# CONTENTS

## INTERPRETATION OF TAXING STATUTES
## AN OVERVIEW


Foreward ..... iii
Preface ..... v
Editorial ..... vi
A Tribute to the stalwart of the Tax Bar ..... viii

**I. GENERAL PRINCIPLES OF INTERPRETATION**

*(N. M. Ranka, Senior Advocate)*

1. The Constitution ..... 1
2. The three organs ..... 2
3. The Indian Legal System ..... 3
4. Taxation ..... 4
5. The tax laws ..... 6
6. Charging and machinery provisions ..... 6
7. Literal Construction ..... 8
8. Different Considerations ..... 9
9. Deeming Provision ..... 13
10. Explanation ..... 13
11. Proviso ..... 14
12. Retrospective or Prospective ..... 15
13. Mandatory or Directory ..... 15
14. Stare Decisis ..... 17
15. Non Obstante Clause ..... 17
16. Casus Omissus ..... 19
17. Ratio Decidendi and the words ..... 20
18. Ejusdem Generis ..... 21
19. Finance Minister's Speech ..... 21
20. Discretion ..... 22
21. Conclusion ..... 23

**II. PRINCIPLES OF NATURAL JUSTICE**

*(V. H. Patil, Advocate)*

1. Introduction ..... 24
2. Definition and Objects ..... 24
3. Basic Principles ..... 25
4. Bias or Interest ..... 26
5. Audi Alteram Partem ..... 28
6. Right to have counsel ..... 31
7. Article 14 of the Constitution and Principles of Natural Justice ..... 32
8. Part of Statutory Provisions ..... 33
9. Limitations on the application of the rule ..... 34
10. Speaking orders or reasoned decisions ..... 39
11. Effect of violation of Principles of Natural Justice ..... 44
12. Recent Development ..... 44

13. Article 10 ..... 45
14. Conclusion ..... 45

**III. STATUTORY LIMITATIONS AS GUIDE TO INTERPRETATION**
*(B. C. Joshi, Advocate)*
1. Introduction ..... 46
2. Essentials of Sale ..... 47
3. Exemptions ..... 48
4. General Exemption ..... 48
5. Contextual Limitations ..... 50
6. Exemptions Limited ..... 51
7. Qualified Exemptions ..... 51
8. Exemptions based on qualifications of class of dealers ..... 51
9. Legislation regarding industries and particularly industries established in backward areas ..... 56
10. Rules Directory ..... 58
11. Beneficial Interpretation ..... 59
12. Stage wise strict and liberal interpretation ..... 62
13. Interpretation of provisions about limitation ..... 62
14. Backward area unit period expired ..... 63
15. Promissory Estoppel ..... 64
16. Circulars and its effects ..... 65
17. No superfluousity of words used Principle of Ejusdem Generis ..... 67
18. Long standing interpretation to be accepted ..... 68
19. Interpretation of Entries ..... 69
20. Legislative fiction — Abide by the same situs of a sale ..... 70
21. Notifications of exemptions how interpreted ..... 70
22. Interpretation of Retrospective Law, Act & Rules ..... 71
23. Exemption or Deduction or What ..... 72

**IV. SUBSIDIARY RULES AND SPECIAL MAXIMS AIDING INTERPRETATION**
*(Dr. P. Daniel, Advocate)*
1. Introduction ..... 74
2. Subsidiary Rules
   a) Liberal Constructions ..... 74
   b) Harmonious Construction ..... 76
   c) Beneficial Construction ..... 78
3. Special Maxims
   a) Rule of Ejusdem Generis ..... 81
   b) Words of Rank ..... 84
   c) Reddendo Singula singulis ..... 84
   d) Contemporanea Expositio ..... 85
   e) Casus Omissus ..... 87
   f) Autrefois Acquit/Autrefois Convict ..... 89

**V. OPERATION, EXPIRY & REPEAL OF STATUTES**
*(K. H. Kaji, Advocate)*

1. General ..... 92
2. Operation ..... 92
3. Retrospective Operation ..... 93
   a) Statutes dealing with substantive rights ..... 93
   b) Existing rights and vested rights ..... 93
   c) Statutes dealing with procedure ..... 93
   d) Fiscal statutes ..... 94
   e) Penal statutes ..... 95
   f) Remedial statutes ..... 95
   g) New remedies for existing rights ..... 95
   h) Declaratory statutes ..... 96
   i) Finality or orders ..... 97
4. Expiry of the Statute
   a) Perpetual ..... 97
   b) Temporary Statutes ..... 97
   c) Effect of expiry of temporary statutes ..... 98
   d) Legal proceedings under expired statute ..... 98
5. Express repeal ..... 99
6. Implied repeal ..... 99
7. Consequences of repeal ..... 99
8. Conclusion ..... 101

**VI. INTERPRETATION OF REVENUE STATUTE**
*(Somendra Chandra Bose, Sr. Advocate, Calcutta High Court)*
1. Introduction ..... 103
2. Rules of Interpretation ..... 103
3. Revenue Statute ..... 104
4. Interpretation of Mandatory and Directory Statute ..... 105

**VII. INTERPRETATION OF STATUTES WITH REGARD TO BENEFIT, DEDUCTION & EXEMPTIONS UNDER THE INCOME TAX ACT**
*(Firoze B., Andhyrujina, Senior Advocate)*
1. Introduction ..... 106
2. Interpretation regarding benefit of deduction ..... 107
3. Interpretation with regard to deductions claimed ..... 110
4. Interpretation regarding Exemptions ..... 113
5. Conclusion ..... 115

**VIII. RELEVANCE OF FOREIGN JUDGMENTS AND OTHER FOREIGN AUTHORITIES ON TAXATION TO THE INTERPRETATION OF TAX LAWS**
*(Annapoorna Jayaseelan and Bijal Ajinkya, Nishith Desai Associates)*
1. Foreign Judgments ..... 116
2. The use of other foreign authorities in the Interpretation of Tax Laws ..... 119

**IX. AIDS TO INTERPRETATION (EXTERNAL & INTERNAL)**

*(B. V. Jhaveri, Advocate)*
1. Internal aids to construction ..... 124
   a) Long Title ..... 124
   b) Exemptions ..... 124
   c) Provisos ..... 125
   d) Explanation ..... 125
   e) Non Obstante clauses ..... 126
   f) Marginal notes & headings ..... 126
   g) Punctuation ..... 126
   h) Definition clause & undefined words ..... 127
   i) Schedule ..... 128
2. External Aids to Construction ..... 128
   a) Legislative history & Background ..... 128
   b) Circulars and Interpretation by tax authorities ..... 128
   c) Speech of a Minister ..... 129
   d) Statement of object and reasons ..... 130
   e) Reports of commissions ..... 130
   f) Previous judicial interpretation of legislation ..... 130
   g) Provision of other statutes and subsequent enactments ..... 131
   h) Integrated scheme of direct taxation and equities ..... 131
   i) Dictionary meanings ..... 132

**X. PRESUMPTION IN STATUTORY INTERPRETATION ..... 133**
*(Sukumar Bhattacharya, Advocate)*

**XI. INTERPRETATION OF INDIRECT TAXES (EXCISE & CUSTOMS)**
*(Arvind P. Datar, Senior Advocate)*
1. General Principles ..... 142
   a) Rules of strict construction ..... 142
   b) Limitations of Court's Powers ..... 143
   c) Interpretation to be reasonable ..... 144
   d) Interpretation to be uniform ..... 144
   e) Interpretation favourable to the assessee to be adopted ..... 144
   f) Interpretation not to restrict the scope ..... 145
   g) Acts in pari materia ..... 145
   h) Case law of different statute ..... 145
   i) Double Taxation permissible ..... 145
   j) Absurd Results to be avoided ..... 145
   k) Machinery provisions – strict rule inapplicable ..... 146
   l) Machinery/charging sections – relation between ..... 146
   m) Retrospective Operation — Validity ..... 146
   n) Retrospective Validation ..... 147
   o) Deeming Provisions ..... 147

p) Interpretation in favour of constitutionality ..... 148
q) Interpretation of notifications ..... 148
r) Interpretation of exemption notification ..... 149
2. Interpretation of tariff heading/principles relating to classification ..... 149

**XII. BINDING PRECEDENTS ON DIRECT TAXES**

*(S. N. Inamdar, Advocate)*

1. Introduction ..... 151
2. Doctrine of Stare Decis ..... 151
3. Constitution of India ..... 152
4. Ratio Decidendi to the Precedent ..... 154
5. Conflicting decision of Supreme Court or High Court — which one is a binding precedent ..... 156
6. High Court decisions as binding precedents ..... 157
7. Doctrine of Res Judicata ..... 157
8. Dismissal of Social Leave by Supreme Court ..... 158
9. Dicisions of Appellate Tribunal ..... 159
10. Last Word ..... 160

**XIII. PRINCIPLES OF INTERPRETATION OF OTHER LAWS APPLICABLE TO DIRECT TAX LAW**

*(V. Ramachandran, Senior Advocate & Dr. Anita Sumanth, Advocate)*

1. Introduction ..... 161
2. Legislative Intention ..... 163
3. Statute to be read as a whole ..... 164
4. Beneficial Construction ..... 165
5. Grammatical Construction ..... 166
6. Harmonious Construction ..... 166
7. Liberal vs. Literal Construction ..... 166
8. Subsidiary Rules ..... 168
a) Casus Omissus ..... 168
b) Conjunction Disjunction ..... 168
c) Rule of ejusdem generis ..... 168
9. Words of Rank ..... 168
10. Reddendo Singula Singulis ..... 168
11. Deeming Provision ..... 169
12. Reading Down ..... 169
13. Expression unius ..... 169
14. Generalia specialibus ..... 169

**XIV. INTERPRETATION OF PENAL PROVISIONS UNDER DIRECT TAXES**

*(Saurabh Soparkar, Sr. Advocate)*

1. Rules for interpreting tax legislation ..... 170
2. Interpretation of penal and remedial statutes..... 171
3. Construction of Taxing Statutes and evasion of statutes ..... 171
4. Element of Mens Rea (Guilty Mind)..... 172
5. Interpretation of Penal Statutes – Whether strict or liberal..... 174
6. Operation of the Statute – Whether prospective or retrospective..... 175
7. Burden of Proof ..... 176

