction for the application of the transfer pricing provisions. This is a jurisdictional requirement and has to be dealt with by the AO when specifically raised by the assessee before making reference to the AO. Grant of personal hearing before referring the matter to the TPO has to be read into s. 92CA(1) in cases where the very jurisdiction to tax under Chapter X is challenged by the assessee (Veer Gems 351 ITR 35 (Guj) disagreed with to the extent it holds that no hearing is required at the stage of reference to the TPO even on jurisdictional issues). If, after the hearing the assessee, the AO holds that there is an international transaction, that would be binding on the TPO;

(iii) The department's contention, based on CBDT Instruction No.3 dated 20.05.2003, that the action of the AO in referring the international transaction is a mere administrative act is not acceptable. The AO is bound to hear the assessee in respect of jurisdictional issues before making the reference. The failure to do so is an illegality;

(iv) The assessee's contention that the DRP would not give a fair hearing as one of its members is the DIT (TP) is not acceptable because it overlooks the fact that these are not appeal proceedings but to finalize the draft assessment order. Also, the DIT(TP) who approved the TPO's order is not on the panel;

(v) The Revenue should keep in mind the sage advice of Nani Palkhivala that the department should not cause misery and harassment to the taxpayer and the gnawing feeling that he is made the victim of palpable injustice. In this case it would be natural for the assessee to feel harassed as neither the AO nor the TPO gave a hearing or dealt with the preliminary objection. It is hoped that the revenue will be more sensitive to the just demands of the assessee and not treat the assessee as an adversary who has to be taxed, no matter what;

(vi) The DRP should decide the assessee's objection regarding chargeability of alleged shortfall in share premium as a preliminary issue. In case the DRP's decision on the preliminary issue is adverse, the assessee shall be entitled to challenge it in a writ petition if it can show that the DRP's decision on the preliminary issue is patently illegal notwithstanding the availability of alternate remedy before the ITAT.

Writ Petition disposed of.

Writ Petition No.1877 of 2013.

Heard on: 28th October, 2013.

Decided on: 29th November, 2013.

Present at hearing: Harish Salve, Sr. Advocate with Anuradha Dutt, Fereshte Sethna, Gayatri Goswami, Tushar Jarwal, Ram Kakkar, Chirag Dave, Aagam Doshi, Shantanu Singh, Antik Senapati, Adhiraj Malhotra and Aarti Basantani i/b. Dutt Menon Dunmorrsett, for Petitioner. Mohan Parasaran, Solicitor General with B.M. Chaterjee, Sp. Counsel Union of India, Girish Dave and Tejveer Singh, for Respondents.

JUDGMENT

Per Mohit S. Shah, CJ.–

At the request of learned counsel for both the sides, the writ petition was taken up for final disposal.

2. By this petition under Article 226 of the Constitution of India, the petitioner challenges:–

(a) the order dated 28 January 2013 of the Transfer Pricing Officer (TPO) passed in terms of Section 92CA of the Income Tax Act,1961 ("the Act"); and

(b) the Draft Assessment Order dated 22 March 2013 passed by Assessing Officer(AO) in terms of Section 143(3) read with Section 144-C (1) of the Act in consequence of order dated 28 January 2013 of the TPO.

3. Learned counsel for the petitioner has raised the following questions for consideration by this Court:

(1) Whether the existence of a potentially taxable income or an expenditure (capital or revenue) that impacts computation of taxable income is a sine qua non for the invocation of jurisdiction under Chapter X ?

(2) Whether Chapter X confers the jurisdiction to

a) treat a transaction on the capital account as a revenue transaction,

b) treat a single transaction of issue of shares as two transactions – viz. as that of issue of shares and of grant of a financial accommodation (equal to the difference in value of the arm's length price as determined and the issue price of shares), and to bring to tax a notional amount as interest foregone on this notional amount of financial accommodation?

(3) Whether the provisions of Chapter X confer the power and jurisdiction upon the department to treat the arm's length price determined in an earlier year as a sum actually received (or receivable) in the later year, and determine the arm's length price of transactions in the later year on that basis?

4. The petition relates to Assessment Year 200910.

5. Brief facts leading to this petition are as under:–

(a) The petitioner is a wholly owned subsidiary of a Mauritian Entity namely Vodafone TeleServices (India) Holdings Ltd ("the Holding Company.");

(b) On 21 August 2008, the petitioner issued 2,89,224 equity shares of a face value of Rs.10/each at the premium of Rs.8591/per share aggregating to a total consideration of Rs.246.38 Crores to its holding company. The petitioner received an amount of Rs.86.93Crores on 21 August 2008 and the balance amount of Rs.159.46 Crores on 5 November 2008 from its holding company;

(c) As the issue of the equity shares by the petitioner was to a nonresident entity, the same was done in compliance with the provisions of Foreign Exchange Management Act, 1999. The Fair Market Value of the said equity shares was determined in accordance with the methodology prescribed under the Capital Issues (Control) Act 1947;

(d) On 30 September 2009, the petitioner filed its return of income for Assessment Year 200910 with the respondentrevenue. Along with its return of income, the petitioner also filed Form 3 CEB dated 28 September 2009 by an accountant in accordance with Section 92E. In the said Form, the transaction of issuance of equity shares by the petitioner to its holding company (undisputedly an Associated Enterprise) was declared as an International Transaction and also the Arms Length Price ("ALP") of the shares so issued, was also determined. However, a note was appended by the accountant to its Form 3 CEB report making it clear that the transaction of issue of equity shares did not affect the income of the petitioner and was being reported only as a matter of abundant caution. The note read as under:–

"Note 1:–

"The company has issued 289224 equity shares of Rs.10/each fully paid at a premium of Rs.8500 per share aggregating to total consideration of Rs.2,46,38,99,016. As per Section 92(1) of the Income Tax Act, 1961 any income arising shall be computed having regard to the arm's length price. This transaction of issue of equity shares does not affect income of the Company. However, out of abundant caution, the same is reported here."

(e) On 30 August 2010, the Assessing Officer issued a notice under Section 143(2) to the petitioner for the purposes of carrying out scrutiny assessment;

(f) On 11 July 2011, the Assessing Officer after obtaining the previous approval of the Commissioner of Income Tax referred all the transactions reported in Form 3 CEB dated 28 September 2009 by the petitioner to the TPO in accordance with Section 92CA(1) . This reference to the TPO was for determining the ALP of the reported International Transactions;

(g) On 14 December 2012, the TPO issued a show cause notice to the petitioner. In the above notice, in so far as relevant to these proceedings, the petitioner was, inter alia, called upon to show cause why:

(i) the issue price (including the premium) of the equity shares to its holding company as declared by the petitioner should be accepted for the purposes of computing ALP under the Act;

(ii) the ALP of the shares issued by the petitioner to its holding company be not determined on the basis of its Net Asset Value (in short "NAV"), after taking into account the transfer pricing adjustment for the Assessment Years 200708 and 200809 which would result in the NAV being enhanced from Rs.12,341.80 millions to Rs.75,564.28 millions. This would result in the ALP per share being enhanced leading to a price adjustment of Rs.2034.95 crores to arrive at the ALP of the equity shares;

(iii) the above short fall of Rs.2034.15 crores should not be treated as amount due from the holding company to the petitioner; and

(iv) the above shortfall of Rs.2034.95 crores from the holding company should not be considered as deemed loan by the petitioner and the interest at the rate of 13.50% should not be charged thereon.

(h) The petitioner filed its replies on 24 December 2012, 7 January 2013 and 22 January 2013 to the show cause notice issued by the TPO. <u>The petitioner in all its replies contended that Chapter X i.e. Transfer Pricing provisions do not apply to the issue of equity shares. Therefore, it was contended that the notice was completely without jurisdiction</u> and its replies should not be construed as submitting to jurisdiction under Chapter X . Without prejudice, the petitioner contested the show cause notice on merits pointing out that Transfer Pricing provisions do not apply to the issuance of the equity shares. Besides reliance was placed upon the concept of real income and no jurisdiction to tax hypothetical income by recharactering the same as deemed loan;

(i) On 28 January 2013, the TPO passed the impugned order holding that the transaction of issuance of equity shares by the petitioner to its holding company is an international transaction covered under Chapter X. In particular, it records the following findings:

(i) The issue of equity shares is an International Transaction governed by Chapter X as is evident from Form 3 CEB dated 28 September 2009 filed by the petitioner. The valuation of equity shares was arrived at by application of Comparable Uncontrolled Price method by the petitioners.

(ii) The issue whether any Income has arisen and/or affected by the International Transaction for purposes of Chapter X would be determined by the Assessing Officer. The jurisdiction exercised by him is only to determine the ALP of

International Transactions and not compute the income arising out of such International Transactions;

(iii) The transaction was an International Transaction as is evident from the Explanation (i)(c) and (e) to Section 92B, which provides that capital financing and restructuring of business would be included within the meaning of International Transactions;

(iv) The issue of shares by the petitioner to its holding company at lower premium then what is due, results in the petitioner subsidizing the price payable by the holding company. This deficit would be a loan extended by the petitioner to its holding company and such loan would have bearing on the profit of the assessee in terms of interest;

(v) The ALP of the issue of equity shares by the petitioner to its holding company as determined by the Accountant under Section 92E was rejected on the ground that methodology of valuation adopted is not suitable to derive the ALP;

(vi) The Transfer Pricing adjustment for the Assessment Years 200708 and 200809 have to be taken into account to determine the fair value of the Petitioner's business;

(vii) Finally, the TPO determined the ALP of equity shares issued by the petitioner to its holding company as under:

"7.5 Determination of Arm's Length Price:

Thus, based on the above discussion, the ALP of equity shares of the company as on 31032008 is computed as below:–

Description	**Amount (Rs. Million)**	**Number/ Amount (Rs.)**	**Remarks**
Net-worth of the assessee company based on audited balance sheet as on 31-03-2008	12341.8		As per the audited balance sheet of the assessee as on 31-03-2008
Add: OffBalance sheet items (for TP adjustment made in the earlier years, ALP valuation of sale of call centre business and ALP of assignment of call options) i Shortfall (net of taxes) in charging for provision of IT enabled services for FY 2006-07	331.53		As per information available in the order of the TPO for the FY 2007-08

ii. Shortfall in charging for sale of call centre business during FY 2007-08	13443.92		As per the order of the TPO for the FY 2008-09, as modified by the directions given by DRPI, Mumbai.
iii. Shortfall in charging for assignment of call options during FY 2007-08.	61788.83		As per the order of the TPO for the AY 2008-09
Less: Provision for tax on shortfall in charging for sale of call centre during FY 2007-08 @ 22.66%	3046.39		As discussed above
Less: Provision for tax on assignment of call option during FY 2007-08 @ 33.99%	21002.02		As discussed above
Total Net Asset Present Value	51515.87		

No. of Equity Shares as on 31-03-2008		9,57,992
ALP Value of each equity Share as on 31-03-2008		53,77,500

Computation of ALP

Description	Number/Amount (Rs.)
ALP Value of each equity shares as on 31-03-2008(a)	53,775
Value of equity shares as per the assessee (b)	8,519
Deficit amount per share (c) = (a)(b)	45,256
No. of equity shares issued (d)	2,89,224
Price charged by the assessee (e)	246,38,99,016
Arm's Length Price (f) = (a) x (d)	1555,30,20,600
Total shortfall from ALP (g) = (f)(e)	1308,91,21,344

As can be seen from above, the price charged by the assessee in these international transactions falls beyond the +5% range. Thus, the above shortfall of Rs.1308,91,21,344/is treated as transfer pricing adjustment for the price charged by the assessee in these international transactions in the nature of issue of equity shares."

(viii) The short fall in the value of shares issued by the petitioner to its holding company was treated as a deemed loan by the petitioner to its holding company. This deemed loan was sought to be charged with interest at 13.5% per annum. Consequently, the TPO arrived at the following transfer pricing adjustment as under:–

"9.2.4 Computation of Arm's Length Price:

Amount of Deemed Loan	Rs.1308,91,21,344/-
Period	6 months
Arm's Length Interest Rate	13.50% p.a.
Arm's Length Price @ 13.97% p.a.	Rs.88,35,15,691/-

9.2.5 Price Received visAvis the Arm's Length Price:

The price charged by the assessee at Rs. Nil in the form of interest chargeable on the debts delayed from its Associated Enterprise is compared to the Arm's Length Price or interest as under:

Arm's Length Interest	Rs.88,35,15,691/-
Interest received	Rs. Nil
Shortfall being adjustment u/s 92CA	Rs.88,35,15,691/-

The above amount of Rs.88,35,15,691/- is treated as an adjustment u/s 92CA for the price chargeable as interest on the deemed loan to its AE for the F. Y. 200809.

10 Summary of TP adjustments

The transfer pricing adjustments made in this order is summarized as below:–

Sr. No.	Nature of International transactions	Adjustment Amount (Rs.)
1	Shortfall in price of shares issued to AE	1308,91,21,344
2	Interest on deemed loan	88,35,15,691
TOTAL		1397,26,37,035

Thus the above total amount of Rs.1397,26,37,035/- is treated as transfer pricing adjustment for the FY 200809, relevant for the AY 200910."

(j) Consequent to the order dated 28 January 2013 of the TPO, the Assessing Officer on 4 February 2013 issued notice to the petitioner. The above notice under Section 142 (1) interalia called upon the petitioner to show cause as to why adjustment aggregating to Rs.1397.26 Crores as proposed by TPO should not be made to the total income of the petitioner;

(k) On 12 February 2013 and 19 March 2013, the petitioner responded to the show cause notice dated 4 February 2013. The petitioner submitted that the order of the TPO is without jurisdiction as the transfer pricing provisions do not apply to a transaction of issuing equity shares to its holding company. Besides, the transaction of issuing shares cannot be governed by Chapter X as no income arises and /or affected by it. Further, there is no occasion to recharacterize a bonafide transaction of issue of shares as deemed loan under the Act. Thus, it was submitted that the proceeding seeking to apply Chapter X to issue of shares to its holding company is bad in law;

(l) On 22 March 2013, the Assessing Officer passed the impugned Draft Assessment Order under Section 143 read with Section 144C(1). The Assessing Officer did not deal with the petitioner's principal contention that Chapter X would not be applicable as the issuance of equity shares to its holding company does not give rise to any income. This was not dealt with by the Assessing Officer on the ground that in terms of Section 92CA(4) , the Assessing Officer has to compute the total income in conformity with the ALP determined by the TPO. In view of the above, the Assessing Officer added the entire amount of Rs.1397.26 Crores determined by the TPO to the petitioner's income;

(m) On 24 April 2013, the present petition was filed. On 26 April 2013, the petitioner filed objections to the draft Assessment Order dated 22 March 2013 before the Dispute Resolution Panel ("DRP") under Section 144C. However, the petitioner raised objections before the DRP only with regard to the valuation/ quantification issue and not with regard to issue of jurisdiction viz: the issue of equity shares by the petitioner to its holding company does not affect income and is thus outside the ambit of Chapter X . This was for the reason that the issue of jurisdiction was the subject matter of challenge in this petition before the Court.