**XV. PROSECUTION UNDER DIRECT TAXES/RULES OF INTERPRETATION**
*(Arun P. Sathe, Advocate)*
1. Strict Interpretation of the Provisions..... 178
2. Mens Rea ..... 179
3. Prosecution of Company ..... 180
4. Rule of Cassus Omissus..... 181
5. Effect of Repeal & Omission of a Provisions in the Act..... 181
6. Sanction ..... 182

**XVI. PEARLS OF WISDOM — A STUDY OF LEGAL MAXIMS**..... 183
*(M. K. Chaturvedi, Vice President (ITAT)*

**XVII. PRINCIPLES OF INTERPRETATION OF ISSUES IN DOUBLE TAXATION AVOIDANCE TREATIES**
*(Sohrab Erach Dastur, Senior Advocate)*
1. Introduction ..... 188
2. Agreement vs. Act..... 190
3. Treaty Shopping ..... 194
4. Who can Tax Income..... 195
5. Double Non-Taxation..... 197
6. Entitlement to claim benefit of a Treaty..... 198
7. "Life" of a treaty..... 199
8. Aids in construing Tax Treaties ..... 200
9. Conclusion ..... 203

**XVIII. IMPORTANT CONSTITUTIONAL CASES ON TAX LAWS**
*(Arvind P. Datar, Sr. Advocate)*
1. Important Constitutional Provisions..... 205
2. Vires of Tax Laws..... 207
3. Specific principles applicable to tax laws ..... 207
4. Difference between tax & fee..... 209
5. Tax Laws and the commerce clause..... 209
6. Conclusion ..... 209

**XIX. INTERPRETATION OF DEEDS, DOCUMENTS & WILLS**
*(L. N. Rastogi, Sr. Advocate)*
1. Introduction ..... 210
2. Interpretation of Deeds, Documents & Wills ..... 210
3. Golden rule of Interpretation of Deeds ..... 211
4. Fundamental rule of construction ..... 211
5. Rule of construction of document in case of ambiguity..... 212
6. Two admissible constructions of documents ..... 212
7. Conflict between earlier & later problem of document ..... 212
8. Scope of legal effect of proviso and exception in interpreting deeds ..... 213

**XX. THE INCOME TAX ACT AND THE CONSTITUTION OF INDIA**
*(Dinesh Vyas. Sr. Advocate)*
1. Power to tax ..... 214
2. Legislative entries in the Constitution ..... 214
3. Constitutional validity of provisions ..... 215
4. Constitutional remedies and writs ..... 220

**XXI. INTERPRETATION OF STATUTE**
*(Y. P. Trivedi Sr. Advocate)* ..... 222

**XXII. GENERAL CLAUSES ACT, 1897 — INTERPRETATION**
*(Firoze B. Andhyarujina, Senior Advocate)*
1. Introduction ..... 226
2. Scope with reference to statutory enactments ..... 226
3. Special law overrides general law ..... 227
4. Cardinal rules of Interpretation of Taxing Statutes ..... 227
5. Instances of application of the General Clauses Act, 1897 to the Income-tax Act, 1961 ..... 229
6. Conclusion ..... 232

**XXIII. INTERPRETATION OF TAX LAWS – 72 FREQUENTLY ASKED QUESTIONS .....**
*(K. Shivaram, S. S. Shetty, Arati Vissanji, Premchandra Tripati and Ajay Singh, Advocates)*
1. General Rules ..... 233
2. Exemption – Deduction ..... 239
3. Penalties ..... 239
4. Other Acts, Rules, Opinions ..... 240
5. Precedents ..... 243
6. Double Taxation Agreements Convention ..... 253
7. General ..... 253
8. Legal Maxims – Principles ..... 256

Alphabetical Subject Index ..... 274
Alphabetical Case Laws Index ..... 277

# GENERAL PRINCIPLES OF INTERPRETATION

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## 1. THE CONSTITUTION

We, the people of India, that is Bharat, resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC in order to secure to all our citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among all of us Fraternity, assuring the dignity of the individual and the unity and integrity of the Nation. In order to achieve the said objectives, we adopted, enacted and gave to ourselves the Constitution of India on 26th day of November, 1949. The Constitution of India is a solemn and sacred document. It is soul, spirit and sound of the million people of Bharat. Article 13 provides that all existing laws, in so far as they are in consistent with the provisions of fundamental rights conferred on we Indians, to the extent of such inconsistency, to be void. Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws. Discrimination on grounds of religion, race, caste, sex or place of birth stands prohibited and equality of opportunity be available to all citizens in matters of public employment. There cannot be any discrimination in law. All citizens are equal. To enjoy, have freedom of speech, to assemble peaceably, to move freely throughout the territory of India, to reside and settle in any part of India and to practice any profession or to carry on any occupation, trade or business. Our founding fathers provided us equal opportunity, equal treatment coupled with protection of life and personal liberty and in respect of conviction of offences too.

Article 21 mandates that no person shall be deprived of his life or personal liberty except according to procedure established by law. The expression, “Procedure established by law” has been construed to mean a procedure which is just, fair and reasonable and therefore, valid. By interpretation it has been expanded to progressively deduce a whole lot of human rights. The Supreme Court has interpreted the word. ‘life’ to cover it in all aspects of life which go to make a man’s life meaningful, complete and worth living it; will also cover his tradition, culture, heritage, education, environment and health. No citizen can be exploited and it is the bounden duty of the State to secure the operation of the legal system promoting justice, on the basis of equal opportunity and also to provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Freedom of trade, commerce and inter-course throughout the territory of India is assured. Many rights so as to lead a peaceful life with dignity have been guaranteed by the Constitution.

## 2. THE THREE ORGANS

To govern is the duty of the Executive, headed by the President. To legislate is the duty of the Parliament and State Legislatures. It is for the judiciary to keep a watch, visit and see that the freedom enshrined in the Constitution reach to every citizen and is not jeopardized or tinkered with or obstructed by the executive or any person in authority or otherwise. Function of the judiciary is to vouch safe that any law enacted by the Parliament

or State legislature is intra vires the constitution and not ultra vires, making the mockery of law and denying the freedom of life and liberty with dignity. The third organ has been created in order to secure justice and in order to let reach every citizen the freedom, the peace, the prosperity spiritual and economic, so as to achieve the objectives contained in the preamble of the constitution. Each one of the Wing has absolute power in its domain and is neither inferior nor subservient to the other. Powers do not overlap and independence has to be preserved.

To safeguard interests of the citizens, the constitution has provided remedies by which a citizen is empowered to move the Supreme Court by appropriate proceedings for the 'enforcement of the rights conferred and guaranteed by the Constitution. Powers have been conferred on the High Courts under Article 226 to issue orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any one or more of them, for the enforcement of any of the rights conferred by the Constitution. Article 227 confers power of superintendence over all courts and Tribunals through out the territories in relation to which a High Court exercises jurisdiction. The Constitutional functionaries; i.e., the Judges of the Supreme Court and the High Courts can correct the erring Executive or the Legislature.

Public interest litigation matters have been in abundance for public good and to preserve the culture, tradition, peace and to promote prosperity. Even complaint contained in a post card or a news in newspaper is considered as a writ and attracts immediate attention of the Hon'ble Judges. A person acting bonafide and having sufficient interest in the proceeding of Public Interest Litigation alone have a locus standi and can approach the Hon'ble Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. It should not be misunderstood as 'Publicity Interest Litigation' or 'Private Interest Litigation' and of late 'Paisa Income Litigation' in the words of Hon'ble Mr. Justice Arijit Pasayat of the Supreme Court. The remedies have been provided to see "LAW IS SUPREME" and one is governed by the 'Rule of Law' and not on whims or caprice or arbitrariness of any person or an authority. It is the bounden duty of the Judiciary to see that the other two wings do not transgress their boundaries. Legislature is to legislate, Judiciary is to interpret and the Executive to let each citizen enjoy economic and social justice.

Legislature is elected, executive is appointed but the judiciary is selected from amongst man well versed in the knowledge and practice of law. The judiciary is expected to supplement the work of the legislature. However, the Court should, in no case, assume the role of a super-legislature. The Judiciary is expected to keep a 'Judicial-restraint'. Legitimacy of judicial interpretation of the Laws is the recognition that it is the institution with an ability. The balance of power in the three organs has to be maintained in order to impart justice and to look at the common good of the citizens of India.

## 3. THE INDIAN LEGAL SYSTEM

The Indian legal system is the product of history. It is rooted in our soil; nurtured and nourished by our culture, languages and traditions; fostered and sharpened by our genius and quest for social justice; reinforced by history and heritage: it is not a mere copy of the English common law; though inspired and strengthened, guided and enriched by concepts and precepts of justice, equity and good conscience which are indeed the hallmarks of the common law.

After the attainment of independence and the adoption of the Constitution of India, judicial administration and the Constitution of the law Courts remained fundamentally unchanged. The concept, structure and organisation of Courts, the substantive and procedural laws, the adversarial system of trial and other proceedings and the function of

judges and lawyers remained basically unaltered and rooted in the common law traditions in contra-distinction to those prevailing in the civil law or other systems of law.

The functions of our Courts, as has been said by one of the acute critic Arthur L. Corbin "is to keep the doctrines up to date with the mores by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honour; and no brave and honest judge shirks the duty or fears the peril.

Eminent Jurist Cardozo states "You may say that there is no assurance that judges will interpret the mores of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is rather that this power of interpretation must be lodged somewhere, and the custom of the Constitution has lodged it in the Judges. If they are to fulfil their function as Judges, it could hardly be lodged elsewhere. Their conclusions must, indeed, be subject to constant testing and retesting, revision and readjustment; but if they act with conscience and intelligence, they ought to attain in their conclusions a fair average of truth and wisdom."

Apart from the Supreme Court, separate High Courts for each State and Subordinate judiciary, to cope with the litigation and in order to make available justice expeditiously without technicalities of law and to reach at the footstep of every citizen, we have created Tribunals, manned by the persons with judicial background and technical knowledge and expertise on the subject. Such Tribunals have all the trappings of the Courts.

## 4. TAXATION

Article 265 of the constitution mandates that no tax shall be levied or collected except by the authority of law. It provides that not only levy but also the collection of a tax must be under the authority of some law. The tax proposed to be levied must be within the legislative competence of the Legislature imposing the tax. The validity of the tax is to be determined with reference to the competence of the Legislature at the time when the taxing law was enacted. The law must be validly enacted; i.e., by the proper body which has the legislative authority and in the manner required to give its Acts, the force of law. The law must not be a colourable use of or a fraud upon the legislative power to tax. The tax must not violate the conditions laid down in the constitution and must not also contravene the specific provisions of the Constitution. The tax in question must be authorised by such valid law. Taxation, in order to be valid, must not only be authorised by a statute but, must also be levied or collected in strict conformity with the statute, which authorises it. No tax can be imposed by any bye-law rule or regulation unless the 'statute' under which the subordinate legislation is made specifically authorises the imposition and the authorisation must be express not implied. The procedure prescribed by the statute must be followed. Tax is a compulsory exaction made under an enactment. The word tax, in its wider sense includes all money raised by taxation including taxes levied by the Union and State Legislatures; rates and other charges levied by local authorities under statutory powers. Tax includes any 'impost' general, special or local. It would thus include duties, cesses or fees, surcharge, administrative charges etc. A broad meaning has to be given to the word "tax".

The 'tax', 'duty', 'cess' or 'fee' constituting a class denotes to various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Within the expression of each specie each expression denotes different kind of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestation only under any law authorising levy and collection of tax as envisaged under Article 265 which uses only expression that no 'tax' shall be levied and collect except authorised by law. It in its elementary meaning conveys that to support a tax legislative action is essential, it cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State Under

Article 266(28) “taxation” has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. “Impost” means compulsory levy.

The well known and well settled characteristic of ‘tax’ in its wider sense includes all imposts. Imposts in the context have following characteristics: (I) The power to tax is an incident of sovereignty; (ii) ‘Law’ in the context of Art, 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority; (iii) The term ‘tax’ under Article 265 r/w Article 266(28) includes imposts of every kind viz., tax, cess or fees; (iv) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a ‘tax’ in its technical sense as an impost, general, local or special.

Article 246 deals with the distribution of legislative powers as between the Union and the State legislatures, with reference to the different lists in the Seventh Schedule. The gist of the article, in short is, that the Union Parliament has fully and exclusive power to legislate with respect to matters in List I and has also power to legislate in respect to matters in list III. The State legislatures, on the other hand, has exclusive power to legislate with respect to matters in List II, minus matters falling in Lists I and III and has a concurrent power with respect to matters included in List III. The Parliament and the State legislature can legislate only in respect to the matters contained relating to tax in such List. One cannot travel beyond the power conferred under the said Article.

Taxes are levied and collected to meet the cost of governance, safety, security and for welfare of the economically weaker sections of the Society. It is well established that the Legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc., for taxation. The tests of the vice of discrimination in a taxing law are less rigorous. It is well established that the Legislature is promulgated to exercise an extremely wide discretion in classifying for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. In *Jaipur Hosiery Mills (P.) Ltd. vs. State of Rajasthan* (1970) 26 STC 341; the apex court while upholding the classification made on the basis of the value of sold garments, held that the statute is not open to attack on the mere ground that it taxes some persons or objects and not others. The same view has been taken in *State of Gujarat vs. Shri Ambica Mills Ltd*. (1974) 4 SCC 916. In *ITO vs. N. Takin Roy Rymbai* (1976) 103-ITR-82 (SC); (1976) 1 SCC 916, the apex court held that the Legislature has ample freedom to select and classify persons, districts, goods, properties, incomes and objects which it would tax, and which it would not tax.

A reference may be made to the decision of the apex court in Mafatlal Industries Ltd.’s case (1998) 111-STC-467. The Supreme Court has observed, thus: “..... laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes J. that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in the case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the Legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved..... The court must always remember that legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry that exact wisdom and, nice adoption of remedy are not always possible’ and that judgment is largely a prophecy based on meagre and uninterrupted experience.

Thus there remains very little scope of challenge by way of discrimination, if there is no discrimination in between the same class of persons or in similar set of circumstances

## 5. THE TAX LAWS

Tax laws are highly complex, complicated and beyond understanding of a tax-payer. The words and expressions used are not simple. Many sections contain sub-sections, clauses, sub-clauses. Many deeming provisions have been inserted. Meaning of an expression is extended by way of Explanation and is curtailed by way of proviso, sometimes more than one provisos and explanations meaning differently. While construing such provisions, if one comes to one understanding by reading in part has to change the view after reading later part and sometimes have to take a somersault by reading the last part. Frequent amendments, insertions, additions, substitutions, omissions are made more than once in a year. View expressed by the Apex Court if not found in line with the view of the officials of the Finance Ministry, amendment is made to set at naught such view. Agony is further increased by amending with retrospective effect, upsetting pending assessments and permitting reopening, if within statutory period. Even a comma, makes a difference and changes entire complexion.

## 6. CHARGING AND MACHINERY PROVISION

The rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. No one can be taxed by implication. A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all. The Supreme Court in *CWT vs. Ellis Bridge Gymkhana and Others (1998) 229 ITR 1* held: "The Legislature deliberately excluded a firm or an association of persons from the charge of wealth-tax and the word "individual" in the charging section cannot be stretched to include entities which had been deliberately left out of the charge. Thus, provision made in a statute for charging or levying tax or interest on delayed payment of tax must be construed as a substantive law and not adjectival law. Penalty provisions in a statute have to be strictly construed. Any provision whereby any additional liability by way of tax, interest, surcharge or penalty is charged or levied or imposed, have to be strictly construed.

It is well known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (See *Whitney vs. Commissioner of Inland Revenue* (1926) AC 37, *Commissioner of Income-tax vs. Mahaliram Ramjidas* (1940) 8 ITR 442 (PC), *India United Mills Ltd. vs. Commissioner of Excess Profits Tax, Bombay* (1955) 27 ITR 20 (SC); and *Gursahai Saigal vs. Commissioner of Income-tax, Punjab* (1963) 48 ITR l (SC). But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. (See *Bengal Nagpur Railway Co. Ltd. vs. Ruttanji Ramji* – AIR 1938 PC 67 and *Union of India vs. A.L. Rallia Ram* (1964) 2 SCR 164 at 185 to 190).

In *Commissioner of Income-tax, A.P. vs. M. Chandra Sekhar* (1985) 151 ITR 433 (SC) and *Central Provinces Manganese Ore Co. Ltd. vs. Commissioner of Income-tax* (1986) 160 ITR 961 (SC), the Apex Court pointed out that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the Legislature to provide for charging interest, the court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. '"

A distinction between the provisions or the statute which are of substantive character and were built in with certain specific objectives or policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished. The choice between a strict and a liberal construction arises only in case of doubt in regard to the intention of the Legislature manifest on the statutory language. Indeed, the need to resort to any interpretative process arises only when the meaning is not manifest on the plain words of the statute. If the words are plain and clear and directly convey the meaning, there is no need for any interpretation. Liberal and strict construction of an exemption provision are, as stated in *Union of India vs. Wood Papers Ltd*. (1991) 83 STC 251 (SC) "to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in the nature of exception is to be construed strictly and against the subject. But once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction."

## 7. LITERAL CONSTRUCTION

The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the Legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and, as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity" of Judge Learned Hand: ".....it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

One must not adopt a strictly literal interpretation of any provision but must construe its language having regard to the object and purpose which the Legislature had in view in enacting that provision and in the context of the setting in which it occurs. One cannot and should not ignore the context and the collocation of the provisions because, as pointed out by judge Learned Hand in the most felicitous language:"..... the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appears, and which all collectively create."

It is a well-recognised rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. It is now a well-settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the Legislature, the court may modify the language used by the Legislature or even "do some violence" to it, so as to achieve the obvious intention of the Legislature and produce a

rational construction: Vide *Luke vs. IRC* (1963) AC 557; (1964) 54 ITR 692 (Cal). The court may also in such a case read into the statutory provision a condition which, though not expressed, is implicit as constituting the basic assumption underlying the statutory provision. The S.C. in *K. P. Varghese vs. ITO* (1981) 131 ITR 597 (SC), eschew literalness in the interpretation of s. 52, sub-s. (2), and tried to arrive at an interpretation which avoids the absurdity and mischief and makes the provision rational and sensible. It ultimately resulted in deletion of section 52 from the Income-tax Act, 1961.

It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case (1584) 3 Co. Rep. 7a was decided that: "..... for the sure and true interpretation of all statutes in general ....four things are to be discerned and considered: (1) what was the common law before the making of the Act, (2) what was the mischief and defect for which the common law did not provide, (3) what remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth and (4) the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy"

In re Mayfair Property Company (1898) 2 Ch (CA) Lindley M.R. in 1898 found the rule "as necessary now as it was when Lord Coke reported Heydon's case". The rule was reaffirmed by the Earl of Halsbury in *Eastman Photographic Materials Company Ltd. vs. Comptroller-General of Patents, Designs and Trade-Marks (1898) AC 571, 576 (HL)* in the following words: "My Lords, it appears to me that to construe the statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the latter Act which provided the remedy. These three things being compared, I cannot doubt the conclusion." This rule being a rule of construction has been repeatedly applied in India in interpreting statutory provisions.

## 8. DIFFERENT CONSIDERATIONS

It is the basic principle of construction of statute that the same should be read as a whole, then chapter by chapter, section by section and words by words. Recourse to construction or interpretation of statute is necessary when there is ambiguity, obscurity or inconsistency therein and not otherwise. An effort must be made to give effect to all parts of statute and unless absolutely necessary, no part thereof shall be rendered surplus sage or redundant. True meaning of a provision of law has to be determined on the basis of what provides by its clear language, with due regard to the scheme of law. Scope of the legislation on the intention of the Legislature cannot be enlarged when the language of the provision is plain and unambiguous. In other words statutory enactments must ordinarily be construed according to its plain meaning and no words shall be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute. It is also well settled that a beneficent provision of legislation must be liberally construed so as to fulfil the statutory purpose and not to frustrate it.

In *Dattatrays vs. State of Bombay* (AIR 1952 SC 181), it was held as under: "Generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the Legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done."

The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law; i.e., the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law.

In Craies on Statute Law VIII Edn. at page 262, it is stated thus: "It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed". That is each case you must look to the subject matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.