6. Affidavit in reply dated 23 September 2013 came to be filed by respondent No.3Dy. Commissioner of Income Tax, (Assessing Officer) for and on behalf of respondents, wherein , inter alia, the deponent has raised the preliminary objection that the writ petition is not maintainable as it is at the stage of draft assessment order and the petitioner has an effective alternate remedy before the DRP, which remedy the petitioner has already resorted to. Affidavit also deals with the petitioner's contentions on merits, which will be referred to hereinafter.

The petitioner has filed affidavitinrejoinder dated 10 October 2013 dealing with the preliminary objection on maintainability and on merits. The Assessing Officer has filed surrejoinder dated 15 October 2013.

7. Learned counsel for the petitioner submitted that –

(A) On correct interpretation of the provisions of Chapter X of the Act including section 92, the following two conditions precedent must be satisfied before invocation or application of Chapter X:–

(i) There must be an international transaction, and

(ii) (a) income must arise from such international transaction, or

(b) there must exist any expense or interest arising from such international transaction, which can impact computation of total income.

Upon fulfillment of such conditions precedent and upon application of Chapter X , the only consequence that follows is that the computation of income (expense or interest) shall be computed having regard to ALP.

(B) Chapter X relating to avoidance of tax does not purport to create any new or additional head of income over and above those provided in section 14 . If a receipt does not fall under any of the heads of income specified in section 14, the revenue cannot by invoking Chapter X create an additional head of income for the purposes of charging of income tax and computation of total income.

(C) The legislative intent that for invocation of Chapter X, income must arise from the international transaction in question (or the expense or interest capable of impacting computation of taxable income must arise) is supported by intrinsic evidence in the provisions of Chapter X as under:–

(i) Title of the chapter is special provisions relating to avoidance of tax meaning thereby avoidance of tax on taxable income;

(ii) Marginal note to section 92 is "computation of income from international transaction having regard to arm's length price". That means section 92 is only a machinery provision and not a charging section.

(iii) All that subsection (1) of section 92 provides is that income arising from an international transaction shall be computed having regard to ALP and, therefore, the explanation clarifies that the allowance for any expenditure or interest arising from such transaction shall also be determined as having regard to arm's length price. Expense or interest can possibly impact computation of taxable income and, therefore, it is taken within the sweep of Chapter X.

(iv) Subsection (3) of section 92 again provides that the provisions of section 92 shall not apply in a case where computation of income under section 92 has the effect of reducing the income chargeable to tax computed on the basis of entries made in the books of account. The emphasis again is on computation of income for the purposes of tax.

(v) Subsection (3) of section 92C confers power on the Assessing Officer to compute ALP. It also provides that this can be done "during the course of any proceeding for the assessment of income".

(vi) Even where the Assessing Officer himself does not determine the ALP but makes a reference to the Transfer Pricing Officer (TPO) under section 92CA and the TPO passes an order determining the arm's length price, subsection (4) provides that the Assessing Officer is to apply the said order "to compute the income of the assessee" in conformity with the arm's length price so determined by TPO.

(D) "Income" is defined by section 2(24) as including –

(i) profits and gains,

(vi) any capital gains chargeable under section 45 and

(xvi) any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (viib) of subsection (2) of section 56.

Section 56(2) (viib) reads as under:–

Income from other sources.

56 (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to incometax under the head "Income from other sources", if it is not chargeable to incometax under any of the heads specified in section 14, items A to E.

(2) In particular and without prejudice to the generality of the provisions of subsection (1), the following incomes, shall be chargeable to incometax under the head "Income from other sources" namely:"..............."

(viib) Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any <u>consideration for issue of shares</u> that exceeds the face value of such shares, the aggregate <u>consideration received for such shares as exceeds the fair market value of the shares</u>. *(emphasis supplied)*

Nowhere in the Act any shortfall in share premium is treated as income. If a case does not fall under section 56(2)(viib) , even share premium in excess of fair market value of shares is not treated as income.

It is therefore vehemently submitted by the learned counsel for the petitioner that the question of determining the arm's length price by invoking the provisions of Chapter X can arise only for the purpose of assessing the income as defined by the Act.

(E) While section 2(24) gives an inclusive definition of "income", section 7 provides which income shall be deemed to be received in the previous year in question and section 9 provides which income shall be deemed to accrue or arise in India. None of those provisions provide for any fiction of treating the receipt of share premium as deemed or notional income. Similarly, no provision even in Chapter X provides that a receipt, even if otherwise not covered by the definition of "income" computed having regard to ALP, will be treated as notional income or deemed income.

Section 92(1) only provides for computation of income arising from an international transaction having regard to the ALP and does not provide that the amount computed as having been received in terms of the ALP shall be treated as deemed income or notional income.

(F) The suggestion made by the Department in the Counter affidavit, that the definition of International Transaction by itself creates a legal fiction by which the ALP of an International Transaction is deemed to be income runs counter to the legislative material placed before this Court by them. It is submitted that the assessments in the present case are a mockery of the legislative intent.

a) The Notes on Clauses refers to Section 92 as a new section to "*provide that any income arising from an International Transaction shall be computed having regard to arms length price....*", and the meanings of associated enterprise and International Transaction "..... with reference to which the income is to be computed under the new section."

b) The Memorandum Explaining the Finance Bill 2001 refers to "MEASURES TO CURB TAX AVOIDANCE" and "New Legislation to curb tax avoidance by abuse of transfer pricing." It points out that "the profits derived by such enterprises carrying on business in India can be controlled by the multinational group, by manipulating the prices.... leading to erosion of tax revenue...". The provisions were inserted ".... With a view to provide a statutory framework which can lead in computation of reasonable fair and equitable profits and tax in India in the case of such multinational enterprises..."

c) The circular issued by the CBDT also echoes the same sentimentit states "... with a view to provide a detailed statutory frame work which can lead to the computation of reasonable, fair and equitable profits and tax in India....".

(G) As per settled legal position Income tax is a tax on real income. Income tax cannot be levied on hypothetical income. If income does not result at all, there can not be a tax. It is submitted that the share premium, which is not taxable, cannot be taxed on the ground that the assessee ought to have received higher share premium and, therefore, the difference should be treated as notional income.

(H) The assessee required from its holding company funds to the tune of about Rs.246 crores for its operations in India. On the basis of the fair market value of equity shares calculated in accordance with the formula under the Capital Shares (Control) Act, 1947, the assessee issued 2,89,224 equity shares of Rs.10/each at a premium of Rs.8,519/per share aggregating to total consideration of Rs.246.38 crores to its Holding company which is undisputedly an Associated Enterprise. The petitioner received the said amounts in August/ November 2008. At the relevant time sub clause (xvi) was not yet inserted in Sec.2(24) – which, in certain cases, treats share premium in excess of fair market value of shares as income w.e.f. 1 April 2013. Hence the petitioner could have as well received Rs.246.38 crores from its holding company by simply issuing only share or 100 shares.

(I) The AO and the TPO have determined the ALP of each share at Rs.53,775/- and on that basis they have treated the differential amount of Rs.45,256/- (Rs.53,775 – Rs.8,519) as the shortfall in the share premium. Since the number of equity shares issued by the petitioner was 2,89,224, the transfer pricing adjustment of Rs.1308.91 crores has been made. This alleged shortfall has been treated as loan from the petitioner to the Associated Enterprise or a receivable from the Associated Enterprise or financial facility extended by the petitioner to the Associated Enterprise or a call in arrears that should have been paid by the Associated Enterprise on the date of issue of shares.

(J) The AO and the TPO both have still gone further and an interest at the rate of 13.5% for 6 months has been computed on the deemed loan interest quantified at Rs.88.35 crores and thus the total transfer pricing adjustment of Rs.1397.26 crores is made.

(K) The transfer pricing provisions have thus been used by the TPO and the AO to treat the alleged shortfall in the amount of share premium as income. It is vehemently submitted by Mr.Harish Salve that the TPO and the AO have turned the entire tax jurisprudence on its head by passing the impugned orders.

(L) The issue of equity shares at a premium by the petitioner to its holding company is itself a process of creation of shares and thus would not be covered as a transfer as held by the Apex Court in Khoday Distilleries Ltd. v/s. CIT, 2009(1) SCC 256. In the above case, the Supreme Court held as under:"

> *There is a vital difference between "creation" and "transfer" of shares...............There is a difference between issue of a share to a subscriber and the purchase of a share from an existing shareholder. The first case is that of creation, whereas the second case is that of transfer of choseinaction."*

Consequently, the issue of shares at a premium being sue generis would not attract the provisions of Section 2(47) and 45 dealing with transfer of capital assets and capital gains.

(M) Section 4 is the charging section and Section 5 which defines the scope of total income to include income received and deemed to be received or accrued. It is submitted that in this case, no income has accrued or has been received or deemed to be received by the petitioner on the issue of equity shares to its holding company and therefore, cannot be subjected to tax. In support of the above submission, reliance was placed upon the decision of this Court in Cadell Weaving Mills Company Limited vs. CIT 116 Taxman 77. In the above case the issue was whether an amount received in consideration for surrendering statutory tenancy could be considered as an amount liable to tax under Section 56 i.e. income from other sources. This Court inter alia held as follows:–

> *"It is true that Section 2(24) defines would "income". That the definition is an inclusive definition. However, it is well settled that capital receipts do not come within the ambit except to the extent of any capital receipt being expressly sought to be covered by the act of the Parliament as in the case of Section 2(24) (vi)."*

The Court held that where capital gain is not chargeable for any reason under Section 45 then any amount/income/gain cannot be brought to tax by applying the general understanding of income in the inclusive definition provided under Section 2(24) . In the present case also it was submitted that the issue of shares was on capital account and the same is not taxable under the head Capital Gains, therefore, cannot be brought to tax as income under any other head unless it is specifically defined in the Act. The aforesaid decision of the Bombay High Court was upheld by the Apex Court in 273 ITR page 1.

(N) One more issue which arises in this case and which cannot be contended before the authorities is: if the revenue's contention is accepted (the amount received as share premium on issuance of equity shares was received in terms of the ALP determined by the department, then no amount received by the petitioner would be subjected to tax. However, if there is any short fall/difference on the amount determined as ALP and amount received by the petitioner then the petitioner would have to pay tax on the differential amount), such construction would lead to imposition of penalty and would not only be arbitrary and violative of Article 14 but also violative of Article 19(1) (g) of the Constitution. In support of the aforesaid proposal reliance was placed upon the decision of the Apex Court in the matter of K.P.Varghese vs. ITO 1981 (4) SCC , 173.

In view of the above, it is submitted by Mr.Salve that this Court should exercise its extra ordinary writ jurisdiction and entertain the petition as the alternative remedy is not an efficacious remedy.

(O) The TPO while determining the ALP of the issue of equity shares by the petitioner to its holding company has treated the ALP determined in respect of transactions in earlier Assessment Years 2007-08 and 2008-09 as the sums actually received/receivable. This is not permissible as the ALP transaction for the earlier period only results in a tax being paid on proper value of the international transaction on the basis of ALP so determined for that transaction in that year. It does not have any carry forward effect.

8. Mr.Salve has also assailed the impugned order on the ground of breach of principles of natural justice:

(a) The impugned orders of the TPO and the draft assessment order of the Assessing Officer are in breach of principles of natural justice in as much as the fundamental issue going to the root of the matter raised by the petitioner viz: the international transaction in question does not give rise to and/or affect any income has not been considered and/or dealt with either by the TPO or by the Assessing Officer and yet Chapter X has been applied. The TPO does not consider the issue of income on the ground that in terms of Section 92CA his mandate is only to determine the ALP of the transaction whereas the Assessing Officer has not dealt with the issue in the Draft Assessment

Order on the ground that in terms of Section 92CA (4) , he is bound by the ALP as determined by the TPO;

(b) Before the Assessing Officer refers a transaction to the TPO for determination of the ALP under Section 92CA , it is incumbent upon the Assessing Officer to hear the petitioner before coming to the conclusion that it is necessary and expedient to refer the transaction to the TPO for computation of ALP. This not having been done, the entire reference to TPO is bad.

(c) Further while referring the matter to the TPO, the Assessing Officer is also required to consider whether there is any income arising from international transactions so as to make provisions of Chapter X applicable as otherwise, at no point of time, the question whether or not, any income arises from international transactions is subject to any examination by the authorities.

(d) The constitution of the DRP is such that one of its members is Director of Income Tax (Transfer Pricing). In terms of Instruction No. 3/2003 dated 20 May 2003 a person of equal rank to the Director of Income Tax (Transfer Pricing) who is equal to a member of the DRP is required to approve the order of the TPO. In view of the above, it is submitted that the Writ Petition be entertained and be disposed of on merits.

9. Mr. Salve further submitted that the petition should be entertained and the petitioner should not be relegated to avail of alternate remedy as the challenge in the petition was to the very jurisdiction of the respondentauthority to tax issue of shares at premium by the petitioner to its holding company. In support of the above, the following submissions were made:–

(a) From the very beginning, the petitioner has protested and challenged the jurisdiction of the authorities in applying Chapter X in respect of the issue of shares, inter alia, on the ground that it does not give any rise to any income. This is evident from Form 3 CEB dated 28 September 2009 filed by the petitioner along with its return of income and the replies filed by the petitioner to the show cause notice dated 14 December 2012 issued by the TPO;

(b) The decision of this Court in W. P. No. 488 of 2012 rendered on 6 September 2013 (for convenience Vodafone II case), wherein this court refused to entertain a writ petition challenging proceeding under Chapter X for the Assessment Year 200809, is inapplicable to the present facts. This is for the reason that unlike in the above case, the petitioner had in these proceedings challenged the jurisdiction of the TPO and the Assessing Officer right from the beginning of the proceeding. Besides in this case, there are no disputed questions of fact as found in Vodafone II case;

(c) Though after the filing of this petition on 24 April 2013, the petitioner has on 26 April 2013 filed objections against draft assessment order before the DRP, these objections were filed only with regard to quantification/valuation issue and not with regard to the jurisdiction of the authorities to apply Chapter X to the issue of shares to its holding company. Thus petitioners are not availing of two remedies at the same time;

(d) In any event, the objections filed by the petitioner to the draft Assessment Order before the DRP is not an efficacious alternative remedy. This is for the reason that in terms of Section 144C (5) read with Section 144 C (8) , the DRP has no jurisdiction to set aside any proposed variation in the draft assessment order, even if is satisfied that the same is without jurisdiction.

(e) The impugned orders are in the nature of penalty in violation of petitioner's fundamental rights as submitted in ground (N) on merits. Hence, the petitioner should not be relegated to a departmental authority like DRP.

(f) It was also submitted that in the affidavit in reply, the Respondentrevenue have set out the reasons why according to them income arises on the international transaction being the issue of shares at a premium is covered by Chapter X . In these circumstances, the contentions of the parties be considered on merits and the matter be decided by this Court finally without relegating the petitioner to either the Assessing Officer or the DRP.

10. On the other hand, Mr. Mohan Parasran, learned Solicitor General, in support of the impugned orders passed by the TPO and the Assessing Officer, submitted that this petition be dismissed at the threshold as an efficacious alternative remedy is provided under the Act, the issues raised herein can more appropriately be dealt with by the authorities under the Act. In support, the following submissions were made:–

(a) The Act provides a complete and self contained machinery for obtaining relief against improper action by the authorities. In this case, the petitioner has already resorted to the alternative remedy by preferring its objections before the DRP. In the above circumstances, the petitioners be directed to proceed with their objections before the DRP and not be allowed to avail of parallel remedies;

(b) This Court in almost similar circumstances in Vodafone II case by its order rendered on 6 September 2013 relating to

Assessment Year 200809 in respect of the same petitioner refused to exercise its writ jurisdiction. In the aforesaid decision, it has been held that the draft assessment order based on the order of the TPO could be challenged before the DRP on all grounds in its entirety including the issue of jurisdiction. Therefore, whether or not any income arises consequent to the international transaction of issue of shares at a premium to its holding company attracting the provisions of Chapter X is also amenable to challenge before the DRP;

(c) The petition itself involves mixed questions of facts and law. The issue of transfer pricing involves valuation which is the result of facts based analysis which could be best done by the authorities under the Act. It was submitted that for this very reason, the respondents are not arguing on the merits, save and except to point out that once an International Transaction exists then the ALP has to be determined by the TPO; and

11. The learned Solicitor General further submitted that the Assessing Officer is under no obligation to give any hearing to an assessee before it makes a reference to the TPO under Section 92CA(1) . All that the Assessing Officer has to do is to reach a prima facie satisfaction that there is an international transaction and that the ALP of the same is to be determined by the TPO after obtaining the previous approval of the Commissioner. There is no need for a hearing as it is only a prima facie opinion of the Assessing Officer. Further, in any view of the matter, the TPO in terms of Section 92CA(2) serves a notice on the assessee and entertains the objections of the assessee while determining the ALP of the international transaction. Therefore, the principles of natural justice are satisfied and the assessee has an opportunity to present its case before the TPO to whom the case is referred to by the Assessing Officer. In these circumstances, there is no justification for the assessee to have one hearing before the transaction is referred to the TPO and another hearing on the same issue after it is referred to the TPO.

12. On merits of the issue, the learned Solicitor General in his reply after canvassing the submissions on the questions of alternate remedy and obligation, if any, of the AO or TPO to give any hearing to assessee simply declined to make any submission on merits of the aspect on the ground that since merits would be considered by the DRP, he would not make any submission on merits of the controversy at the hearing of this writ petition.

13. Subsequently, one week after conclusion of the arguments including rejoinder, learned counsel for the respondents submitted written submissions on behalf of the revenue dealing with merits of the controversy and attempting to rebut the petitioner's contentions on merits. As indicated earlier, in the affidavitinreply dated 23 September 2013 also the revenue had dealt with merits of the controversy.

14. When the learned counsel for the petitioner submitted in rejoinder that the learned counsel for the revenue had shied away from the merits of the case because the revenue has no case on merits, in the subsequent written submission submitted on behalf of the revenue reliance is placed upon the decision of the Supreme Court in Tin Plate Co. of India Ltd. v/s. State of Bihar and ors, (1998) 8 SCC 272. The Supreme Court observed in that case that when the High Court dismisses a writ petition on the ground that the petitioner has an alternate remedy available to him, the High Court should not make observations touching upon the merits of the case.

True it is, that while disposing of a writ petition on the ground of alternate remedy, the Court should not express any opinion on merits of the controversy between parties. That, however, does not absolve the respondentauthority from its duty to Court to indicate a prima facie, probable or atleast a plausible defence when the Court calls upon the respondentauthority to disclose its defence in a nutshell, after the petitioner makes out a strong prima facie case for invoking the jurisdiction of the High Court on the ground that the respondentauthority has exfacie acted without jurisdiction. Otherwise, even in case of grossly arbitrary action or proceeding initiated without any jurisdiction whatsoever, the authority raising plea of alternate remedy, may remain silent on merits of the matter and expect the High Court to dismiss the writ petition on the ground of alternate remedy, requiring the petitioner to go through the labyrinth of appeals and revisions, hoping to tire the petitioner out in terms of time, energy and costs before he can approach the writ court again for adjudication of merits of the dispute. Authorities shall keep this caution in mind for future.

15. Now we will make a brief reference to the reply on merits in the affidavitinreply, wherein the respondents had taken the following stand:

"... I state that the Revenue contends that the nature of receipt, whether `capital or revenue', has no bearing on the issue of accrual of income for the purposes of Chapter X.

"........ The transaction of issue of shares by the petitioner to its AE does have a bearing on the assets of the petitioner company and hence is as per the mandate of law, within the jurisdiction of the TPO for determining the arm's length price....

".... the computation part of transfer pricing regulation does not put a pre condition of tax implication before examining ALP of an international transaction......." (para 15)

"...... The Act nowhere states that only revenue items would be taken as income.......".

".....the determination or variation in the ALP of an International Transaction as determined by the AO/TPO under Chapter X, would be part of `notional income' including the total income of an assessee." (para 20).

"For the purposes of Chapter X, the difference in ALP of an international transaction has to be treated as income, for which noexpress statutory fiction is required, as contended by the petitioner." (para 40.2(J))

16. On merits of the issue the revenue made the following submissions:-

(a) The issue of equity shares at a premium by the petitioner to its holding company is an international transaction in terms of Section 92B. This was recognized even by the petitioner who along with its return filed the requisite statutory Form 3 CEB, declaring the issue of shares to its holding company as an international transaction. In terms of Section 92B of the Act, all transactions between Associated Enterprises which have bearing on profit, income or loss or assets would be considered to be an international transaction. Therefore, the issue of equity shares would be regarded as international transaction as it would have bearing on the assets of the petitioner. Moreover, Section 92B includes within the meaning of international transactions also capital financing and business restructuring as provided in the Explanation (1) (c) and (1) (e) to Section 92B. It was submitted that whether or not, the issue of shares has a bearing on the assets and income of the petitioner and the extent of the assets and income would be decided by the authorities, assessing the petitioner to tax. In view of the above circumstances, no submission on merits of the transactions were being made by the revenue at the bar;

(b) Issue of share capital by a subsidiary to its holding company is normally liable to capital gains. This is evident from the fact that Section 47 provides for transactions not to be regarded as transfers for the purpose of capital gain. Attention was particularly drawn to Section 47 (vi) (d) which clearly provides that issue of shares in certain situation is regarded as transfer and may give rise to capital gains under Section 45 . Therefore, though this is not a case of demerger, the same is being relied upon so as to emphasize that conceptually an issue of share capital could be regarded as transfer giving rise to capital gains. Therefore, the difference between the ALP and the declared value would give rise to income.

17. The petitioner as well as the respondents have relied upon various decisions in support of their above submissions. We shall deal with the relevant case law cited by the counsel, where necessary, while considering their submissions.

18. The first issue which arises for our consideration is whether this petition as contended by the petitioner should be entertained in exercise of our writ jurisdiction under Article 226 of the Constitution of India or dismissed at the very threshold on the ground of alternative remedy as submitted by revenue.

19. The respondentrevenue has placed strong reliance upon the decision of this Court rendered in Vodafone II case filed by this petitioner relating to the Assessment years 200809. In the above case, the petitioner had challenged the jurisdiction of the TPO in taking suomoto notice of International Transactions and determining its ALP. It is the contention of the revenue that on a similar fact situation, this Court directed the petitioner to avail of the alternate remedy available under the Act. The Court held that the DRP and the ITAT are entitled to set right any defect in the order of the TPO as reflected in the draft Assessment Order including the question of lack of jurisdiction of the TPO. In view of the above, it was submitted by the revenue that this Court should not exercise its extra ordinary jurisdiction and follow its decision rendered in Vodafone II case.

20. It is not possible to accept the contention of the revenue that the situation in VodafoneII case was similar to the present case (which may, for the sake of convenience, be referred to as VodafoneIII case).

(a) In VodafoneII, TPO had suo motu exercised his jurisdiction to determine the arm's length price in respect of two unreported international transactions, being

(i) the transaction relating to sale of call centre business by the petitioner to Associated Enterprise, and

(ii) the assignment of call options under the new framework agreement dated 5 July 2007.

The petitioner had contended before the TPO that the transactions did not constitute international transactions. The Division Bench held that there were several issues of fact and law on material aspects which were required to be considered by the authorities under the Act and, therefore, it was not a fit case to invoke Article 226 of the Constitution of India (para 195/page 195).

(b) In para 145, the Division Bench dealt with the contentions thus:

> *"The petitioner's case is this. The petitioner and HWP (India) are Indian companies. The call centre business was therefore, transferred by the petitioner, an Indian company, to HWP (India), another Indian company. Section 92B requires at least one of the parties to be a nonresident. As both the parties to the transaction were Indian companies, section 92B did not apply. There was no agreement between HWP (India) and the*

> *associated enterprise of the petitioner viz. VIH BV. The findings to the contrary are perverse and without jurisdiction."*

(c) The Division Bench held that the relevant question was whether call centre business was sold before or after the sale of the CGP share. Determination of that question was necessary to decide whether the transaction of sale of call centre business was an international transaction because after the sale of CGP share the authorities would be entitled to consider the petitioner as being in the Vodafone group. (para 187/page 189).

(d) The Division Bench also noted that the completion date under the Share Purchase Agreement admittedly was 8 May 2007. The BTA was also dated 8 May 2007. The answer to the question whether the sale and purchase of the share preceded the sale of the call centre business or vice versa or whether they were simultaneous requires a consideration of facts, circumstances and factors, including the conduct of parties. (para 170/page 178179)

(e) Another question, which was agitated before the Division Bench, was whether MOU purported to have been signed on 25 April 2007 was antedated or not. The Division Bench held that this was a question of fact which must be decided by the authorities/Tribunal under the Act. (para 172173/page180181)

(f) The Division Bench further held that even assuming that MOU was not antedated and was executed prior to the Share Purchase Agreement, the petitioner did not have an open and shut case. The terms and conditions of the MOU require serious consideration – whether the MOU constituted an agreement at all or whether it was only an agreement to enter into an agreement which is not enforceable in law. (para 174/page 181)

(g) The Division Bench held that the following were questions of fact:

> *"151. …. The question would be whether the parties, including HWP (India) intended that HWP (India) would be bound by the terms of the SPA relating to the sale of the call centre business.*
>
> *158. The next question is in relation to Mr. Salve's third contention whether the relevant transaction i.e. the BTA/ sale of the call centre business was in relation to the SPA and/or the terms thereof were determined by the SPA.*
>
> *164. The fourth question is whether the SPA was prior in point of time to the BTA / the sale of the call centre business.*

The Division Bench thereafter referred to the contention of the respondents and then held that the contention was not wholly inarguable or improbable. (para 146/page 164-165)

(h) The Division Bench gave a specific finding that TPO had jurisdiction to determine the arm's length price of the two unreported and unreferred transactions. (para 131/ page 140)

(i) The Division Bench held that in the case before it, there was no warrant for exercise of writ jurisdiction because the petitioner had not only an equally but a more efficacious remedy by filing the objections before DRP and that DRP would be entitled to go into all aspects of the matter, factual and legal, whereas in a writ petition a Court may decline interference where there are disputed questions of fact. (Para 107/page 119)

21. It must be pointed out that while relegating the petitioner to the alternate remedy in Vodafone II case, this Court had also entered a caveat that the existence of alternate remedy by itself will not bar the Court from exercising its extra ordinary jurisdiction if the facts of the case so warrant. Moreover, we find that the Court while refusing to entertain the petition had on facts found that the petitioner had not challenged/objected to the jurisdiction of the TPO at any time prior to filing the petition and on the contrary, the petitioner had actively participated in the proceedings before the TPO without raising any objections as to its jurisdiction.

As against the above, in the present proceedings, the petitioner has from the very out set, been objecting to the jurisdiction of the authorities to apply Chapter X on issue of shares at a premium by it to its holding company. This is evident from the Form 3 CEB dated 28 September 2013 filed by the petitioner, wherein it was specifically stated by its accountant that the International Transaction of issuing shares at a premium to its holding company is not covered by Chapter X as the issue of shares does not give rise to or affect any income. Further, even while replying to the show cause notice dated 14 December 2012 issued by the TPO, the petitioner had in its replies dated 24 December 2012, 7 January 2013 and 22 January 2013 protested to the jurisdiction of the TPO to apply Chapter X to issue of equity shares, inter alia, on the ground that it does not give rise to any income.

Thus, the fact situation in the present case is fundamentally different from the fact situation in Vodafone II case where the petitioner had submitted to the jurisdiction of the revenueauthorities and had not challenged and/or protested to the same till such time the TPO had passed an order.

22. Further, the revenue has also placed reliance upon the decision of this Court in *Hindalco Industries Ltd. v/s. Addl. CIT* 2012 (211) Taxman page 315 wherein also this Court refused to entertain a petition under Article 226 of the Constitution on the ground of alternative remedy. However, this was for the reason that in the above case also the petitioner had willingly participated in the proceedings before the TPO

and only after the TPO had rendered a finding on 31 October 2011 with regard to the ALP, that the petitioner moved the petition. It its petition, Hindalco had also challenged the validity of the reference made by the Assessing Officer to the TPO on 9 October 2009 as well as approval of the Commissioner of Income Tax on 30 September 2009 for making the reference to TPO. However the above challenge in Court was made after delay of two years. It was in the above circumstances that the Court refused to entertain the petition holding that a comprehensive remedy was available to the petitioner under the Act to challenge the order of the TPO.

23. In view of the above, none of the two decisions being relied upon by the revenue are applicable to the present facts so as to warrant dismissal of the petition at the very out set. Therefore, we would have to independently examine the issue on the facts arising herein whether the petition should be entertained or the petitioner be directed to pursue its remedies under the Act.

24. The contention of the petitioner is that filing of objections with the DRP from the draft assessment order is not an efficacious alternative remedy for the reason that in view of Section 144C(8) , the DRP while passing order under Section 144C(5) cannot set aside any variations in the draft assessment order or remand the matter to Assessing Officer for further enquiry. Section 144C(8) reads as under:"

> *The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that <u>it shall not set aside any proposed variation</u> or issue any direction under subsection (5) for further enquiry and passing of the assessment order."*

(emphasis supplied)

Learned counsel for the petitioner further referred to powers of the Commissioner (Appeals) conferred by Section 251(1)(a) in the following terms:–

> *251(1) In disposing of an appeal the Commissioner (Appeals) shall have the following powers-*
>
> *(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment.*

Thus the contention of the petitioner is that primary issue raised by it (viz: Chapter X is not applicable in view of the fact that no income arises and /or is affected) could never result in the draft assessment order being set aside by the DRP even if it is convinced of the petitioner's case. According to the petitioner the only jurisdiction the DRP has is with regard to quantification/valuation and therefore, this Court should exercise its writ jurisdiction.

25. On the above issue, the revenue has submitted in their written submissions as under:"

> The petitioner is not correct in contending that the powers conferred in subsection (5) of Section 144C to the DRP are curtailed by its subsection (8), particularly when fetters are put on the DRP that it shall not set aside any proposed variation or issue any direction under subsection (5) for further enquiry and passing of the assessment order. In this context, it is submitted that a purposive construction should be given to this subsection by harmoniously reading the entire scheme of section 144C, including subsections (6), (7), (12) and subsection (13). It is further submitted that fetter to set aside and issue of directions is limited to further enquiry by the AO which can be read with subsection (13) so that the completion of assessment is expedited within available limited time of nine (9) months."