In case of doubt, the assessee is entitled to interpret which is favourable to him. It is trite law that a taxing statute has to be strictly construed and nothing can be read into it. In the classic passage from Cape Brandy Syndicate vs. IRC (1921) 1 KB 64, 71, which was noticed in the judgment under appeal, it was said (page 92 of AIR 1997 AP (FB): "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used." This view has been reiterated by the Supreme Court time and again. In *State of Bombay vs. Automobile and Agricultural Industries Corporation* (1961) 12 STC 122, the court said (page 125): "But the courts in interpreting a taxing statute will not be justified in adding words thereto so as to make out some presumed object of the Legislature..... If the Legislature has failed to clarify its meaning by the use of appropriate language, the benefit thereof must go to the taxpayer. It is settled law that in case of doubt, that interpretation of a taxing statute which is beneficial to the tax-payer must be adopted."

The Supreme Court in *CED vs. Kantilal Trikamlal* (1976) 105 ITR 92. It said (page 97): "The sweep of the sections which will be presently set out must, therefore, be informed by the language actually used by the Legislature. Of course, if the words cannot apply to any recondite species of property, courts cannot supply new logos or invent unnatural sense to words to fulfil the unexpressed and unsatisfied wishes of the Legislature."

As long as there is no ambiguity in the statutory language, resort to any interpretative process to unfold the legislative intent becomes impermissible. The supposed intention of the Legislature cannot then be appealed to whittle down the statutory language which is otherwise unambiguous. If the intendment is not in the words, it is nowhere else. The need for interpretation arises when the words used in the statute are, on their own terms, ambivalent and do not manifest the intention of the Legislature. When words acquire a particular meaning or sense because of their authoritative construction by superior courts, they are presumed to have been used in the same sense when used in a subsequent legislation in the same or similar context.

To the extent not prohibited by the statute, the incidents of the general law are attracted to ascertain the legal nature and character of a transaction. This is quite apart from distinguishing the "substance" 'of the transaction from its "form". The court is not precluded from treating what the transaction is in point of fact as one in point of law also. To say that the court could not resort to the so-called "equitable construction" of a taxing statute is not to

say that, where a strict literal construction leads to a result not intended to subserve the object of the legislation another construction, permissible in the context, should not be adopted. In this respect, taxing statutes are not different from other statutes.

A public authority cannot be stopped from doing its duty, but can be estopped from relying on a technicality as said by the Lord Denning. Francis Bennion in his Statutory Interpretation, 1984 edition, says at page 683 : "Unnecessary technically: Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the Legislation."

The definition Section of the Act in which various terms have been defined, if it opens with the words "in this Act, unless the context otherwise requires" would indicate that the definitions, which are indicated to be conclusive may not be treated to be conclusive if it was otherwise required by the context. This implies that a definition, like any other word in a statute, has to be read in the light of the context and scheme of the Act as also the object for which the Act was made by the legislature. While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted.

It is settled law that the expressions used in a taxing statute would ordinarily be understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative intention. In *Raja Jagdambika Pratap Narain Singh vs. C.B.D.T.* (1975) 100 ITR 698, Supreme Court held that "equity and income-tax have been described as strangers". The Act, in the very nature of things, cannot be absolutely cast upon logic. It is to be read and understood according to its language. If a plain reading of the language compels the court to adopt an approach different from that dictated by any rule of logic, the court may have to adopt it, vide *Azam Jah Bahadur (H.H. Prince) vs. E.T.O.* (1972) 83 ITR 82 (SC). Logic alone will not be determinative of a controversy arising from a taxing statute. Equally, common sense is a stranger and an incompatible partner to the Income-tax Act. It does not concern itself with the principles of morality or ethics. It is concerned with the very limited question as to whether the amount brought to tax constitutes the income of the assessee. It is equally settled law that if the language is plain and unambiguous, one can only look fairly at the language used and interpret it to give effect to the legislative intention. Nevertheless, tax laws have to be interpreted reasonably and in consonance with justice adopting a purposive approach. The contextual meaning has to be ascertained and given effect to. A provision for deduction, exemption or relief should be construed reasonably and in favour of the assessee.

When a word is not defined in the Act itself, it is permissible to refer to dictionaries to find out the general sense in which that word is understood in common parlance. However, in selecting one out of the various meanings of a word, regard must always be had to the context, as it is a fundamental rule that 'the meaning of words and expressions used in an Act must take their colour from the context in which they appear'." (Principles of Statutory Interpretation by Justice G. P. Singh. Eighth Edition, 2001, page 279). Its meaning in general parlance and commercial word need be consider. The Supreme Court in S. *Samuel vs. Union of India,* AIR 2004 (SC) 218 did not consider 'tea' as 'food-stuff as it neither nourishes body nor sustains or promotes growth and is not understood as food stuff in common parlance or by lexicographers.

No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. Every statute is an edict of the Legislature. The elementary principle of interpreting any word while considering a statute is to gather the

means or sententia legis of the Legislature. Where the words are clear and there is no obscurity and the intention of the Legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or altering the statutory provisions. Wherever the language is clear the intention of the Legislature is to be gathered from the language used. While doing so what has been said in the statute and what has not been said has to be noted. A construction which requires for its support addition or substitution of words has to be avoided. The court cannot aid the Legislature's defective phrasing of an Act, the court cannot add or mend and by construction make up deficiencies which are left there. In the case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case.

A fiscal statute has to be interpreted strictly. When a particular action has to be taken in a particular manner or over a specified period or on specified boundation or by a prescribed authority, the same has to be taken in that manner and not otherwise.

## 9. DEEMING PROVISION

It is well-settled that in interpreting a provision creating a legal fiction, the court must ascertain the purpose for which the fiction is created and having done so, to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. When the law requires that an imaginary state of affairs should be treated as real, then unless prohibited from doing so, one must also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanies it.

If you are bidden to treat an imaginary state of affairs as real, you must also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it; and if the statute says that you must imagine a certain state of affairs, it cannot be interpreted to mean that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

## 10. EXPLANATION

The normal principle in construing an Explanation is to understand it as explaining the meaning of the provision to which it is added. The Explanation does not enlarge or limit the provision, unless the Explanation purports to be a definition or a deeming clause. If the intention of the Legislature is not fully conveyed earlier or there has been a misconception about the scope of a provision, the Legislature steps in to explain the purport of the provision; such an Explanation has to be given effect to, as pointing out the real meaning of the provision all along. If there is conflict in opinion on the construction of a provision, the Legislature steps in by inserting the Explanation, to clarify its intent. Explanation is normally clarificatory and retrospective in operation.

An Explanation brought on the statute book is ordinarily clarificatory in nature and has retrospective effect, as the Explanation so brought to a provision in the statute simply explains the law as it has always been in the main provision. However, the rule governing the construction of the provisions imposing penal liability upon the subject is that such provisions should be strictly construed. When a provision creates some penal liability against the subject, such provision should ordinarily be interpreted strictly. That apart, if two views of the interpretation or construction of a provision in the statute are reasonably possible, the view which is favourable to the subject should be adopted.

## 11. PROVISO

A proviso qualifies the generality of the main enactment by providing an exception and taking out from the main provision, a portion, which, but for the proviso would be part of the main provision. A proviso, must, therefore, be considered in relation to the principal matter to which it stands as a proviso. A proviso should not be read as if providing by way of addition to the main provision which is foreign to the main provision itself. Indeed, in some cases, a proviso may be an exception to the main provision though it cannot be inconsistent with what is expressed in the main provision and, if it is, it would be ultra vires the main provision and liable to be struck down. As a general rule, in construing an enactment containing a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear, it is desirable to make an effort to give meaning to the proviso with a view to justifying its necessity.

A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the court is required to carefully scrutinize and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the enacting part or the main part of the section be construed first without the proviso and if the same is found to be ambiguous only then recourse maybe had to examine the proviso. On the other hand, an accepted rule of interpretation is that a section and the proviso thereto must be construed as a whole, each portion throwing light, if need be, on the rest. A proviso is normally used to remove special cases from the general enactment and provide for them specially.

## 12. RETROSPECTIVE OR PROSPECTIVE

Now, it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provided or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in volume 36 of the Laws of England (third edition) and reiterated in several decisions of the Supreme Court as well as English courts is that “all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective” “ and retrospective operation should not be given to a statute so as to effect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”

In *Hitendra Vishnu Thakur vs. State of Maharashtra*, AIR 1994 S.C. 2623, The Supreme Court held: (i) A statute which affects substantive rights in presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits. (ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature; (iii) Every litigant has a vested right in substantive law, but no such right exists in procedural law. (iv) A procedural statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished. (v) A statute which not only changes the procedure but also creates a new rights and liabilities, shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication. It stands approved by the Constitution Bench in the case of *Shyam Sunder vs. Ram Kumar* AIR 2001 S.C. 2472.

## 13. MANDATORY OR DIRECTORY

The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design, and the consequences which would follow from construing it one way or the other. The use of the word shall in a statutory provision, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceedings invalid. The user of the word "may" by the legislature may be out of reverence. In the setting in which the word "may" has been used need consideration and given due weightage.

If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the Statute are prima facie enabling, the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right — public or private — of a citizen. The power to rectify the order of assessment conferred on the Income-tax Officer by sec. 35 relevant to sec. 154 of IT Act 1961, is to ensure that injustice to the assessee or to the revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested ,with quasi-judicial functions under the Act, that to do justice it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceeding. That power is not discretionary and the Income-tax Officer cannot, if the conditions for its exercise were shown to exist, decline to exercise it as held by the Supreme Court in *L. Hirday Narain vs. I.T.O.* (1970) 78 I.T.R. 26 (S.C.).

The use of the word "shall" in a statute ordinarily speaking means that the statutory provision is mandatory. It is construed as such unless there is something in the context in which the word is used which would justify a departure from this meaning. Where the assessee seek to claim the benefit under the statutory scheme, they are bound to comply strictly with the condition under which the benefit is granted. There is no scope for the application of any equitable consideration when the statutory provisions are stated in plain language. The courts have no power to act beyond the terms of the statutory provision under which benefits have been granted to the assessee.

It is beyond any cavil that the question as to whether the provision is directory or mandatory would depend upon the language employed therein. (See *Union of India and Others vs. Filip Tiago De Gama of Vedem Vasco De Gama*, (AIR 1990 SC 981 : (1989) Suppl. 2 SCR 336). In a case where the statutory provision is plain and unambiguous, the Court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom. In *E.Palanisamy vs. Palanisamy (Dead) by Lrs. And Others*, (2003) 1 SCC 122 a Division Bench of the Supreme Court observed: "The rent legislation is normally intended for the benefit of the tenants. At the same time, it is well settled that the benefits conferred on the tenants through the relevant statutes can be enjoyed only on the basis of strict compliance with the statutory provisions. Equitable consideration has no place in such matter."

The 'Court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the Court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot re-write or recast legislation. It is also necessary to determine that there exists a presumption that the Legislature has not

used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression 'shall or may' is not decisive for arriving at a finding as to whether statute is directory or mandatory. But the intention of the Legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the Legislature was that the provisions are mandatory in character.

## 14. STARE DECISIS

It is a sound principle of law to follow a view which is operating for long interpretation of a provision rendered years back and accepted and acted upon should not be easily departed from. While reconsidering decisions rendered a long time back, the courts cannot ignore the harm that is likely to happen by un-settling law that has once being settled. Interpretation given to a provision by several High Courts without dissent and uniformly followed; several transactions entered into based upon the said exposition of the law; the doctrine of stare decisis should apply or else it will result in chaos and open up a Pandora's box of uncertainty. Hence, to give it a quietus and to maintain consistency, the principle of stare decisis apply.

The Supreme Court referring to *Muktul vs. Manbhari*, AIR 1958 SC 918; on the scope of the doctrine of stare decisis with reference to Halsbury's Law of England and Corpus Juris Secundum and relying upon the observations of the Apex Court in *Mishri Lal vs. Dhirendra Nath* (1999) 4 sec 11, observed in *Union of India vs. Azadi Bachao Andolan* (2003) 263 ITR at 726: "A decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority other than the court establishing the rule, even though the court before whom the matter arises afterwards might be of a different view."

## 15. NON OBSTANTE CLAUSE

The principles governing any non obstante clause are well established. Ordinarily, it is a legislative device to give such a clause an overriding effect over the law or provision that qualifies such clause. When a clause begins with "notwithstanding anything contained in the Act or in some particular provision/provisions in the Act", it is with a view to give the enacting part of the section, in case of conflict, an overriding effect over the Act or provision mentioned in the non obstante clause. It conveys that in spite of the provisions or the Act mentioned in the non obstante clause, the enactment following such expression shall have full operation. It is used to override the mentioned law/provision in specified circumstances.

The distinction between the expression "subject to other provisions' and the expression "notwithstanding anything contained in other provisions of the Act" was explained by a Constitution Bench of the Supreme Court in *South India Corporation (P.) Ltd. vs. Secretary, Board of Revenue* (1964) 15 STC 74; AIR 1964 SC 207 about the former expression the court said while considering article 372 (page 215 of AIR 1964 SC and page 89 of 15 STC): "The expression 'subject to' conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject." About the non obstante clause with which article 278 began, the court speaking through Subba Rao J. said (page 215 of AIR 1964 SC and page 89 of 15 STC): "The phrase 'notwithstanding anything in the Constitution' is equivalent to saying that in spite of the other articles of the Constitution, or that the other articles shall not be an impediment to the operation of article 278."

The principle enunciated by the Supreme Court in *South India Corporation (P.) Ltd. vs. Secretary, Board of Revenue*, AIR 1964 SC 207, was reiterated by the apex court in *Union of India vs. Kokil* (G.M.) AIR 1984 SC 1022; wherein it said (page 1026 of AIR 1984 SC: "It is well known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found

either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions." Again the apex court said in *Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram*, AIR 1987 SC 117: "A" clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned in the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this court in *South India Corporation (P) Ltd. vs. Secretary, Board of Revenue*, AIR 1964 SC 207; (1964) 4 SCR 280." The above principles were again reiterated in *Paryankandiyal Eravath Kanapravan Kalliani Amma vs. K. Devi* (1996) AIR 1996 SC 1963.

It is fairly common in different enactments to use the expression 'notwithstanding anything contained in this Act or other Acts' in order to make such provision as superseding to the other provisions.' The Supreme Court in *Maharashtra Tubes Ltd. vs. State Industrial and Investment Corporation of Maharashtra Ltd*. (1993) 78 Comp Case 803 has held in no uncertain terms that where two statutes contain similar non obstante clauses, it is the latter which is to prevail over the former, for, the Legislature is supposed to be aware of the fact that the statute already in force contains a non obstante clause but still incorporates such non obstante clause in order to obliterate the effect of the non obstante clause contained in the former statute.

## 16. CASUS OMISSUS

The Court only interprets the law and cannot legislate. To legislate is the prerogative of the Parliament or the State Legislature. A casus omissus should not be readily inferred and for the purpose all the parts of the statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if a literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available. Where to apply words literally would defeat the obvious intention of the legislation and produce a wholly unreasonable result the court must do some violence to the words so as to achieve that obvious intention and produce a rational construction. If a provision of law is misused and subjected to the abuse of the process of law, it is for the Legislature to amend, modify or repeal it, if deemed necessary. Legislative casus omissus cannot be supplied by judicial interpretative process. The court cannot read anything into a statutory provision which is plain and unambiguous. A statute is the edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the Legislature itself.

Two principles of construction — one relating to casus omissus and the other in regard to reading the statute as a whole— appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more

so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. “An intention to produce an unreasonable result”, said Danckwerts L. J. in Artemiou vs. Procopiou (1966) 1 QB 878 (CA) (page 888) “is not to be imputed to a statute if there is some other construction available”. Where to apply words literally would “defeat the obvious intention of the legislation and produce a wholly unreasonable result” we must “do some violence to the words” and so achieve that obvious' intention and produce a rational construction (per *Lord Reid in Luke vs. IRC* (1964) 54 ITR 692; (1963) AC 557 where at page 577, he also observed: ‘this is not a new problem, though our standard of drafting is such that it rarely emerges”).

## 17. RATIO DECIDENDI AND THE WORDS

It is a well settled principles of law that the decision on an interpretation of one statute can be followed while interpreting another provided both the statutes are in parimateria and they deal with identical scheme. However, the definition of an expression in one statute cannot be automatically applied to another statute whose object and purpose are entirely different. One should not place reliance on decisions without discussing how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they were words in a legislative enactment. Judicial utterances are made in the setting of the facts of particular cases. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

The words and expressions defined in one statute judicially interpreted do not supply a guide to the construction of the same words or expressions in another statute unless both the statutes are peri material legislation or specifically provided in one statute to give the same meaning to the words as defined in another statute. For reliance on the words and expressions defined in one statute and applying to the other statute it has also to be seen as to whether the aim and object of the two legislation, is similar. When the word is not so defined in the Act it may be permissible to refer to the dictionary to find out the meaning of that word as it is understood in the common parlance. But where the dictionary gives divergent or more than one meaning of a word, in that case it is not safe to construe the said word according to the suggested dictionary meaning of that word. In such a situation, the word has to be construed in the context of the provisions of the Act and regard must also be had to be legislative history of the provisions of the Act and the scheme of the Act. It is a settled principle of interpretation that the meaning of the words, occurring in the provisions of the Act must take their colour from the context in which they are so used. In other words, for arriving at the true meaning of a word, the said word should not be detached from the context. Thus, when the word; read in the context conveys a meaning, that meaning would be the appropriate meaning of that word and in that case we need not rely upon the dictionary meaning of that word.

While it is true that two different words may be used in the same statute to convey the same meaning, that is the exception rather than the rule. The general rule is that when two different words are used by the same statute, *prima facie* one has to construe these different words as carrying different meanings. Where the words used are unambiguous, other extrinsic interpretative aids such as the objects of the statute, or the difficulties that would be faced by the parties will not be relevant in interpreting the expression.

## 18. EJUSDEM GENERIS

A person is known by the company he keeps' Birds of same feather flock together. Similarly a word is to be .interpreted after considering the other words used and in its context. The principle of ejusdem generis is applicable when particular words pertaining to a class, category or genus are followed by general words. In such a case the general words are construed as limited to things of the same kind as those specified. The rule applies only

when: (i) the statute enumerates the specific words, (ii) the subjects of enumeration constitute a class or category, (iii) that class or category is not exhausted by the enumeration, (iv) the general terms follow the enumeration, and (v) there is no indication of a different legislative intent. If the subjects belongs to a broad based genus as also a narrower genus there is no principle that the general words should be confined to the narrower genus. The rule cannot be applied unless there is a genus constituted or a category disclosed. If the preceding words do not constitute mere specifications of a genus but constitute description of a complete genus, then the rule has no application.

The principle of statutory interpretation is well known and well settled that when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. This rule is known as the rule of ejusdem generis. It applies when (1) the statute contains an enumeration of specific words; (2) the subjects of enumeration constitute a class or category; (3) that class or category is not exhausted by the enumeration; (4) the general terms follow the enumeration; and (5) there is no indication of a different legislative intent. Reference in this connection may be made to *Amar Chandra vs. Collector of Excise, Tripura* AIR 1972 SC 1863 and *Housing Board of Haryana vs. Haryana Housing Board Employees Union* AIR 1996 SC 434 and *CIT vs. Udaipur Distillery Co. Ltd*. (2004) 186 CTR 1 at 14 268 I.T.R. 305 (Rajashtan). The Hon'ble Court held that bottling fee levied by the State of Rajasthan is not fee as envisaged under section 43 B of the I.T. Act.

## 19. FINANCE MINISTER'S SPEECH

It is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation was enacted. This is in accord with the recent trend in juristic thought not only in Western countries, but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of the Supreme Court, one in *Loka Shikshana' Trust vs. CIT* (1975) 101 ITR 234, the other in *Indian Chamber of Commerce vs. CIT* (1975) 101 ITR 796 and the third in *Addl. CIT vs. Surat Art Silk Cloth Manufacturers Association* (1980) 121 ITR 1, where the speech made by the Finance Minister while introducing the exclusionary clause in s.2, cl. (15), of the Act was relied upon by the court for the purpose of ascertaining what was the reason for introducing that clause.