26. This very submission was made by the Petitioner before another Division Bench of this Court in Vodafone II case and was negatived by decision dated 6 September 2013 (supra) wherein it recorded the submission and observed, inter alia, as under:–

> *"82. Mr. Salve submitted that the DRP is entitled under Section 144C only to "confirm, reduce or enhance" the variation proposed in the draft order. These words according to him, relate and are germane only to quantification of the arms length price. The DRP is therefore not entitled to consider whether or not the transaction are international transactions. We are unable to agree.*
>
> *83 to 86……*
>
> *87. …… Nor does it limit the consideration by the DRP to the nature of the report relating to draft assessment order.*
>
> *Sub-section(6) and especially clauses (a) and (b) thereof illustrate the DRP would also be entitled to consider whether or not the TPO was entitled to exercise jurisdiction.*
>
> *88. This view is not repugnant to the words "confirm reduce or enhance" in section 144C(8). The suggestion that these three words refer only to the valuation or quantification of the arm's length price is unfounded. A reduction or an enhancement indeed relate to the valuation or quantification. The word 'confirm', however, is much wider. The DRP's power to confirm would include the power not to confirm. It would include the power to annul the variations or any of them. The doubt if any, is set to rest by the use of the words "may confirm". Once the entire draft order is before the DRP for confirmation, it is axiomatic that it would have the power to consider the entire draft assessment order, including the question as to whether the*

unreported transactions are international transactions or not or even whether what the TPO considered was a transaction at all.

The Division Bench of the Gujarat High Court in Veer Gems (supra) also held that the issue whether there was an international transaction or not can also be examined by the DRP.

89 to 93………

94. In the result, the petitioner has, in fact, more than one alternate remedy although not to the extent contended by the Advocate General. In view of our findings, the petitioner's remedy against the order of the TPO is not before the AO. The AO must make the assessment in conformity with the TPO's order. The AO is not entitled to either question the TPO's order in any respect or to make the assessment contrary thereto. However, the assessee is entitled to challenge not merely the determination of the arm's length price, but also the TPO's conclusion that a particular transaction is an international transaction before the DRP. Alternatively, the assessee can wait till the final assessment order is passed without raising any objections upon the receipt of the report from the TPO and challenge the same before the CIT(Appeals). The petitioner, therefore, has an alternate remedy of challenging all aspects of such a matter either before the DRP or before the CIT(Appeals). The alternate remedy is, therefore, clearly there. In fact, from the order of the DRP or the CIT, the petitioner is entitled to file a further appeal before the ITAT. These appellate authorities are entitled to go into all questions of law and of fact. It is not suggested that either the CIT or the ITAT cannot consider the question as to whether a transaction is an international transaction or not."

27. Thus the contention of the petitioner that the filing of objections to the DRP from the draft assessment order is not an efficacious remedy on the ground that issues other then quantification/valuation could not be raised stands negatived by the judgment dated 6 September 2013 of this Court in Vodafone II case. We are informed at the Bar that the said decision has been accepted by the petitioner as it has not been challenged before the Apex Court. The learned Solicitor General also submitted that the DRP has jurisdiction to consider all issues including the question whether a transfer is an international transaction and the question whether income has arisen or has been affected by the international transaction.

28. Thus it would be open to DRP to consider all issues, including the jurisdictional issue of no income arising and/or affected by the International Transaction. This the DRP can do by issuing final

directions under section 144C(5) to the Assessing officer or before issuing final directions, by issuing directions under section 144C(7) to the assessing officer to make a further enquiry and report.

29. Therefore, we have now to consider the issue whether in the face of availability of an efficacious alternative remedy, this Court should exercise its writ jurisdiction. It was contended by the revenue that the petition should not be entertained as the petitioner has already availed of the alternative remedy by filing its objections with the DRP on 26 April 2013. Normally, a writ petition would not be entertained if the petitioner has availed of an alternative remedy on the ground that it is not permissible for a party to pursue two parallel proceedings at the same time. This would be particularly so when the alternative remedy provided under the Act provides for the petitioner obtaining the relief sought in the petition. However, in this case, we find that the petitioner has only filed its objections with regard to valuation/ quantification of the ALP and not with regard to jurisdiction. In its objections to the DRP, the petitioner has specifically noted as under:–

> *"Accordingly, since the issues involved in the present case relate to jurisdiction of the AO/TPO and the applicability of transfer pricing provisions, the remedy before the DRP is not efficacious. The Assessee has, therefore, filed a Writ Petition before the Bombay High Court assailing the jurisdictional issues arising out of the TP Order and the Draft Assessment Order. The Assessee, by way of the present objections, is only assailing valuation/ quantification issues involved in the present transaction before the DRP."*

The petitioner has reserved its rights to file objections with regard to jurisdiction in case the Court does not interfere with the petition. Therefore, the petitioner could now file objections with regard to jurisdiction before the DRP.

30. However, as of date, the petitioner has not challenged the issue of jurisdiction before the DRP. It is well settled that where an alternative remedy is available, normally a writ will not be issued, but this is a self imposed restriction i.e. restraint and not a case of the Court not having jurisdiction to entertain a petition. Declining to exercise writ jurisdiction due to availability of an alternative remedy is a rule of discretion and in an appropriate case, the Court would exercise its writ jurisdiction notwithstanding availability of an alternative remedy or mould the reliefs appropriately even while relegating the petitioner to the alternate remedy.

31. In this case, the petitioner seeks the exercise of writ jurisdiction by us on the following three grounds:–

(a) The entire proceedings to tax issue of shares under Chapter X is without jurisdiction as the sine qua non to exercise jurisdiction is: Income arising and/or being affected from or potentially arising and/or being affected from an International Transaction. This issue has not been examined either by the Assessing Officer or by the TPO at any time; Section 92(1) reads as under:–

Computation of income from international transaction having regard to arm's length price.

92(1) Any income arising from the international transaction shall be computed having regard to the arm's length price.

Explanation:– For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price. (emphasis supplied)

(b) The proceedings are in breach of natural justice in as much as no hearing was given to the petitioners by the Assessing Officer before making a reference to the TPO under Section 92CA(1) , which reads as under:–

Reference to Transfer Pricing Officer.

92CA (1) Where any person, being the assessee, has entered into an international transaction (or specified domestic transaction) in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said international transaction (or specified domestic transaction) under section 92C to the Transfer Pricing Officer. (emphasis supplied)

(c) The Constitution of the DRP as constituted consists of one Director of Income Tax (Transfer Pricing). In terms of Instruction No.3/2003 dated 20 May 2003, a person of equal rank i.e. Directorate of Income Tax (Transfer Pricing) has to approve the speaking order passed by TPO. Therefore, the appeal provided from the draft assessment order is illusory being an appeal from Ceaser to Ceaser's wife.

We shall now examine each of the above contentions.

32. It is clear that in view of Section 92(1) , there must be income arising and/or affected or potentially arising and/or affected by an International Transaction for the purpose of application of Chapter X. This would appear to be in the nature of jurisdictional requirement and the Assessing officer must be satisfied that there is an income or a potential of an income arising and/or being affected on determination of an ALP before he proceeds further in determining the ALP or referring the issue to the TPO to determine the ALP. In this case, we find that the petitioner has from the very beginning been challenging the jurisdiction

to apply Chapter X on the ground that no income arises and/or is affected or potentially arises and/or is affected on account of issue of its shares to its holding company. The Assessing officer does not deal with this objection/issue before referring the matter to the TPO. The TPO does not deal with the above objection on the ground that in terms of Section 92CA, his mandate is only to compute the ALP in relation to the International Transaction. The TPO in the impugned order dated 28 January 2012 meets the petitioner's objection by stating that the same would be dealt with by the Assessing Officer. However, when the same objection was raised before the Assessing Officer post the order of the TPO, the Assessing Officer does not consider the same in the impugned draft assessment order dated 22 March 2013 on the ground that in view of Section 92 CA (4) , the Assessing Officer is obliged to pass an order in conformity with the ALP determined by the TPO. This jurisdictional issue has to be dealt with either by the TPO or the Assessing Officer when specifically raised by the petitioner/assessee.

33. Normally when an accountant reports an international transaction under Section 92E there may be no dispute that there is an income arising and/or being affected or a potential of an income arising and/or being affected by an international transaction on determination of ALP. However when an assessee challenges the above premise, then the issue must be decided. Such an issue must be dealt with at the very threshold that is before determination of ALP. This is so because in case it is held that in the International Transaction there is no income or potential of any income arising and/or being affected on determination of an ALP, the entire exercise of determining the ALP would become academic. In terms of Section 92CA(4) , the Assessing Officer is bound to pass an order in conformity with the ALP determined by the TPO as held by another Division Bench of this Court in the judgment dated 6 September 2013 in Vodafone II case. However where the Assessing officer is himself determining the ALP in terms of Section 94C(3) then in accordance with Section 94C(4) he would compute the income, having regard to the ALP. In such cases where the Assessing officer decides the ALP himself, it is open to him to consider the issue of income arising and/or being affected or not before commencing the proceedings under Chapter X or at the stage of passing an assessment order.

34. However, in cases of transaction referred to the TPO, it would be for the Assessing Officer to first determine the issue of any income arising and/or being affected or potentially arising on determination of ALP before referring the transaction to the TPO, when specifically contended by the petitioner/Assessee. This is also indicated in Section 92CA(1) which requires an Assessing officer to refer an International Transaction for determination to the TPO only if he considers it "necessary or expedient" to refer the mater to the TPO. The exercise of finding out whether any income arises and/or is affected or potentially

arises and/or is affected by the International Transaction would certainly be a factor to determine whether or not it is necessary or expedient to refer the matter to the TPO. In case no objection is raised by the assessee to the applicability of Chapter X then the prima facie view of the Assessing officer would be sufficient before referring the transaction to the TPO for determining the ALP. However where an objection is raised about the applicability of Chapter X by an assessee then the requirement for taking a decision after taking on board the objection becomes necessary. In the absence of it being considered at this stage, the same could only be considered by the DRP and as pointed out above, if considered at the very threshold by the Assessing Officer it could save an elaborate exercise of determining the ALP which may turn out to be entirely academic. It is for the above reason that grant of personal hearing before referring the matter to the TPO has to be read into Section 92CA(1) in cases where the very jurisdiction to tax under Chapter X is challenged by the assessee. Admittedly the aforesaid exercise of considering the objection of no income arising or potentially arising from the transaction has not been done in this case and finds no mention even in the draft assessment order.

35. The revenue has relief upon various decisions to contend that no personal hearing is necessary before referring the matter to the TPO. The relevant cases are as under:

(a) *Sony India (P) Ltd. vs. CBDT* 2007(288) ITR 512;

(b) *Aztee Software & Technology Services Ltd. vs. ACIT* 2007 (294)(AT) 32; and

(c) *Veer Gems vs. ACIT* 2013(351) ITR 35.

36. So far as the decisions at (a) and (b) are concerned they were rendered in the context of Section 92CA(4) as existing prior to 2007. The preamended Section 92CA(4) provided that the Assessing officer will determine the income having regard to the ALP arrived at by the TPO. The earlier (unamended) Section 92CA(4) reads as under:–

> *92CA (4) On receipt of the order under subsection (3), the Assessing Officer shall proceed to compute the total income of the assessee under subsection (4) of section 92C having regard to the arm's length price determined under subsection (3) by the Transfer Pricing Officer. (emphasis supplied)*

This was similar to the power which the Assessing officer still enjoys when he determines the ALP himself in terms of Section 92C(4) as pointed out above. Thus at that time the Assessing officer was not bound to complete the assessment in compliance with the ALP determination of the TPO and it was open to the Assessing officer to consider the question of jurisdiction at the time of passing the draft assessment order. However with effect from 2007, Section 92CA(4) has undergone a change and the

Assessing officer is bound to pass an order in conformity with the ALP determined by the TPO. Amended Section 92CA(4) reads as under:–

> *92CA(4) On receipt of the order under subsection (3), the Assessing Officer shall proceed to compute the total income of the assessee under subsection (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer.*
>
> *(emphasis supplied)*

Therefore in the context of the preamendment law as then existing hearing on jurisdictional issues could take place after the order of the TPO which is not possible post amendment of 2007. In any case, the fact situation existing in this case of viz. a question of jurisdiction was not in issue in the above cases and therefore these two cases can have no application to the present case.

37. So far as the decision of the Gujarat High Court in Veer Gems case is concerned, it deals with the post amended Section 92CA(4) and holds that no hearing need be given by the Assessing Officer before making a reference to the TPO even in respect of jurisdictional issue. This was based on the reasoning that the jurisdictional issue can be decided by the Assessing Officer while framing the assessment Order at which time a hearing would be given. The Gujarat High Court held that under Section 92CA(4) the Assessing officer is bound by the order of the TPO only to the extent of determination of the ALP and on all other issues arising under Chapter X , the Assessing Officer can independently decide all other questions while framing the assessment at which time a hearing would be afforded to the petitioner. However, the Division Bench of this Court in Vodafone II case (para 69) has disagreed with above view of the Gujarat High Court in Veer Gems (supra).The Division Bench of this Court has held that the Assessing Officer cannot deviate from the order of the TPO on any issue including jurisdictional issue that the transaction is or is not an International Transaction. Further we note that in case the draft assessment order is objected to before the DRP then in that event in terms of Section 144C(13) the Assessing Officer is obliged to complete the assessment without granting a hearing to the assessee in accordance with the directions of the DRP. Thus to our mind the hearing has to be given by the Assessing officer before making a reference to the TPO. Thus on this aspect of the matter in view of the decision of a coordinate Bench of this Court, we do not accept the view of Gujarat High Court in Veer Gems(supra).

38. The petitioner seeks to read the requirement of personal hearing in all cases where the Assessing officer seeks to refer an international transaction to the TPO for determination of ALP. It is submitted that even if the hearing is not provided at the stage of reference to TPO under Section 92CA(1) , atleast hearing on the jurisdictional issue is required to

be given by TPO when he issues notice to assessee under Section 92CA(2).

39. It was contended by learned counsel for the petitioner that in Veer Gems (supra) after referring to the assessee's reply to notice under Section 92CA (2) and after recording prima facie satisfaction that the provisions of Section 92A were attracted, in his notice dated 16 August 2011 the TPO directed the assessee to show cause why its transaction with the associated enterprise should not be subject to transfer price proceeding and profits of the assessee not appropriately modified. The TPO had ,thus, appreciated that application of transfer pricing provisions was going to cause serious civil consequences for the assessee in that case and ,therefore, principles of natural justice were required to be followed. The same should be done by the TPO in all cases.