The Supreme Court in *K.P. Varghese vs. ITO* (1981) 131 ITR 597 relied upon and referred to the speech made by the Finance Minister while moving the amendment introducing sub s. (2) clearly states what were the circumstances in which sub-s. (2) came to be passed, what was the mischief for which s. 52 as it then stood did not provide and which was sought to be remedied by the enactment of sub-s. (2) and why the enactment of sub-s. (2) was found necessary. The Rajasthan High Court in *Jodhpur Chartered Accountants Society vs. UOI* (2003) 264 ITR 529 referred to the speech of the then Finance Minister, evolving the concept of service tax, while upholding constitutional validity of levy of service tax on Chartered Accountants.

## 20. DISCRETION

Many provisions confer discretion on the Court or the Authority. Discretion should be exercised judiciously as a judicial authority well versed in law. In Halsbury's Laws of England, 4th Edn., Vol. I, it has been observed: "A statutory discretion is not, however, necessarily or, indeed, usually absolute; it may be qualified by express and implied legal duties to comply with substantive and procedural requirements before a decision is taken

whether to act and how to act. Moreover, there may be a discretion whether to exercise a power, but; no discretion as to the mode of its exercise; or a duty to act when certain conditions are present, but a discretion how to act. Discretion may thus be coupled with duties".

Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine; himself *(Per Lord Halsbury, L.C., in Sharp vs. Wakefield, (1981) Appeal Cases 173).* Also (See S.G. *Jaisinghani vs. Unkon of India and Other* (AIR 1967 SC 1427).

The word 'discretion' standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, where the Legislature concedes discretion it also imposes a heavy responsibility.

## 21. CONCLUSION

General principles of interpretation of Law including the Tax Laws are to protect a citizen against the excesses of the Executive, Administration, Corrupt authority, erring individuals and the Legislature. It is an aid to protect and uphold 'enduring values' enshrined in the Constitution and Laws enacted by the Parliament/Legislatures. It is to assist, to arrive at the real intention, object and purpose for which Laws are enacted and to make life of each citizen worth living in this world. Let the hopes of the framers of the Constitution and the father of Nation, Mahatma Gandhi, inspire all Constitutional functionaries, Judges, Jurists, Members of Tribunals, Advocates, Law faculties and students and the people of India to preserve their freedom and mould their lives on sound principles of interpretation of Laws.

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# PRINCIPLES OF NATURAL JUSTICE

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## 1. INTRODUCTION

Justice not only should be done, it should appear to have been done is an old adage. The concept of natural justice that one must be heard before he is condemned has its root in ancient law. In fact, it is said that God himself respects and follows the principles of natural justice. Before holding Adam and Eve guilty of eating prohibited apple, he is said to have asked: "Adam, where are thou? Hast thou not eaten the fruit of the tree, whereof I commanded thee thou should not eat?" It is said, the same question was put to Eve also. As such, it can be safely said that the principles of natural justice have origin in the ancient past and almost all civilised systems of jurisprudence, one way or the other, have recognised and accepted the principles of natural justice.

In law, procedural provisions are as important as substantive provisions. A Judge of the Supreme Court of United States observed: "Procedural fairness and regularity are indisputable essence of liberty... substantive laws can be endured if they are fairly and impartially applied." He went on to say "that it might be preferable to live under Russian Laws applied by common law procedures" than under the common law enforced by the Russian procedures. Another judge observed: "The history of liberty is largely been the history of observance of procedural safeguards."

Not only that the principles of natural justice have ancient origin and also that they have been universally accepted, in the natural of things they are all pervasive. They govern all spheres of administration. As you will see later on the sphere to which the principles of natural justice are made applicable is ever expanding. At present, they pervade the exercise of all state powers, except perhaps the exercise of legislative powers. The Original distinction between administration and judicial exercise of power is completely wiped out and now it is well established that the principles of natural justice pervade all spheres of state action, whether administrative or judicial.

## 2. DEFINITION AND OBJECTS

Though it is very easy to explain what constitutes natural justice, it is very difficult to define precisely what natural justice means. Natural justice has meant many things to many writers, lawyers and systems of law. It has many colours and shades and many forms and shapes. As it is observed that the principles of natural justice are easy to proclaim, but their precise extent is far less easy to define. No doubt, it is true that the concept of natural justice is not very clear and therefore, it is not possible to define it; yet the principles of natural justice are universally accepted and enforced. As against criticism of vagueness of concept of natural justice, Lord Reid in the historic decision of *Ridge vs. Baldwin (1964 AC 40)* observed:

"In the modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured, therefore it does not exist....."

The Hon'ble Supreme Court in *Kraipak vs. Union of India AIR 1970 S.C. 150* observed:

"the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it. It is true that if a statutory provisions can be read consistently with the principles of natural justice, the courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But if on the other hand a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice then the court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power."

## 3. BASIC PRINCIPLES

As stated above, though it is difficult to precisely define what is meant by natural justice, the contents of principles of natural justice are quite easy to enumerate. As it stands today, the basic principles of Natural justice are: (i) that the parties should be heard before deciding an issue; (ii) the hearing must be before an impartial Judge, as no man can be judge of his own cause. Therefore, the hearing must be before an unbiased Judge; (iii) the Judge should decide in good faith. He should have no bias, personal or pecuniary; and (iv) the decision given must be reasoned one and therefore, the decision must be evidenced by a speaking order which enumerates the reasons for coming to a particular conclusion. The American Due Process of Law postulates: (a) notice (b) opportunity to be heard (c) an impartial tribunal and (d) an orderly course of procedure. As you will see later on, the concept of speaking order as a part of principles of natural justice is a significant and important contribution by Indian jurisprudence. While the English Jurists and Judges have hesitated in adopting speaking order as a part of the principles of natural justice, the Indian courts, particularly the Hon'ble Supreme Court has unequivocally accepted that speaking order is the third important basic principle of natural justice. Therefore, as it stands as far as the Indian law is concerned, the three basic accepted principles of natural justice are

(1) that the dispute should be decided by an impartial judge without any bias or interest against the parties and in the subject-matter of dispute;

(2) Audi alteram partem which means, no man should be condemned unheard. Both parties must be heard before passing any order;

(3) that the decisions must be reasoned one and the orders containing the decision must be speaking orders.

Now let us consider, in detail, these basic principles of natural justice:

## 4. (i) Bias or interest

The first principle of natural justice consists of the rule against bias or interest and is based on three maxims:

(i) no man shall be a judge in his own cause;

(ii) justice not only should be done but manifestly and undoubtedly be seen to be done; and

(iii) Judges, like Caesar's wife should be above suspicion and therefore, anything which tends or may be regarded as tending to cause such a person to decide a case otherwise than on evidence must be held to be biased.

This is stated in Maxim *Nemo in propria causa judex, esse debet.*

The bias which will violate the principles of natural justice may be of three types:

(i) pecuniary bias

(ii) personal bias and

(iii) official bias or bias as to subject-matter.

It is well settled that as regards pecuniary interest, the least pecuniary interest in the subject matter of the litigation will disqualify any person from acting as a Judge. This principle is so strictly applied that a pecuniary interest, however slight, will disqualify, even though it is not proved, that the decision is in any way affected because of such interest. The classic illustration are those where the Judge having some shareholding in a company which is one of the parties to dispute. In the leading case of *Dimes vs. Grant Function Canal,* where the judge had shareholding in the company, the House of Lords observed as under:

"No one can suppose that the Lord Cottenham could be in the remotest degree, influenced by the interest he had in this concern, but, my Lords, it is of the last importance that the maxim, that no one is to be a judge in his own case, should be held sacred.... This will be lesson for all inferior Tribunals to take care not only that in the decrees they are not influenced by personal interest, but to avoid the appearance labouring under such an influence."

This principle is observed to clear away everything which might engender suspicion and distrust of the Tribunal and so to promote the feeling of confidence in the administration of Justice. Nothing is to be done which creates even suspicion, that there has been an improper interference with the course of justice. As the Hon'ble Supreme Court observed in *Manek Lal vs. Premchand (AIR 1957 SC 425):* "It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a Judge." In the leading case a Kraipak, the Hon'ble Supreme Court struck down the whole selection process because one of the applicants for selection was also acting as one of the members of the Selection Board.

**(ii) Personal bias**

The second type of bias is personal one. The personal bias may be due to predilections or personal relationships to one of the parties. Here a Judge may be a relative, friend or business associate of a party or he may be personally hostile as a result of an event occurring either before or during the course of trial.

**(iii) Official bias**

The third type of bias is official bias or bias as to the subject-matter. This may arise when the Judge has a general interest in the subject-matter. However this bias rarely invalidates the proceedings. A mere general interest in the object to be perused would not disqualify the Judge from deciding the matter. There must be some direct connection with the litigation. Accordingly, that ministerial or departmental policy cannot be regarded as a disqualifying bias. Suppose the Minister is empowered to frame a scheme after hearing the objections. The procedure for hearing the objection is subject to the principles of natural justice insofar as they require a fair hearing. But the Minister's decision cannot be impugned on the ground that he has advocated his scheme or he is known to support it as a matter of policy. The Minister cannot be prevented from attaching more importance to the fulfilment of his policy than to the fate of individual objectors and it would be quite wrong for the courts to say that the Minister could act in the same kind of way as a board of works deciding whether a house should be pulled down. But sometimes this official bias may disqualify the person from deciding the issue. In Gulapalli's case the hearing given by the Secretary,

Transport Department to the objectors of the Government Scheme of Road Transport was held by the Supreme Court to offend the principle of natural justice and the proceedings and hearing given therein were consequently held to be void. However, in the second Gulapalli's case, the same principle that a party cannot be a judge in his own cause was invoked, this time against the Chief Minister in charge of the portfolio of transport. A distinction was sought to be drawn between official bias of an authority which is exercising a statutory duty imposed on it and personal bias of the said authority. The opinion of the Supreme Court in the instant case affirmed the well settled principles of doctrine of bias. The Supreme Court, however, drew an essential distinction between the functions of a Secretary and of a Minister, the former is part of the Department and the latter is only primarily responsible for the disposal of the business pertaining to that Department. Consequently, the order passed by the Minister cannot be assailed on the ground of official bias and as for personal bias there was no proof of it.