40. In our view, once the AO gives hearing to the assessee before making a reference to TPO, the TPO would be bound by formation of opinion of AO that there was international transaction in the relevant year and that income arises or is affected by the international transaction and the TPO is bound to determine the ALP of the international transaction under consideration, since ultimately it is the duty and responsibility of AO to assess chargeable income of the assessee on the basis of the provisions. Hence, there would be sufficient compliance with the principles of natural justice, if AO gives an opportunity of hearing to the assessee. Normally when the assessee files his return along with a copy of the Accountant's report under Section 92E the applicability of Chapter X may be an admitted position. However we may add a caveat and that is: where the assessee objects to the jurisdiction under Chapter X being exercised then hearing is required to be given by the Assessing officer to the assessee to consider whether it is necessary and expedient to refer the matter to the TPO as otherwise this objection would never be considered, as pointed out above and as in fact has happened in this case. In such cases where the applicability of Chapter X to the facts of the assessee's case is objected to, a hearing should be given to consider the assessee's objection but not otherwise.

41. Thus, in the above circumstances, there is no bar in the Assessing officer deciding the jurisdictional issues about applicability of Chapter X when objected to by the assessee, after giving a personal hearing before referring the matter to the TPO.

42. The revenue also places reliance upon the decision of the Authority for Advance Ruling (AAR) in the matter of *Castleton Investments Ltd.* (2012) 348 ITR 537 to contend that ALP has to be first determined and the chargeability to tax would arise only at later stage. Hence it is submitted that there is no requirement to decide the issue whether income arises or not at the threshold.

43. We find that the facts of the above case are completely different and a decision rendered in the context of facts therein can have no application to the present case. In the above case, the issue was whether income arising from an international transaction was chargeable to tax or not in view of the Double Tax Avoidance Agreement ("DTAA") between India and Mauritius. It was contended by the applicant therein that even if income does arise out of the international transaction, the same would not be chargeable to tax in view of the DTAA. Thus it was contended that the exercise of determining the ALP need not be gone into. The AAR held that whether or nor there is liability to pay tax would not affect the operation of Chapter X . In the present case, the issue which arises is whether income arises or potentially arises from the international transaction. The liability to pay tax is an issue which arises after determining the income arising from the transaction. In the case of Castleton (supra), there was no dispute that income does arise from the international transaction. Thus Chapter X became applicable and the entire exercise as provided therein has to be carried out and thereafter the issue of chargeability to tax would arise. In fact in the case before us the petitioner's contention is that no income arises from the International transaction and Chapter X is not applicable. Therefore the above case of Castleton (supra) does not support the revenue.

44. The learned Solicitor General submitted that the action of AO in referring the international transaction to TPO is a mere administrative act, because as per CBDT Instruction No.3 dated 20 May 2003, AO is to exercise powers under Section 92C where the value of the transaction is upto Rs.5 crores (now revised to Rs.15 crores) and AO is required to refer the transaction to TPO where even the value of the international transaction exceeds Rs. 5 crores (now exceed Rs.15 crores). It is, therefore, submitted that in view of the above Circular, AO has no discretion in the matter and , therefore, AO hearing the assessee before making reference to TPO would be an empty formality and a futile exercise.

45. We are unable to accept the above submission of the revenue. CBDT Circular regarding distribution of files depending on value of transaction cannot detract from the obligation of AO to follow the principles of natural justice, which we have read into Section 92(A)(1), because once AO refers the transaction to TPO, AO will be bound to act in conformity with the order of TPO, as mandated by Sec.92 CA(4), in all respects including jurisdictional issue as held by this Court in Vodafone II case.

46. In view of the above discussion, We find no merit in the contentions of the revenue that no hearing is required to be given to the assessee in respect of jurisdictional issues. There has to be consideration of the petitioner's objection to the applicability of Chapter X. The same should atleast have found a place in the impugned draft assessment

order. The failure on the part of the AO in not having examined the issue of income arising or not from an international transaction is an illegality.

47. However as no final assessment order has yet been passed by the Assessing officer and the issues are still at large before the DRP the same could be urged before the DRP. In the facts of the present case we are not inclined to set aside the draft assessment order of the AO or the order of the TPO and remand the matter to AO, because the AO has already filed an affidavit contesting the petition on merits and justifying the stand that the alleged shortfall in premium upon issue of shares is chargeable to income tax under Chapter X . Hence, instead of remanding the matter to the AO to examine this question, we are of the view that the merits of this question must be considered by DRP under Section 144C(5) read with Section 144C (8) . In a given case if the DRP requires any further material, DRP may exercise its powers either under Section 144C(7) or (5) i.e. by directing the Assessing officer to make enquiry into this aspect of the matter and report or alternatively decide it itself and give final directions to the assessing officer. The process before the DRP is a continuation of the assessment proceedings as only thereafter would a final appealable assessment order be passed. Till date there is no appealable assessment order. The proceeding before the DRP is not an appeal proceeding but a correcting mechanism in the nature of a second look at the proposed assessment order by high functionaries of the revenue keeping in mind the interest of the assesee. It is a continuation of the Assessment proceedings till such time a final order of assessment which is appealable is passed by the Assessing Officer. This also finds support from Section 144C(6) which enables the DRP to collect evidence or cause any enquiry to be made before giving directions to the Assessing Officer under Section 144C(5) . The DRP procedure can only be initiated by an assessee objecting to the draft assessment order. This would enable correction in the proposed order(draft assessment order) before a final assessment order is passed. Therefore, we are of the view that in the present facts this issue could be agitated before and rectified by the DRP.

48. We now take up for consideration the ground based on the constitution of the DRP: one of the members is the Director of Income Tax (Transfer Pricing). In terms of CBDT Instruction No.3/2003 a Director of Income Tax(Transfer Pricing) is required to approve the order passed by the TPO on the ALP. Hence it is submitted that the hearing before the DRP would not be fair hearing as a person of equal rank has already approved the order of TPO.

49. This submission completely overlooks the fact that the proceedings before the DRP are not appeal proceeding but a proceeding to finalize the assessment on the basis of the draft assessment order. Besides, the DRP consists of three members and does not have the Director of Income Tax (Transfer Pricing) in particular who had approved

the order of the TPO as a member. In these circumstances, we do not find any merit in this objection.

50. We have mentioned herein above that it is necessary for the Assessing Officer to decide the issue of objection to applicability of chapter X, if raised by the assessee, before referring the transaction to the TPO as it is a basic issue and would prevent loss of man hours on both sides in computing the ALP if it is finally concluded that Chapter X is not applicable. We are of the view that this exercise could also be done by the Assessing officer before he determines the ALP in exercise of his powers under Section 92C(3) . It was Mr. Nani Palkhiwala who in the concluding paragraph of his Preface to the eighth edition of his monumental work "The Law and Practice of Income Tax" observed:–

> *"Every Government has a right to levy taxes. But no Government has the right, in the process of extracting tax, to cause misery and harassment to the taxpayer and the gnawing feeling that he is made the victim of palpable injustice"*

The revenue would do well to keep the above stage advice in mind while dealing with the assessee. We are constrained to observe that in this case it would be natural for the petitioner to feel harassed as the Assessing Officer did not give any opportunity of hearing before making a reference to the TPO and none of the two authorities viz. the TPO and the Assessing Officer dealt with its preliminary objection. The TPO does not deal with the petitioner's objection about applicability of Chapter X , on the ground that it would be dealt with by the Assessing officer. Thereafter when the petitioner raises the same issue before the Assessing Officer he does not deal with the same on the ground that he is bound to complete the assessment in terms of the ALP determined by the TPO. We hope the revenue will be more sensitive to the just demands of the assessee and not treat the assessee as an adversary who has to be taxed, no matter what.

51. Mr.Harish Salve, learned senior counsel for the petitioner has made a serious grievance that when the assessee is bringing in the country Foreign Direct Investment (FDI) by way of issue of share capital by an Indian subsidiary company to its foreign holding company, such capital receipts are sought to be taxed, even when the Incometax Act does not contain any provision for such chargeability. Even with effect from 1 April 2013, it is only when the share issuing company falling under Section 56 receives share premium in excess of fair market value of such shares, that such excess premium would be chargeable to incometax. The revenue's case in the present matter is that the share premium was less than the fair market value of the shares issued by the petitioner. Secondly, the petitioner has heavily relied upon the decision of the Supreme Court in *Khoday Distilleries*

Ltd. vs. CIT (2009) 1 SCC 256 (261) laying down that issue of shares to a subscriber is creation of shares, whereas purchase of shares from an existing shareholder is transfer of share. Hence, there is no question of taxing the difference between alleged fair market price of the shares issued by the petitioner to its holding company and the issue price as capital gains as contended by the revenue in its replyaffidavit.

52. The assessee is entitled to have its preliminary objection (against chargeability of the alleged short fall in share premium) dealt with. Not a single authority has so far dealt with this issue and even the learned counsel for the revenue did not address us even briefly on merits of this controversy to show a plausible prima facie defence (though the revenue sought to justify its stand in the affidavitinreply and in the written submissions after conclusion of the oral argument) Though the petitioner submitted that we decide the issue on merits, we have not done so for the present for all the reasons pointed out above. Therefore the submissions made on merits are not being considered by us and left open to be urged before the DRP for consideration by the DRP, but even proceeding on the basis that transaction in question is an international transaction since the preliminary objection raised by the petitioner raises a question of law and does not involve disputed questions of fact and having regard to how the petitioner's preliminary objection has so far not been dealt with by the Revenue, this appears to be a fit case to direct the DRP to decide the petitioner's objection regarding chargeability of alleged shortfall in share premium as a preliminary issue and further to observe that in case the decision of the DRP on the preliminary issue is adverse to the petitioner, it would be open to the petitionerassessee to challenge the decision of the DRP on the preliminary issue in a writ petition, in case the petitioner makes out a case at that stage that the decision of the DRP on the preliminary issue is patently illegal, notwithstanding the availability of alternate remedy before the ITAT.

53. In the above circumstances, we dispose of the present petition with the following directions:–

(A) The petitioner shall within two weeks from today submit before the DRP its preliminary objections to Draft Assessment Order and the TPO's order by raising jurisdictional issues.

(B) The DRP shall decide the issue of jurisdiction before considering issue of valuation / quantification raised by the petitioner in its objections filed before the DRP, this of course subject to the additional grounds on jurisdiction being filed by the Petitioner within two weeks from today. The DRP shall decide the issue of jurisdiction as a preliminary issue within two months from the date on which the petitioner files its objections on the question of jurisdiction.

(C) We make it clear that since the question of jurisdiction for applicability of Chapter X for the Assessment Year 2009-10 is raised independently of the challenge to the orders of the TPO and the AO for the Assessment Year 2008-09, the DRP shall decide the preliminary issue about applicability of Chapter X to the assessment for the Assessment Year 2009-10, without awaiting for decision on the dispute relating to the Assessment Year 2008-09.

(D) We further make it clear that in case the decision of the DRP on the above preliminary issue is adverse to the petitioner, it would be open to the petitioner to challenge the order of the DRP on the preliminary issue in a writ petition if a case is made out at that stage that the decision of the DRP is patently illegal, notwithstanding the availability of alternative remedy of filing an appeal before the Income Tax Appellate Tribunal.

54. The petition was filed on 24 April 2013. The objections with regard to computation in the draft assessment order were lodged before DRP on 26 April 2013. In view of the matter pending before this Court, the respondentrevenue had made a statement before us to maintain statusquo and not to proceed with the hearing before the DRP. This statement was made on 24 August 2013. Thereafter, on 29 October 2013 we have granted stay of the proceedings before the DRP. In view of the fact that this petition was filed, the DRP was not able to conduct proceedings in respect of the objections filed by the petitioner. The DRP in terms of Section 144C(12) has to give its directions within nine months from the end of the month in which the Draft Assessment Order is received by the Assessee. The Draft assessment order was passed on 22 March 2013. The period of nine months would thus commence from 1 April 2013 and expire on 31 December 2013. In view of the above, the period for the DRP to give its directions under Section 144C(5) shall exclude the period from 24 August 2013 (when the respondentrevenue made a statement to the Court that they would maintain statusquo) till the DRP decides the preliminary issue.

55. All the issues and contentions are left open, to be urged/agitated before the DRP.

56. **Writ Petition is disposed of** with the above directions, with no order as to costs.

2014 TRI 84 (H.C. Guj.)

HIGH COURT OF GUJARAT AT AHMEDABAD

M.R. Shah and R.P. Dholaria, JJ.

Commissioner of Income Tax II
v.
Gujarat State Road Transport Corporation

FACTS/HELD

Employees' PF/ ESI Contribution is not covered by s. 43B & is only allowable as a deduction u/s 36(1)(va) if paid by the "due date" prescribed therein

1. In AY 2005-06 the assessee collected Rs.51 crore from its employees as their contribution to the provident fund but deposited an amount of Rs.21 crore with the provident fund trust within the time allowed under the Provident Fund Act. The shortfall was deposited with the PF trust before the due date for filing the ROI u/s 139(1). The AO held that the amount not deposited in time was assessable as "income" u/s 2(24)(x) & that a deduction u/s 36(1)(va) could not be allowed as the payment was not within the prescribed "due date". He also held that s. 43B applied only to the employer's contribution. On appeal by the assessee, the CIT(A) and ITAT upheld the assessee's claim by relying on Alom Extrusions Ltd 319 ITR 306 (SC). On appeal by the department to the High Court HELD allowing the appeal:

   S. 43B which permits a deduction for payments made upto the due date for filing the ROI applies only to the employer's contribution to the provident fund etc. It does not apply to the employees' contribution. The employees' contribution received by the employer-assessee is deemed to be income in the assessee's hands u/s 2(24)(x) and if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in Explanation to s. 36(1)(va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in s.

28 of the Act. The argument that two view are possible is not acceptable because only one view is possible on a correct interpretation of the provision (Alom Extrusions 319 ITR 306 (SC) distinguished, Aimil Ltd 321 ITR 508 (Del), Nipso Polyfabriks 350 ITR 327 (HP), Spectrum Consultants 34 taxmann.com 20 (Kar), Udaipur Dugdh Utpadak Sahakari Sandh 35 taxmann.com 616 (Raj) & Hemla Embroidery Mills (P&H) dissented.

Appeals allowed.

Tax Appeal No. 637 of 2013 with Tax Appeal Nos. 1711, 2577 of 2009, 925, 949, 965, 1655, 2365, 2378, 2644 of 2010 and 814 of 2011.

Decided on: 26th December, 2013.

Present at hearing: Manish R. Bhatt, Sr. Advocate with Mauna M. Bhatt, Advocate, for Appellant. Deepak Shah, Advocate, for Respondent in Tax Appeal No. 637 of 2013. NR KM Parikh, Advocate, for Appellant in Tax Appeal No. 1711 of 2009. Paurami B. Sheth, Advocate, for Appellant. Manish J. Shah, Advocate, for Respondent in Tax Appeal No. 2577 of 2009. Manish R. Bhatt, Sr. Advocate with Mauna M. Bhatt, Advocate, for Appellant. Manish J. Shah, Advocate, Advocate, for Respondent in Tax Appeal No. 925 of 2010. Manish R. Bhatt, Sr. Advocate with Mauna M. Bhatt, Advocate, for Appellant in Tax Appeal No. 949 & 965 of 2010. Sudhir M. Mehta, Advocate, for Appellant. Manish J. Shah, Advocate, for Respondent in Tax Appeal No. 1655 of 2010. Paurami B. Sheth, Advocate, for Appellant. Manish J. Shah, Advocate, for Respondent in Tax Appeal No. 2365 of 2010. Paurami B. Sheth, Advocate, for Appellant in Tax Appeal No. 2378 & 2644 of 2010. Manish R. Bhatt, Sr. Advocate with Mauna M. Bhatt, Advocate, for Appellant in Tax Appeal No. 814 of 2011.