As far as the test of pecuniary bias is concerned, however slight the interest may be, it violates the principles of natural justice. But in case of a personal bias or bias as to subject-matter, the test is whether there is a likelihood of bias in the Judge. A distant possibility will not prove bias. In that case, the test is not whether in fact a bias has affected the judgement; the test always is and must be whether a litigant could reasonably apprehend that the bias attributable to a member of the Tribunal might have operated against him in the final decision of the Tribunal,

Applying the principles of pecuniary bias, it can be clearly held that the recent scheme of reward in case of income tax, excise or custom matters, is clearly in violation of principles of natural justice. The question of additions to be made to the returned income, has a direct nexus with the amount to be given by way of reward. This scheme creates a pecuniary interest in favour of the Assessing Officer, which would make his conducting the assessment proceedings in violation of the principles of natural justice relating to Bias.

## 5. AUDI ALTERAM PARTEM

It is fundamental of a fair procedure that both sides should be heard. This is more far reaching of the principles of natural justice since it can embrace almost every question of fair procedure or due process and its implications can be worked out in greater details. The right to a fair hearing has been used by the court as the base on which to build a kind of code of fair administrative procedure comparable with due process of law as understood under the constitution of the United States.

The numerous new administrative authorities, local, state and central, which have come into being in Nineteenth and Twentieth centuries opened up large new territory for the principles of natural justice. The courts saw no reason for permitting these new authorities to adopt any less fair procedure than the previously allowed procedure. The character of the authority was not the matter. What mattered was the character of the power exercised; if it adversely affected the legal rights and interest, it must be exercised fairly.

A proper hearing must always include a fair opportunity to those who are parties in the controversy for correcting and contradicting anything prejudicial to their view.

Therefore, not only the disclosure of a charge or opposing case must be made, but it must be made within reasonable time to allow the person affected to prepare his defence or his comments. He must have fair notice of any accusation against him and it is commonly included in the right to fair view by calling it the right to notice and hearing.

The principle of audi alteram partem has two aspects:

(i) notice and (ii) hearing.

**(i) Notice**

Before any action is taken, the affected party should be given a notice to show cause against the proposed action and seek his explanation. Any order passed without giving notice is against the principles of natural justice. Accordingly, even if there is no provision in the statute about giving of notice, if the order in question adversely affects the rights on an individual, the notice must be given. The notice must be clear, specific and unambiguous and the changes should not be vague and uncertain. The object of notice is to give an opportunity to the individual concerned, to present his case. Moreover, the notice must give a reasonable opportunity to comply with the requirements mentioned therein. Natural justice, therefore, requires that the person directly affected by the proposed acts, decisions or proceedings be given adequate notice of what is proposed, so that he may be in a position.

(a) to make representation on his own behalf, or

(b) to appear at the hearing or inquiry (if any), and

(c) effectively to prepare his own case and to answer the case he has to meet.

Accordingly, the notice should be served in sufficient time to enable these representations to be made effectively. If an oral hearing is to be held, the time and the place must be properly notified. If the charges are to be brought, they should be specified with particulars.

**(ii) Hearing**

The second requirement of audi alteram partem is that the person concerned must be given an opportunity of being heard before any adverse action is taken against him.

Though an adjudicating authority must observe the principles of natural justice and must give a reasonable opportunity of being heard, yet in the absence of statutory provisions, an administrative authority is not bound to give the person concerned an oral hearing. The oral hearing is not regarded as essential part of natural justice. Accordingly, a person is not generally entitled to an oral hearing unless such a right is conferred by the statute. As observed by the Hon'ble Supreme Court in *M.P. Industries vs. Union of India (AIR 1966 SC 671);* "It is no doubt a principle of natural justice that a quasi-judicial Tribunal cannot make any decision adverse to a party without giving him an effective" opportunity to meet any relevant allegations against him but the said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the Tribunal." However, at the same time it must be remembered that a hearing will normally be an oral hearing. As a general rule, an opportunity to present contention orally, with whatever advantages the method of presentation has, is one of the rudiments of the fair play required." Accordingly, in the absence of clear statutory guidance on the matter, one is entitled to the protection of audi alteram partem rule now *prima facie* entitled to put his case orally. Again, if there are contending parties before the adjudicating authority and one of them is permitted oral hearing, the same facility must be afforded to the other, or where complete legal and technical questions are involved, it is necessary to give oral hearing. Thus, in the absence of statutory requirement about the oral hearing, the courts will have to decide the matter as regards oral hearing, taking into consideration the facts and circumstances of the case.

When an oral hearing is given, the Tribunal must:

(a) consider all relevant evidence which a party wishes to submit.

(b) inform every party of all the evidence to be taken into account, whether derived from another party or independently.

(c) allow witnesses to be questioned.

(d) allow comments on evidence and arguments of the whole case. The right to call and to cross examine witnesses, as a general rule, is part of natural justice.

Wrongful refusal of an adjournment whether reasonably requested, may amount to refusal of fair hearing.

As a general rule, proper opportunity of being heard at appellate stage will not cure the defect of refusal of fair hearing at the original stage. Similarly, hearing given after the decision will not cure the defect of not hearing before decision.

## 6. RIGHT TO HAVE COUNSEL

The right of representation by a lawyer is not considered to be part of the principles of natural justice. It cannot be claimed as of right, unless such right conferred by the statute. But speaking generally, the right to appear through a counsel has been recognised in law. Experience has taught that to deny persons, who are unable to express themselves, the services of competent spokesman is a very mistaken kindness.

Therefore, as observed by Lord Denning "When a man's reputation or livelihood is at stake, not only has a right to speak by his own mouth, has also a right to speak by counsel or solicitor," general, legal representation of the right quality before statutory Tribunals is desirable and that a person threatened with social or financial ruin must have assistance of a qualified person. Some statutes do not permit appearance of legal practitioners. In such cases, there is no choice. But, in the absence of such prohibition the guideline is that if the matter is very simple, the request for legal representation can be rejected. On the other hand, if the oral evidence produced at the enquiry requires services of a lawyer for cross-examination of witnesses, or legal complexity is involved therein or where complicated questions of fact and law arise, or where the evidence is voluminous and the party concerned may not be in a position to meet with the situation effectively or where he is pitted against a trained prosecutor, he should be allowed to engage a legal practitioner to defend him, lest the scales should be weighed against him. These are all relevant grounds and in these circumstances, refusal to permit legal assistance may cause serious prejudice to the person concerned and may amount to a denial of reasonable opportunity of being heard.

The following principles, may be considered as well settled vis-à-vis the principles of fair hearing.

(1) The adjudicating authority must be impartial and without any interest or bias of any type.

(2) In exercising the power, where the adjudicating authority is exercising judicial or quasi-judicial power, the order must be made by that authority and that power cannot be delegated or sub-delegated to any other officer.

(3) The adjudicating authority must give full opportunity to the affected person to produce all the relevant evidence in support of his case.

(4) The adjudicating authority must disclose all materials placed before it in the course of the proceedings and cannot utilise any material unless an opportunity is given to the party against it is sought to be utilised. Thus, in the leading tax case *Dhakeshsari Cotton Mills vs. CIT (26 ITR 775) (SC),* the Supreme Court set aside the order passed by the Tribunal on the ground that it did not disclose some evidence produced by the department to the assessee.

(5) The adjudicating authority must give an opportunity to the party concerned to rebut the evidence and material placed by the other side.

(6) An opportunity to rebut the evidence produced by the other side, however, does not necessarily mean that the right of cross-examination of witnesses should be given to him. It depends upon the facts and circumstances of each case and the statutory provisions.

(7) Oral or personal hearing is not a part of natural justice and cannot be claimed as a matter of right, though normally such opportunity should be afforded, particularly if complex questions of facts and law are involved.

(8) Representation through counsel or an advocate is also not accepted as part of the principles of natural justice.

(9) If hearing is not given by the adjudicating authority to the person concerned and the principles of natural justice are violated, the order is void and it cannot be justified on the ground that hearing would make no difference or no useful purpose would have been served. If the principles of natural justice are violated in respect of any decision, it is indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of natural justice.

(10) A hearing given on appeal is not an acceptable substitute for a hearing not given before the initial decision.

However, even in cases where the application of fair hearing is excluded at the time of the decision, there is an obligation to give fair post decisional hearing. Under Income-Tax Act, in case of search and seizure, such prompt hearing is provided under the provisions of S. 132 of the Income-tax Act, 1961. As such, exclusion from prior hearing does not authorise no hearing at all.

## 7. ARTICLE 14 OF THE CONSTITUTION AND PRINCIPLES OF NATURAL JUSTICE

Article 14 of the Constitution guarantees equality before the law and equal protection to all persons.

The Hon'ble Supreme Court has recognised that to treat a person in violation of the principles of natural justice would amount to arbitrary and discriminatory treatment and would violate the fundamental rights of equality guaranteed by Article 14. The Hon'ble Supreme Court while interpreting Article 14 has given a dynamic interpretation on the concept of equality before the law. As per the Hon'ble Supreme Court, violation of the rules of natural justice would amount to discrimination, where discrimination is the result of State action which would violate Article 14 of the Constitution. In short, as per the Supreme Court in certain cases, violation of the principles of natural justice may amount to violation of the Fundamental rights of equality guaranteed by Article 14.

## 8. PART OF STATUTORY PROVISIONS

The rules governing principles of natural justice are so widened in the administration of law that the Hon'ble Supreme Court has laid down that unless there is some specific provision excluding the application of the principles of natural justice, the principles of natural justice are part and parcel of any statutory provision. It is always presumed that even if there is no specific mention of hearing etc. the basic principles underlying principles of natural justice would form part and parcel of any statute. The Hon'ble Supreme Court in the leading case of *Maneka Gandhi vs. Union of India – AIR 1978 Supreme Court 597* observed that although there are no positive words in the Passport Act, 1967 requiring the applicant to be heard, yet the justice of the common law will supply the omission of the legislature. The principles of audi alteram partem, which mandates that no one shall be condemned unheard, are part of the rules of natural justice. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the year it has grown into a

widely pervasive rule affecting large of administrative action. The inquiry must, always be, does fairness in action demand that an opportunity to be heard should be given to the person affected. It also observed that law must be taken to be well settled that even in an administrative proceeding, which involves Civil consequences, that obtaining of natural justice must be a right to conclude that the audi alteram partem rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passport Act, 1967. If such a provision were held to be incorporated in the Passport Act, 1967 by necessary implication, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness.