JUDGMENT

Per M.R. Shah, J.–

1.00. As common question of facts and law arise in this group of appeals, they are disposed of by this common judgement.

2.00. Common substantial question of law which arises in this group of appeals is with respect to deletion of disallowance of employees' contribution to PF Account as well as ESI contribution despite provisions of section 36(1)(va) of the Income Tax Act, 1961. (hereinafter referred to as "the IT Act" for short).

3.00. For the sake of convenience facts of Tax Appeal No.637 of 2013 are narrated which in nutshell are as under:

3.01. That the respondent – assessee is a Corporation run by State of Gujarat, engaged in the business of public transportation. The assessee filed their return of income declaring total loss of Rs.35,51,88,507/- on 30/10/2005 for the AY 2005-06. That the return was processed under section 143(1) of the IT Act. That the assessee filed revised return of income on 31/12/2006 declaring total loss of Rs.93,16,88,230/- on the basis of the final audited accounts and auditor report under section 44AB of the IT Act (Revised) after considering the observations / comments of the Statutory Auditor i.e. Accountant Journal.

3.02. That the case was selected for scrutiny and notice under section 143(2) of the IT Act dtd. 21/6/2006 was issued and served upon the assessee on 22/6/2006. That thereafter notice under section 142(1) of the IT Act dtd. 22/5/2007 was issued and served upon the assessee on 23/6/2007. It appears that there was no compliance from the assessee to the said notice and therefore, further notices under section 143(2) of the IT Act and under section 142(1) of the IT Act requiring the assessee to furnish the details were issued on 19/10/2007 and served upon the assessee on 22/10/2007. In response to the same, the Account Officer of the assessee along with its Chartered Accountant attended and submitted submissions vide letters dated 4/6/2007 and 2/11/2007. The Account Officer submitted chart showing provident fund contribution collected from the employees and deposited with PF Trust as well as Corporation's contribution towards contributory provident fund and its deposit with the PF Trust. That on verification of the same, it was found that there was shortfall in remittance of provident fund collected from the employees which was required to be treated as income of the assessee as per the provisions contained in section 2(24)(x) read with section 36(1)(va) of the IT Act. There was also shortfall in the fund of remittance of assessee Corporation, which according to the Assessing Officer was required to be disallowed under section 43B of the IT Act.

3.03. It was found that the assessee Corporation collected amount of Rs.51,06,02,712/- from its employees but it has deposited an amount of Rs.21,16,61,582/- with provident fund trust. Thus, there was shortfall of Rs.24,89,41,130/-. The Assessing Officer treated the aforesaid amount of Rs.24,89,41,130/- as income of the assessee Corporation considering section 2(24)(x) read with section 36(1) (va) of the IT Act while passing final assessment order.

3.04. The Assessing Officer also added amount of Rs.1,93,55,580/- being the amount of shortfall towards the employers' contributory provident fund and therefore disallowed the same under section 43B of the IT Act and disallowed the said amount of Rs.1,93,55,580/- from the expenses claimed by the assessee Corporation for the year under consideration, as per the provisions contained in section 43B of the IT Act.

3.05. Thereafter, being aggrieved by and dissatisfied with the Assessment Order passed by the Assessing Officer in making addition of Rs. Rs.24,89,41,130/- by invoking provisions of section 2(24)(x) read with section 36(1) (va) of the IT Act being shortfall in employees' contribution to the provident fund and in making total disallowance of Rs.1,93,55,580/- being shortfall in employers' contribution to the provident fund, the assessee preferred an appeal before the CIT(A) and the learned CIT(A) by order dtd. 25/6/2009 partly allowed the said appeal and directed to delete disallowance of Rs.24,89,41,130/- (shortfall in employees' contribution to PF Account) and Rs.1,93,55,580/- (shortfall in employers' contribution to PF Account), by observing that employees' contribution / employer's contribution was deposited before the filing of the return under section 139(1) of the IT Act for the relevant period.

3.06. Being aggrieved by and dissatisfied with the order passed by the CIT(A) in deleting disallowance of Rs.24,89,41,130/- being shortfall in employees' contribution to PF Account and Rs.1,93,55,580/- being shortfall in employers' contribution to PF Account, the revenue preferred appeal before the ITAT being ITA No.2785/Ahd/2009. That the learned ITAT by the impugned Judgement and Order, relying upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income-Tax vs. Alom Extrusions Ltd.*, reported in [2009] 319 ITR 306 (SC), has dismissed the said appeal confirming the order passed by the CIT(A) deleting disallowance of short fall in employees' contribution and employers' contribution to PF Account.

3.07. Being aggrieved by and dissatisfied with the Judgement and Order passed by the ITAT in deleting disallowance of Rs.24,89,41,130/- being shortfall in employees' contribution to PF Account, the appellant revenue has preferred Tax Appeal No.637 of 2013.

3.08. In Tax Appeal Nos.637/2013; 1711/2009; 925/2010; 949/2010; 2365/2010; 2644/2010 and 814/2011, the issue is with respect to disallowance of shortfall of employees' contribution to PF Account under section 36(1) (va) of the IT Act and in Tax Appeal Nos.2577/2009; 965/2010 and 1655/2010, the issue is with respect to shortfall in employees' contribution as well as ESI contribution and in Tax Appeal No.2378/2010, the issue is with respect to shortfall in ESI contribution only.

4.00. Mr.Manish Bhatt, learned counsel has appeared on behalf of the revenue with Mr.K.M. Parikh and Ms.Paurami Sheth, and Mr.Sudhir Mehta and Mr.S.N. Soparkar, learned counsel has appeared on behalf of the assessee. Mr.Manish J. Shah and Mr.Dipak Shah, learned advocates have also appeared on behalf of the respective assessees.

4.01. On behalf of the revenue, Mr.Manish Bhatt, learned counsel has made submissions and on behalf of the assessee, Mr.S.N. Soparkar, learned counsel has made submissions and Mr.Manish J. Shah and

Mr.Dipak Shah, learned advocates have adopted the submissions made by Mr.S.N. Soparkar, learned counsel appearing on behalf of the assessee.

4.02. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has vehemently submitted that the learned tribunal has materially erred in relying upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income-Tax vs. Alom Extrusions Ltd.*, reported in [2009] 319 ITR 306 SC. It is submitted that as such before the Hon'ble Supreme Court in the case of Alom Extrusions (supra) the issue involved was with respect to employer's contribution to PF Account whereas in the present cases, the issue involved is with respect to employees' contribution to PF Account. It is submitted that as such under the Income Tax Act provisions with respect to employees' contribution to PF Account and employers' contribution to PF Account are different. It is submitted that as such with respect to employers contribution, section 43B of the IT Act would be applicable. However, with respect to employees' contribution, section 36(1) (va) of the IT Act would be applicable. It is submitted that both the provisions i.e. section 43B and section 36(1) (va) of the IT Act are different and distinct and will operate in different situation and with respect to different contributions and therefore, the provision applicable with respect to section 43B cannot be made applicable with respect to section 36(1) (va) of the IT Act. It is, therefore, submitted that the learned appellate tribunal has materially erred in relying upon the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra).

4.03. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has further submitted that as per the definition of "Income" provided under section 2(24)(x), any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of Employees State Insurance Act or any other fund for the welfare of such employees is required to be included in the income of the assessee.

4.04. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has further submitted that as per the provisions of section 36(1)(va) with respect to any sum received by the assessee from any of its employees to which provision of sub-clause (x) of clause (24) of section 2 apply, and if the same is credited by the assessee to the employees account in the relevant fund or funds on or before the <u>due date</u>, the assessee shall be entitled to the deduction. It is submitted that even explanation to Section 36(1)(va) makes it very much clear that for the purpose of Clause (va) of subsection (1) of section 36 "due date" means the date by which the assessee is required as an employer to credit the employees' contribution to the employees account in the relevant fund under any Act, Rule or Notification issued thereunder or under any standing order, award or contract of service or otherwise. It is submitted that therefore, during the relevant assessment year, if the employer has not deposited the entire amount towards employees' contribution with the PF Department on or before the relevant date (Due Date) under the PF Act / ESI Act, to the extent there is a shortfall in deposit of the employees' contribution / ESI contribution, the assessee shall not be entitled to the deduction.

4.05. Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue has further submitted that provisions of section 43B of the IT Act which will be applicable to the employers' contribution to any provident fund or any other fund for the welfare of the employees and the Amendment made in section 43B which provides that any such amount of employers' contribution is deposited by the assessee/employer on or before the due date of filing of the return under section 139 of the IT Act shall be entitled to deduction in the relevant year, shall not be applicable with respect to employees' contribution. It is submitted that, therefore, when the assessee has not deposited the employees' contribution in the PF Account before the due date provided under the PF Act and/or ESI Act, the assessee shall not be entitled to deduction under section 36 of the IT Act in the relevant assessment order though the assessee might have deposited employees contribution on or before the due date of filing of the return under section 139 of the IT Act. It is submitted that, therefore, both, the learned CIT(A) as well as the learned tribunal have materially erred in deleting disallowance of shortfall in employees' contribution, by holding that as the assessee had deposited the shortfall on or before the due date of filing of the return under section 139 of the IT Act, the assessee shall be entitled to the deduction under section 36(1)(va) of the Act.

By making above submissions, it is requested by Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue to admit and allow all these appeals and quash and set aside the respective orders passed by the learned appellate tribunal in deleting disallowance of shortfall in employees PF contribution / ESI contribution.

5.00. On the other-hand, Mr.S.N. Soparkar, learned counsel appearing on behalf of the assessee has supported the respective orders passed by the learned appellate tribunal. The learned counsel appearing on behalf of the assessee has vehemently submitted that as such the controversy raised in the present appeals is squarely covered by the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra)

5.01. Learned counsel appearing on behalf of the assessee has also relied upon the following decisions in support of their submissions that the learned appellate tribunal has rightly deleted disallowance of shortfall in employees' contribution by observing that as the respective assessee have deposited shortfall in employees' contribution in PF Account on or before the due date of filing of the return as provided under section 139 of the IT Act, considering section 43B of the IT Act, the assessee would be entitled to disallowance :-

[1] *Commissioner of Income-Tax vs. Alom Extrusions Ltd.*, [2009] 319 ITR 306 SC;

[2] *Commissioner of Income-Tax vs. Aimil Ltd.*, [2010] 321 ITR 508 (Delhi);

[3] *Commissioner of Income-Tax vs. Nipso Polyfabriks Ltd.*, [2013] 350 ITR 327 (Himachal Preadesh);

[4] *Commissioner of Income-Tax vs. Alembic Glass Industries Ltd.*, [2005] 279 ITR 331 (Gujarat);

[5] *Commissioner of Income-Tax and another vs. Sabari Enterprises*, [2008] 298 ITR 141 (Karnataka);

[6] *Commissioner of Income Tax vs. Pamwi Tissues Ltd.*, reported in [2009] 313 ITR 137 (Bombay).

[7] *Spectrum Consultants India (P) Ltd. vs. Commissioner of Income-Tax, Bangalore-III*, [2013] 34 taxmann.com 20 (Karnataka);

[8] *Commissioner of Income-Tax, Udaipur vs. Udaipur Dugdh Utpadak Sahakari Sandh Ltd.*, [2013] 35 taxmann.com 616 (Rajasthan) and

[9] *Commissioner of Income-Tax, Faridabad vs. Hemla Embroidery Mills (P) Ltd.*, [2013] 37 taxmann.com 160 (Punjab & Haryana).

5.02. Relying upon the aforesaid decisions, it is vehemently submitted by the learned counsel appearing on behalf of the revenue that in all the aforesaid cases it is held that if the shortfall in the provident fund / ESI fund is deposited/made before filing of the return, assessee shall be entitled to deduction under section 36(1) (va) in the same year. It is submitted by the learned counsel appearing on behalf of the assessee that in all the aforesaid decisions it is held by various High Courts that the deletion with effect from April 1, 2004 by the Finance Act, 2003 of the second proviso to section 43B of the Income Tax Act, which stipulated that contributions to the provident fund and Employees State Insurance fund should be made within the time mentioned in section 36(1)(va), that is the time allowed under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, as well as the Employees' State Insurance Act, 1948, is treated as retrospective in nature. It is further held that if the provident fund and ESI contribution is made before due date of filing of the return under section 139 of the I.T. Act, there shall not be disallowance in view of provisions of section 43B as amended by Finance Act, 2003. It is submitted that in all these cases, admittedly provident fund / ESI funds have been deposited by the respective assessee on or before the due date of filing of the return and therefore, they shall be entitled to the deduction in the same year, as rightly allowed by the learned appellate tribunal.

5.03. Relying upon the decision of the Hon'ble Supreme Court in the case of *Commissioner of Income-Tax, Gujarat-I vs. Sarabhai Sons Ltd.*, reported in [1983] 143 ITR 473 SC, it is submitted by Mr.Soparkar, learned counsel appearing on behalf of the assessee that as observed and held by the Hon'ble Supreme Court in the said decision, if two views are possible and different High Courts have taken a particular one view, this Court may not take a different view. Therefore, it is requested to follow the aforesaid decisions relied upon by the assessee and hold that the respective assessee shall be entitled to the deduction even with respect to the shortfall in depositing employees' contribution and ESI contribution, as the same have been deposited on or before the due date of the filing of the return, considering Amended section 43B of the IT Act and it is requested to dismiss all these appeals.

6.00. In rejoinder to the above, learned counsel appearing on behalf of the revenue has submitted that in most of the decisions which are relied upon by the assessee, the controversy was with respect to shortfall in employers' contribution and/or whether Amendment in section 43B of the IT Act made by Finance Act, 2003 would have retrospective effect or not. It is submitted that even in the case before the Hon'ble Supreme Court in Alom Extrusions Ltd. the controversy was with respect to shortfall in employers' contribution and retrospective application of Amendment in section 43B of the IT Act made by Finance Act, 2003.

6.01. Now, so far as the reliance placed by the learned counsel appearing on behalf of the assessee on the decision of the Hon'ble Supreme Court in the case of Sarabhai Sons Ltd. (supra) and request not to take a contrary view than the view taken by the other High Courts is concerned, it is submitted by Mr.Manish Bhatt, learned counsel appearing on behalf of the revenue that if only one view is possible as canvassed on behalf of the revenue, in such a case it will be open for this Court to take a different view than the view taken by the other High Courts.

By making above submissions it is requested to allow these appeals.

7.00. Heard the learned advocates appearing on behalf of the respective parties at length.

7.01. Short question which is posed for consideration of this Court is with respect to the disallowance of the amount being employees' contribution to PF Account / ESI Contribution which admittedly which the concerned assessee did not deposit with the PF Department / DSI Department within due date under the PF Act and/or ESI Act.

7.02. To answer the above controversy, the relevant provisions of Income Tax Act, 1961 are required to be referred to.

7.03. "Income" has been defined under section 2(24) of the Act.

Under section 2(24)(x), any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the Employees' State Insurance Act, 1948, or any other fund for welfare of such employees, constitute income. Section 2(24)(x) reads as under:–

> **"Section 2(24)(x) :- Any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the Employees' State Insurance Act, 1948, or any other fund for welfare of such employees."**

7.04. Section 36 of the Act provides for deduction in computing the income referred to in section 28. The relevant provisions applicable to the present cases would be Section 36(1)(va). As per sub-section 36(1)(va), assessee shall be entitled to the deduction in computing the income referred to in section 28 with respect to any sum received by the assessee from his employees to which the provisions of subclause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employees' accounts in the relevant fund or funds on or before the "Due Date". As per explanation to section 36(1)(va) for the purpose of the said clause, "Due Date" means the date by which the assessee is required as an employer to credit the employees' contribution to the employees account in the relevant fund under the Act, Rule, Order or Notification issued thereunder or under any Standing Order, Award, Contract or Service or otherwise. Section 36(1)(va) reads as under:

> **"Section 36(1) : The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28–**
>
> **Section 36(1) (va) : any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.**
>
> **Explanation :- for the purpose of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract or service or otherwise."**

7.05. Another provision which is required to be considered while considering the above controversy would be Section 43B of the Act, which stood prior to the amendment of section 43B of the Act vide Finance Act, 2003 and after the amendment to Section 43B of the Act by Finance Act, 2003. Section 43B of the Act prior to the amendment of Section 43B of the Act vide Finance Act, 2003 reads as under:

> **"Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) or clause (e) or clause (f), which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by th assessee along with such return:**
>
> **Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of subsection (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date."**

By the Finance Act, 2003, Second Proviso to section 43B of the Act came to be deleted and even the first proviso to section 43B of the Act came to be amended. The first proviso to section 43B of the Act, after its amendment by the Finance Act, 2003 reads as under:–

> **"Provided that nothing contained in this section apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."**

7.06. Considering the aforesaid provisions of the Act, as per section 2(24)(x), any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees shall be treated as an 'Income'. Section 36 of the Act deals with the deductions in computing the income referred to in section 28 and as per section 36(1)(va) such sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 apply, the assessee shall be entitled to deduction of such amount in computing the income referred to in section 28 if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the "due date" i.e. date by which the assessee is required as an employer to credit the employee's contribution to the employee's account in the relevant fund, in the present case, the provident fund and ESI Fund under the Provident Fund Act and ESI Act. Section 43B is with respect to certain deductions only on actual payment. It provides that notwithstanding anything contained in any other provisions of the Act, a deduction otherwise liable under the Act in respect of...... (B) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him. It appears that prior to the amendment of section 43B of the Act vide Finance Act, 2003, an assessee was entitled to deductions with respect to the sum paid by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees (employer's contribution) provided such sum – employer's contribution is actually paid by the assessee on or before the due date applicable in his case for furnishing return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment is furnished by the assessee along with such return. It also further provided that no deduction shall, in respect of any sum referred to in clause (B) i.e. with respect to the employer's contribution, be allowed unless such sum is actually been paid in cash or by issue of cheque or draft or by any other mode on or before the due date as defined in explanation below clause (va) of sub-section (1) of section 36 and where such sum has been made otherwise that in cash, the sum has been realized within 15 days from the due date. By the Finance Act 2003, Second Proviso of section 43B of the Act has been deleted and First Proviso to section 43B has also been amended which is reproduced hereinabove. Therefore, with respect to employer's contribution as mentioned in clause (b) of section 43(B), if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B on actual payment and such deduction would be admissible for the accounting year. However, it is required to be noted that as such there is no corresponding amendment in section 36(1) (va). Deletion of Second Proviso to section 43B vide Finance Act 2003 would be with respect to section 43B and with respect to any sum mentioned in section 43(B) (a to f) and in the present case, employer's contribution as mentioned in section 43B(b). Therefore, deletion of Second Proviso to section 43B and amendment in first proviso to section 43B by Finance Act, 2003 is required to be confined to section 43B alone and deletion of second proviso to section 43B vide amendment pursuant to the Finance Act, 2003 cannot be made applicable with respect to section 36(1)(va) of the Act. Therefore, any sum with respect to the employees' contribution as mentioned in section 36(1)(va), assessee shall be entitled to the deduction of such sum towards the employee's contribution if the same is deposited in the accounts of the concerned employees and in the concerned fund such as Provident Fund, ESI Contribution Fund, etc. provided the said sum is credited by the assessee to the employees' accounts in the relevant fund or funds on or before the 'due date' under the Provident Fund Act, ESI Act, Rule, Order or Notification issued thereunder or under any Standing Order, Award, Contract or Service or otherwise. It is required to be noted that as such there is no amendment in section 36(1) (va) and even explanation to section 36(1)(va) is not deleted and is still on the statute and is required to be complied with. Merely because with respect to employer's contribution Second Proviso to section 43B which provided that even with respect to employers' contribution [(section 43(B)b], assessee was required to credit amount in the relevant fund under the PF Act or any other fund for the welfare of the employees on or before the due date under the relevant Act, is deleted, it cannot be said that section 36(1)(va) is also amended and/or explanation to section 36(1)(va) has been deleted and/or amended.

It is also required to be noted at this stage that as per the definition of "income" as per section 2(24)(x), any sum received by the assessee from his employees as contribution to any Provident Fund or Superannuation Fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of the such employees is to be treated as income and on fulfilling the condition as mentioned under section 36(1) (va), the assessee shall be entitled to deduction with respect to such employees' contribution. Section 2(24)(x) refers to any sum received by the assessee from his employees as contribution and does not refer to employer's contribution. Under the circumstances and so long as and with respect to any sum received by the assessee from any of his employees to which provisions of sub-clause (x) of sub-section 24 of section 2 applies, assessee shall not be entitled to deduction of such sum in computing the income referred to in section 28 unless and until such sum is credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as mentioned in explanation to section 36(1)(va). Therefore, with respect to the employees contribution received by the assessee if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in explanation to section 36(1) (va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in section 28 of the Act.

7.07. Now so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra), by the learned ITAT as well as learned advocates appearing on behalf of the assessee in support of their submission that in view of amendment in section 43B pursuant to Finance Act, 2003, by which the second proviso to section 43B has been deleted and therefore even with respect to employees contribution despite section 36(1)(va), and explanation to section 36(1)(va), if the employees' contribution is credited after the due date mentioned in the particular Act but credited on or before the due date by filing return under section 139 of the Act, assessee shall be entitled to the deduction of such amount, is concerned, on considering the controversy before the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra), the said decision would not be applicable to the facts of the present case. In the said case before Alom Extrusions Ltd., the controversy was whether the amendment in section 43B of the Act, vide Finance Act, 2003 would operate retrospectively w.e.f. 1/4/1988 or not. It is also required to be noted that in the case before the Hon'ble Supreme Court, the controversy was with respect to employers' contribution as per section 43(B)(b) of the Act and not with respect to employees' contribution under section 36(1)(va). Before the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra) the Hon'ble Supreme Court had no occasion to consider deduction under section 36(1)(va) of the Act and with respect to employees' contribution. As stated above, the only controversy before the Hon'ble Supreme Court was with respect to amendment (deletion) of the Second Proviso to section 43(B) of the Income Tax Act, 1961 by the Finance Act, 1963 operates w.e.f. 1/4/2004 or whether it operates retrospectively w.e.f. 1/4/1988. Under the circumstances, the learned tribunal has committed an error in relying upon the decision of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra) while passing the impugned judgement and order and deleting disallowance of the respective sums being employees' contribution to PF Account / ESI Account, which were made by the AO while considering the proviso to section section 36(1) (va) of the Income Tax Act.

7.08. Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of Alembic Glass Industries Ltd. (supra) is concerned, on facts and considering the provisions of section section 36(1)(va) of the Act as is stands, the said decision would not be applicable to the facts of the case on hand and the controversy in question.

7.09. Now, so far as the reliance placed upon the decision of the Karnataka High Court in the case of Sabari Enterprises (supra) is concerned, on facts and controversy raised in the present appeals, the said decision would not be any assistance to the assessee. In the case before the Karnataka High Court, the dispute was with respect to the employer's contribution and the controversy was whether the amendment to section 43B of the Act would be retrospective in nature or not. In the aforesaid case before the Karnataka High court, there was no dispute with respect to employees' contribution as is there in the present case.

7.10. Similarly, the decision of the Bombay High Court in the case of Pamwi Tissues Ltd. (supra) also would not be applicable to the facts of the case on hand. In the case before the Hon'ble Bombay High Court, the dispute was whether deletion of Second Proviso to section 43B would be applicable retrospectively or not and in that case the dispute was also with respect to employer's contribution.

7.11. Now, so far as the reliance placed upon the decision of the Himachal Pradesh High Court in the case of Nipso Polyfabriks Ltd. (supra); decision of the Karnataka High Court in the case of Spectrum Consultants India (P) Ltd. (supra); decision of the Rajasthan High Court in the case of Udaipur Dugdh Utpadak Sahakari Sandh Ltd. (supra) and decision of the Punjab and Haryana High Court in the case of Hemla Embroidery Mills (P) Ltd. (supra) taking view that where the assessee deposited employees' contribution to ESI and Provident Fund before the due date of filing the return under section 139(1) of the Act, the same would be allowable as deduction, are concerned, With respect and for the reasons stated hereinabove, we are not in agreement with the view taken by the aforementioned High courts. As discussed hereinabove, as there is no amendment in Section section 36(1)(va) of the Income Tax Act and considering section 36(1) (va) of the Income Tax Act as it stands, with respect to any sum received by the assessee from any of his employees to which the provisions of clause (x) of sub-section (24) of section 2 applies, assessee shall not be entitled to deduction of such amount in computing the income referred to in section 28 if such sum is not credited by the assessee to the employees' account in the relevant fund or funds on or before the due date as per explanation to section 36(1)(va) of the Act. Merely because Second Proviso to Section 43B of the Act in which there was a reference to due date as defined in explanation below clause (va) of sub-section (1) of section 36, it cannot be held that even section 36(1)(va) is amended and/or even explanation below clause (va) of sub-section (1) of section 36 is also deleted. It can be said that there was a reference to explanation below clause (va) of sub-section (1) of section 36 in second proviso of section 43B (which has been deleted by Finance Act, 2003), only for the purpose of defining due date as per explanation below clause (va) of sub-section (1) of section 36. Therefore, by deleting Second Proviso to section 43B by Finance Act, 2003, it cannot be said that Section 36(1) (va) is amended and/or explanation below clause (va) of subsection (1) of section 36 is deleted, which is with respect to employees' contribution. Under the circumstances, we are not in agreement with the view expressed by the Himachal Pradesh High Court; Karnataka High Court; Rajasthan High

Court and Punjab and Haryana High Court in the cases refereed to hereinabove.

7.12. Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Sarabhai Sons Ltd. (supra), by the learned counsel appearing on behalf of the assessee and his submission that if two views are possible and different High Courts have taken a particular view, this Court may not take a different view, is concerned, we are of the opinion that in the present case, and as discussed hereinabove, only one view is possible as canvassed on behalf of the revenue and as observed by under section hereinabove and we are not in agreement with the view taken by the Himachal Pradesh High Court; Karnataka High Court; Rajasthan High Court and Punjab and Haryana High Court in the cases refereed to hereinabove, and therefore, the submission made on behalf of the assessee to follow the decisions of the different High Courts refereed to hereinabove and/or not to take a contrary view cannot be accepted.

8.00. In view of the above and for the reasons stated above, and considering section 36(1)(va) of the Income Tax Act, 1961 read with sub-clause (x) of clause 24 of section 2, it is held that with respect to the sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section (2) applies, the assessee shall be entitled to deduction in computing the income referred to in section 28 with respect to such sum credited by the assessee to the employees' account in the relevant fund or funds on or before the "due date" mentioned in explanation to section 36(1)(va). Consequently, it is held that the learned tribunal has erred in deleting respective disallowances being employees' contribution to PF Account / ESI Account made by the AO as, as such, such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds (in the present case Provident Fund and/or ESI Fund on or before the due date as per the explanation to section 36(1)(va) of the Act i.e. date by which the concerned assessee was required as an employer to credit employees' contribution to the employees' account in the Provident Fund under the Provident Fund Act and/or in the ESI Fund under the ESI Act.

Consequently, all these appeals are allowed and the impugned judgement and orders passed by the tribunal in deleting the disallowances made by the AO are hereby quashed and set aside and the disallowances of the respective sums with respect to the Provident Fund / ESI Fund made by the AO is hereby restored. The questions raised in present appeal are answered in favour of the revenue. With this, all these appeals are allowed.

2014 TRI 99 (H.C. Del.)

HIGH COURT OF NEW DELHI

Sanjiv Khanna and Sanjeev Sachdeva, JJ.

Commissioner of Income Tax-TDS
v.
DHTC Logistics Ltd.

FACTS/HELD

Section 272B penalty on deductor for wrong/ non-stating of PAN in TDS return is not applicable if information is not furnished by deductee. Penalty is Rs. 10000 per deductor and not per wrong PAN

1. The assessee filed a TDS return in which the PAN of 30,706 deductees was either missing or was incorrectly stated. The AO held that as penalty of Rs. 10,000 u/s 272B was levaible for the non-mentioning of the PAN, the penalty had to be computed per PAN/deductee. He accordingly levied penalty of Rs. 30.70 crore at the rate of Rs. 10,000 per deductee. The CIT(A) restricted the penalty to Rs. 10,000 on the ground that as per the CBDT's letter dated 05.08.2008 bearing No. 275/24/2007-IT(B), s. 272B penalty is linked to the person/ deductor and not with the number of defaults in the PAN quoted in the TDS return. The Tribunal upheld the view of the CIT(A) (order attached). On appeal by the department to the High Court HELD dismissing the appeal:

   There are two reasons why the appeal cannot be entertained. Firstly, the AO in the penalty order u/s 272B has not specifically referred to any default or failure by the assessee mentioning PAN Number even when the said particulars and details were available. The stand taken by the assessee was that the PAN Numbers were not furnished by the truck owners and, therefore, they were not quoted by them or PAN Numbers as informed were quoted. In case, the PAN Numbers are not furnished by the deductees, the assessee cannot be penalized u/s 272B. S. 139A also imposes the obligation on the deductees to furnish PAN Number to the deductor. Secondly, the stand taken by the revenue is contrary to the stand taken by the CBDT. The AO had imposed penalty of Rs.10,000/- in each case where PAN Number was not provided by the deductee. However, the CBDT has in letter dated 5.8.2008 vide No.275/24/2007-IT(B) clarified that penalty of Rs.10,000 u/s 272B is linked to the person, i.e., the deductor who is responsible to deduct TDS, and not to the number of defaults regarding the PAN quoted in the TDS return. Therefore, regardless of the number of defaults in each return, maximum penalty of Rs.10,000/- can be imposed on the deductor. Penalty cannot be imposed by calculating the number of defective entries in each return and by multiplying them with Rs.10,000/-. This also appears to be a legislative intent, as in many cases, the TDS amount may be small or insignificant fraction of Rs.10,000. (Clarified that the Q whether penalty u/s 272B can be imposed if the deductor has not correctly recorded the details despite proper representation by the deductee is not decided)

Appeal dismissed.

ITA No. 314 of 2013.

Decided on: 26th July, 2013.

Present at hearing: Karan Khanna, Sr. Standing Counsel, for Appellant. None, for Respondent.

JUDGMENT

Sanjiv Khanna, J.–

1. There are two reasons why we feel the present appeal should not be entertained.

2. Firstly, the assessing officer in the penalty order under Section 272B has not specifically referred to any default or failure by the respondent-assessee mentioning PAN Number even when the said particulars and details were available. The stand taken by the respondent was that the PAN Numbers were not furnished by the Truck owners and, therefore, they were not quoted by them or PAN Numbers as informed were quoted. In case, the PAN Numbers are not furnished by the deductees, the respondent- assessee cannot be penalized under Section 272B. Section 139A also imposes the obligation on the deductees to furnish PAN Number to the deductor.

3. Secondly, the stand taken by the revenue is contrary to the stand taken by Central Board of Direct Taxes. The assessing officer had imposed penalty of Rs.10,000/- in each case where PAN Number was not

provided by the deductee. There were in all 30706 cases in which the PAN Number was missing or was incorrectly stated. The assessing officer, accordingly, imposed penalty of Rs.10,000/- in each case. Thus, penalty of Rs.30,70,60,000/- was imposed. Board in the letter dated 5.8.2008 vide No.275/24/2007-IT(B) has clarified that penalty of Rs.10,000/- under Section 272B is linked to the person, i.e., the deductor who is responsible to deduct TDS, and not to the number of defaults regarding the PAN quoted in the TDS return. Therefore, regardless of the number of defaults in each return, maximum penalty of Rs.10,000/- can be imposed on the deductor. Penalty cannot be imposed by calculating the number of defective entries in each return and by multiplying them with Rs.10,000/-. This also appears to be a legislative intent, as in many cases, the TDS amount may be small or insignificant fraction of Rs.10,000/-.

4. We clarify that we have not examined in this appeal, question and issue that if a deductee has made a representation to the deductor and inspite of the said representation, proper details and particulars are not correctly mentioned/recorded by the deductor, whether penalty under Section 272B can be imposed, as a separate case.

5.In view of the aforesaid position, we do not think any substantial question of law arises for consideration.

INCOME TAX APPELLATE TRIBUNAL
DELHI "B" BENCH, NEW DELHI

S.V. Mehrotra, Accountant Member and Kulbharat, Judicial Member

Appeals dismissed.

I.T.A .Nos.-675,676 & 677/Del/2012 (Assessment Year-2005-06 to 2007-08).

Heard on: 5th September, 2012.

Decided on: 14th September, 2012.

Present at hearing: S.Krishna, CIT DR, for Appellant. Rakesh K. Sehgal, CA, for Respondent.

JUDGMENT

Per Kulbharat:– (Judicial Member)

These three appeals of the assessee are directed against the order of Ld. CIT(A)-XXX, New Delhi dated 17.11.2011 for the AYs 2005-06 to 2007-08.

2. All these appeals are arising out of common order and raised identical grounds of appeal. Hence, these are heard together and are being disposed off by a consolidated order.

3. The revenue has raised the identical grounds of appeal in all the three appeals which reads as under:–

> *"1). In deleting the penalty of Rs. 30,70,30,000/- levied u/s 272B of the IT Act by the A.O Cir. 49(1) holding that the penalty is per person (appellant) and not per PAN.*
>
> *2). In directing the A.O to collect the penalty demand of Rs. 30,000/- u/s 272B of the IT Act as per per person (appellant) per year.*
>
> *3). In appreciating the fact that the Section 139(5B) is to be read in conjunction with Section 272B, if these two sections are read together, the intend of the legislation becomes apparent that the penalty is to be levied per PAN in the TDS return and not per person."*

The facts are identical in all these appeals, hence the facts of ITA No.675/Del/2012 are being taken as a lead case.

4. The facts in brief are that the Assessing Officer issued a show cause notice for levying penalty u/s 272B r.w.s 139A(5B) in respect of missing PAN of deductee in the TDS return. The assessee in respect of thereto made a detailed reply. However, the Assessing Officer did not accept the explanation offered by the Counsel for the assessee and imposed a penalty of Rs. 30,70,60,000/- i.e @ Rs. 10,000/- for missing/incorrect PAN of 30706 deductees. The assessee feeling aggrieved by the order of the Assessing Officer preferred an appeal to Ld. CIT(A) who after considering the submissions reduced the penalty to Rs. 30,000/-. Against this order, the revenue has filed the instant appeals.

5. Ld. CIT DR strongly relied upon the order of the Assessing Officer and submitted that section 272B of the Act is to be read in conjunction with section 139A(5B) of the Act. He submitted that non-mentioning of the PAN, made the deductor liable for penalty u/s 272B and such penalty is leviable on each default. On the contrary, Ld. AR of the assessee submitted that the tax at source is deductible u/s 194C of the Act in respect of the payment made. He submitted that section 194C(6) envisages that no tax is deductible in the event i.e PAN is furnished. He submitted that in this case the PAN was not made available by the deductee to the deductor assessee company. He submitted that even otherwise also in terms of Board's letter dated 05.08.2008 No. 275/24/2007-IT(B), the penalty u/s 272B is not leviable in respect of default. He submitted that it has been clarified therein that the penalty is linked to the person and not with the number of defaults in the PAN quoting in the e-TDS return. He also relied on the decision of the Hon'ble ITAT, Banglore Bench, rendered in ITA NO. 907,908 & 909 (Ind.) 2008 wherein it has been observed that there is no mechanism at the end of the assessee deductor to compel deductee to provide PAN.

6. We have heard the rival submissions perused material available on record. Ld. CIT(A) has restricted penalty to the tune of Rs. 30,000/- in all these appeal following the clarification embodied in the CBDT letter dated 05.08.2008. Since this fact is not disputed by the revenue that CBDT has issued a clarification whereby it has been clarified penalty u/s 272B of Rs. 10,000/- is linked to the person and not with the number of defaults.

7. Hence, we do not find any infirmity into orders of Ld. CIT(A), this ground of the appeal is rejected since the facts of the grounds are identical in all the three appeals i.e ITA No. 675, 676 & 677/Del/2012.

8. In the result, all these three appeals of the revenue are dismissed.

Order pronounced in the Open Court on 14.09.2012.

2014 TRI 103 (H.C. Utk.)

HIGH COURT OF UTTARAKHAND AT NAINITAL

Barin Ghosh, CJ and
U.C. Dhyani, J.

Samsung Heavy Industries Co. Ltd.
v.
The Director of Income-tax -1 International Taxation, Delhi and another

FACTS/HELD

Article 7 of DTAA: Even in a composite contract, Department cannot assess off-shore profits without showing how it is attributable to the permanent establishment

1. The assessee entered into a consortium contract with ONGC and L&T to carry the work of surveys, design, engineering, procurement, etc. It opened a project office in India for co-ordination and execution of the project. The assessee claimed that a portion of the work was carried out inside India and a portion was carried out outside India. It claimed that it had suffered a loss on the work done inside India and that income on the work done outside India was not assessable to tax in India. The AO held that 25% of the work done outside India

had to be assessed in India. This was upheld in principle by the Tribunal (133 ITD 413 (Del)) on the ground that the contract was indivisible and that opening a project office in India was a condition precedent for the contract. It was held that the said project office constituted a "permanent establishment" under Article 5(1) of the India-Korea DTAA and that it covered the entire scope of work. As regards the percentage of income attributable to the PE, the Tribunal directed the AO to determine the extent of business activities carried on through the said project office. On appeal by the assessee to the High Court HELD reversing the Tribunal:

> Being a resident of Korea, the assessee is governed by the Income-tax laws as prevalent in Korea. Therefore, it has a tax identity in Korea. In addition, the assessee has submitted to the jurisdiction of Indian taxing authorities by furnishing return of income and, thereby, acknowledged that it has also a tax identity in India. The question is, this identity is covered by which provision of the India-Korea DTAA. In terms of Article 7(1), the assessee will acquire its tax identity in India only when it carries on business in India through a permanent establishment situate in India. By submitting the return, the assessee has held out that it is carrying on business in India through a permanent establishment situated in India. In the circumstances, the contention of the assessee, whether the Project Office of the appellant opened at Mumbai can be, or cannot be said to be a permanent establishment within the meaning of the said DTAA is of no consequence. In terms of the DTAA, if an enterprise does not have a tax identity in India in the form of a permanent establishment, it has no obligation to either submit any tax return with, or pay any tax to India. The Indian Taxing Authority is not entitled to arbitrarily fix a part of the revenue to the permanent establishment of the assessee in India. The assessee held out that a part of the revenue was received by it for doing certain work in India. It did not contend that even those works were done by or through its Project Office at Mumbai. On the other hand, there is not even a finding

that 25 per cent of the gross revenue of the assessee was attributable to the business carried out by the said Project Office. Neither the AO nor the Tribunal has made any effort to bring on record any evidence to justify the same. Tax liability cannot be fastened without establishing that the same is attributable to the tax identity or permanent establishment of the enterprise situate in India

Appeal allowed.

Income Tax Appeal No. 01 of 2012.

Decided on: 27th December, 2013.

Present at hearing: C.S. Aggarwal, Senior Advocate assisted by P.R. Mullick, Advocate, for Appellant. Hari Mohan Bhatia, Advocate, for Respondent.

JUDGMENT

Barin Ghosh, CJ.–

For the Assessment Year 2007-08 and in relation to previous year 2006-07, appellant, a foreign Company, filed its return of income on 21st August, 2007 showing nil income and claiming to have sustained loss. It was disclosed by the appellant that it has entered into a contract between O.N.G.C. on the one hand and Larsen & Toubro Limited and the appellant on the other hand as consortium partners executed on 28th February, 2006. It was indicated that under the contract, appellant received certain amount of money. It was held out that a part thereof was received in relation to inside India activities and, in respect thereof, it has incurred certain expenses and after deducting such expenses, it has earned a loss and, accordingly, earned no income taxable in India. The Assessing Officer, by its order dated 25th October, 2010 refused to accept some of the deductions as was claimed by the appellant and found on the disclosure made by the appellant that in addition to the sum of money shown to have been received, appellant has received other sums of monies under the contract and claimed that the same were in respect of outside India activities. The Assessing Officer held that 25 per cent of the revenues, thus received allegedly for outside India activities, should be brought within the taxing network of this country and passed an order accordingly. This order of the Assessing Officer has been confirmed by the Appellate Tribunal. Hence the present appeal.

2. Before filing the present appeal, appellant, on the garb of seeking rectification of mistake, made an attempt to have the order of the Tribunal reviewed by it, which the Tribunal has refused to do. In the present appeal, we are not concerned with the deductions as were claimed by the appellant and disallowed by the Assessing Officer. We are

only concerned with bringing in of 25 per cent of the money received by the appellant under the contract, but in connection with allegedly outside India activities within the tax network of this country.

3. A short summarization of the facts, as above, would indicate two things, namely, that (i) the appellant has a tax identity in India and a tax identity outside India and, accordingly, (ii) its tax liability in India is required to be apportioned. What mechanism will be adopted to apportion the same has, however, not been provided in the Agreement for avoidance of double taxation of income and the prevention of fiscal evasion entered by the Union of India with the Republic of Korea.

4. In paragraph 1 of Article 7 of the said Agreement, it has been provided that profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. It, therefore, recognizes two tax identities of an enterprise. The said paragraph makes it clear that the profits of the enterprise may be taxed in the other State only so much of the same which is attributable to that permanent establishment.

5. Paragraph 2 of Article 7 is as follows:–

> "Subject to the provisions of paragraph (3), where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment."

6. In the event, an enterprise having a tax identity in one Contracting State for having a permanent establishment there, and dealing wholly independently with its other tax entity situate in the other Contracting State, the profit attributable to the first tax identity will be profit which might be expected to be made.

7. Therefore, the said Agreement does not give any guidance to ascertain what income is attributable to which tax entity unless profit is generated by one tax entity dealing with the other tax entity.

8. In the instant case, appellant held out that a part of the money received by it was attributable to within India activities and the remaining on account of out of India activities. Appellant was not generating any revenue by dealing with either its Indian tax identity, or its Korean tax identity. It was generating revenue by dealing with O.N.G.C. under the said contract. It confessed that a part of such revenue was earned by it for having had carried out within India activities. It

asserted and continues to assert that the remaining revenue was generated by carrying out out of India activities. There is no finding anywhere that the revenue earned and said to have been on account of out of India activity was earned, in fact, on account of within India activity.

9. Being a resident of Korea, appellant is governed by the Income-tax Laws applicable to the class of assessees as that of the appellant as prevalent in Korea. Therefore, it has a tax identity in Korea. In addition thereto, appellant has submitted to the jurisdiction of Indian Taxing Authorities by furnishing return of income and, thereby, acknowledged that it has also a tax identity in India. The question is, this identity is covered by which provision of the Agreement. In terms of paragraph 1 of Article 7, appellant will acquire its tax identity in India only when it carries on business in India through a permanent establishment situate in India. By submitting the return, appellant has held out that it is carrying on business in India through a permanent establishment situated in India. In the circumstances, the contention of the appellant, whether the Project Office of the appellant opened at Mumbai can be, or cannot be said to be a permanent establishment within the meaning of the said Agreement is of no consequence. In terms of the said Agreement, as it appears to us, if an enterprise does not have a tax identity in India in the form of a permanent establishment, it has no obligation to either submit any tax return with, or pay any tax to India. The question still remains, whether it was right on the part of the Taxing Authority to assess income-tax liability of the appellant as was assessed in the instant case. In other words, can it be said that the Agreement permitted the Indian Taxing Authority to arbitrarily fix a part of the revenue to the permanent establishment of the appellant in India? As aforesaid, appellant held out that a part of the revenue was received by it for doing certain work in India. It did not contend that even those works were done by or through its Project Office at Mumbai. On the other hand, there is not even a finding that 25 per cent of the gross revenue of the appellant was attributable to the business carried out by the Project Office of the appellant. One has to read Article 5 of the Agreement in order to understand what a permanent establishment is, in terms whereof "permanent establishment" means a fixed place of business through which business of an enterprise is wholly or partly carried on. In the instant case, according to the revenue, the Project Office of the appellant in Mumbai is the "permanent establishment" of the appellant in India through which it carried on business during the relevant assessment year and 25 per cent of the gross receipt is attributable to the said business. Neither the Assessing Officer, nor the Tribunal has made any effort to bring on record any evidence to justify the same.

10. That being the situation, we allow the appeal, set aside the judgment and order under appeal as well as the assessment order in so far as the same relates to imposition of tax liability on the 25 per cent of the gross receipt upon the appellant in the circumstances mentioned above, and observe that the questions of law formulated by us, while admitting the appeal, have not, in fact, arisen on the facts and circumstances of the case, but the real question was, whether the tax liability could be fastened without establishing that the same is attributable to the tax identity or permanent establishment of the enterprise situate in India and the same, we think, is answered in the negative and in favour of the appellant.