The Hon'ble Supreme Court in *Swadeshi Cotton Mills etc. vs. Union of India, AIR 1981 Supreme Court 818* observed "The general principle as distinguished from an absolute rule of uniform application – seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to giving of a predecisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the predecisional state, unless viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned, save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible with situational modifications, But the core of it must, however, remain, namely that the person affected must have reasonable opportunity of being heard and not an empty public relations exercise. Provisions of Chapter XXC of the Income-tax Act, 1961 do not provide an opportunity to he heard to be given before order for purchase as also do not provide to disclose reasons recorded to affected parties on challenge as to provisions being violative of Article 14 of the Constitution

The Hon'ble Supreme Court in the case of *C.B. Gautam vs. Union of India (1993) 199 ITR 530* observed that the requirement of a reasonable opportunity being given to the concerned parties, particularly the intending purchaser and the intending seller must be read into the provisions of Chapter XX C.

## 9. LIMITATIONS ON THE APPLICATION OF THE RULE

However, there are certain limitations on the rule of audi alteram partem, though these limitation have been slowly and gradually liberalised or dispensed with.

### (1) Administrative order

The original limitation that the principle is applicable only in case of exercise of judicial or quasi-judicial authority and not in case of purely administrative authority no longer holds good in view of emphatic rejection of the said view, both in India and England. As such, it is now well settled that the said rule would be equally applicable to administrative authority. In the leading case of *Ridge vs. Baldwin* it is observed:

"We can, I think, take pride of what has been done in recent periods and particularly the filed of administrative law by invoking and applying these principles broadly classified under designation of natural justice. Many problems as to their application remain to be solved."

As observed by Lord Denning: "It is now well settled that a statutory body which is entrusted with the statute with a discretion must act fairly. It does not matter whether the functions are described as judicial or quasi-judicial on one hand or administration on the other hand."

The Hon'ble Supreme Court in *State of Orissa vs. Binapani (AIR 1967 SC 2169)* observed:

"It is true that the order is administrative in character. But even as an administrative order it involves serious consequences and must be consistent with the rules of natural justice."

Again, the Hon'ble Supreme Court observed in the leading Kripaka's case *(AIR 1970 SC 150);*

"Till very recently it was the opinion of the court that unless the authority concerned was required by law under which it functions to act judicially, there was no room for application of rules of natural justice. The validity of that limitation is now questioned. If the purpose of rules of natural justice is to prevent miscarriage of justice, one fails to see why these rules should not be made applicable to administrative enquiries."

Again in the leading case of *Maneka Gandhi (AIR 1978 SC 597)*, the Hon'ble Supreme Court observed:

"The frontier between the judicial and quasi-judicial determination on the one hand and exercise of administrative determination on the other hand become blurred; the rigid view that the principles of natural justice are applied only to judicial and quasi-judicial acts and not the administrative act, no longer holds the field."

**(2) Wide discretionary powers**

It is also stated where the authority in which is vested the power to decide is entrusted with a wide discretion, in such cases the function is often said to be executive or administrative and to be inconsistent with a duty to act judicially and as such, the Rule does not apply. However, this limitation no longer holds good. In fact, it is observed now that because there vests wide discretionary powers there is reason to act fairly and therefore, there is every reason why opportunity of being heard should be given in the course of exercise of such power. It is questioned that why only because wide powers are given, the same should be exempted from any obligation to listen to representations before it is exercised. Once it was thought that while wide discretionary powers are given, it was obvious that principles of fair hearing would not be applicable. There may be sound reasons for holding that in a particular context, it will be undesirable or impracticable for a court of law to engraft any procedural duty on to wide discretionary power, but the mere fact that the discretionary power is very wide is inconclusive. The nature of the power, the condition under which it has to be exercised and its impact on the interest of individuals must all be taken into account. A hearing may be particularly appropriate when despite the width of statutory discretion, the decision is actually based upon findings of adjudicative facts or the interpretation or application of decisional criteria of greater specification than those contained in the statute. In both of these situations the quality of the decision may be enhanced by allowing the individual affected an opportunity to be heard.

**(3) Where legislation expressly requires notice and hearing for certain purposes but imposes no procedural requirements for other purposes**

Here the maxim expression unius est exclusive alterius may be invoked to deny a right to notice and hearing in a context where the statute or the rules are silent. But this maxim, like so many other side to interpretation, certainly requires to be watched; it may be a valuable servant, but a dangerous master to follow. The exclusion is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application,

having regard to the subject-matter to which it is to be applied, leads to inconsistency of justice.

**(4) Where the action taken constitutes denial or a privilege as distinct from interference with a right**

In the past, courts had refused to imply procedural duty to hear before an administrative Tribunal exercises discretionary licensing powers; while granting such privileges such decisions were said to concern privileges, not rights. This conceptualist approach has been in large part abandoned in favour of a more sophisticated analysis towards the procedural duties of licensing authorities and a more realistic assessment of the economic effect upon the individual. Therefore, the test is not as regards right or privileges, but the test is what are the consequences of such decisions denying licence.

**(5) Where to impose an obligation to disclose relevant information to the party affected would be prejudicial to the public interest**

The Courts have readily accepted the argument that to require the authority to reveal to the interested parties material prepared or obtained in the course of departmental duties might unduly interfere with the administrative process by destroying the anonymity of the civil service, discouraging frank comment in official reports and undermining the principle of ministerial responsibility to Parliament. In housing and town planning cases, the refusal of the courts to require the disclosure of inspectors' reports on inquiries and other relevant materials, even where the Minister's function were organised as including a judicial element, reduced but did not eliminate the area in which the audi alteram partem rule operated. However, the climate of opinion has changed; the administrative process has become less opaque. But the principle that the audi alteram partem rule may be modified for the protection of what an executive officer conceives to be the public interest is still reflected in contemporary procedural rules. However, the issue of public interest or affecting such public interest has been strictly construed by the courts which is reflected by the leading Supreme Court judgement in Maneka Gandhi's case where the state's refusal to give reasons for refusing to issue passport on the ground of public interest was not upheld. The rule may also be modified, by legislation or judicial decision, for the protection of particular facet of the public interest; e.g., the maintenance of secrecy about aspects of national policy or the sources of information leading to the detection of crime or other information supplied in confidence for the purposes of government, or possibly, the discharge of certain public function. The public interest also is not necessarily confined to matters of administrative law. It may be extended to other fields also.

**(6) Where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action of a preventive or remedial nature**

The purpose of giving the executive powers to detain security suspects in war time or grave emergency would plainly be frustrated if the suspect were entitled to prior notice of its intentions. Summary action for the maintenance of public security or public order in normal times may also be permissible. Orders may be made regulating the conduct of a public procession, or prohibiting the holding of all public processions or all public processings of a specified class for a period in a locality, if the police have reasonable grounds for apprehending serious public disorder. Although the point has not been tested, it is unlikely that a court would hold that the organisers of processions affected were entitled to be notified of the intention to make representation against it beforehand.

The interests of public safety or public health may similarly justify summary interference with property rights, as where an inspector from the Ministry of Agriculture destroys infected crops, or a dangerous nuisance is abated without notice in the exercise of common-law powers, or a public official disinfects verminous articles offered for sale, or an administrative order is made prohibiting smoking in a theatre. That urgency may warrant disregard of the audi alteram partem rule in other situations is generally conceded; there will

be disagreement, however, about the circumstances in which a deviation ought to be permissible. Here one may give the instance of search and seizure proceedings. It is inconceivable or it would defeat the very purpose of provisions of search and seizure if the court insists that before taking action for search and seizure, the party must be heard as to whether the circumstances permitting such search and seizure exist. As such, the very nature of this power would exclude application of principles governing fair hearing.

**(7) Where for any other reason it is impracticable to give prior notice or opportunity to be heard**

One may assume that the Rule will be held to be impliedly excluded in so far as the number of persons affected by a particular order, act or decision is so great as to make it manifestly impracticable for them all to be given an opportunity of being heard by the competent authority before hand. Practical convenience may explain why the Rule is not to apply to the making of regulations of a legislative character. But an implied opportunity is given by statute for representations to be made against local authority by laws before they are confirmed by a Minister and certain Acts provide for notice and opportunity to be heard in the making of statutory instruments. Some regard might well be paid to American experience in the shaping of hearing procedures prior to the issue of subordinate legislation.

**(8) Where appropriate substitutes for prior notice and opportunity to be heard are available**

In some administrative situations, remote from the typical settings of adjudication, the courts have held that failure to give any formal opportunity to be heard is immaterial if the person affected was in fact aware of what was proposed or knew or ought to have known that he could have made representations had he wished. This may occasionally be a common-sense approach; it will be appropriate, however, only in cases where there is no difficulty in making informal representations.

**(9)** Where the matter in issue or the monetary value of the interest at stake is too trivial to justify an implication that notice or opportunity to be heard be afforded before action is taken. The implied exception may be left to speak for itself.

**(10) Where the power exercised is disciplinary**

Earlier it was held that in case of disciplinary powers being non-judicial, the Rule does not apply. However, now it has been held that the principles of natural justice would be equally applicable in case of taking disciplinary action, if it would affect the right of the party against whom such disciplinary action is to be taken.

**(11) Legislative action**

It is open to the legislature to provide that rules of natural justice should not be observed in certain cases. But this has to be explicitly or necessarily implied in the statute. The burden is on the party to show that the legislature does not intend to invite application of rules of natural justice. As held by the Hon'ble Supreme Court: "Next there must be ever present in mind that our laws or procedures are granted on principles of natural justice which require that the man should not be condemned unheard; that the decision should not be read behind the back. But the procedure that affects life and property should not be continued in the absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to.

But they can by and large and subject to the proviso our laws and procedure, should be construed wherever that is reasonable possible in the light of that principle." Accordingly, unless expressly prohibited, the rules or principles of natural justice would supplement the statutory rules. As such, unless there is express exclusion or necessary inconsistency, the principles of natural justice are always treated as part of any adjudication.

In *S. Mallaya vs. State of A.P. AIR 1959 AP 7,* where the Board of Revenue did not hear the person who came in revision; the argument that statute did not provide for hearing was rejected and the proceeding quashed as the party concerned was not given an opportunity of being heard. However, unlike in England, in India the exclusion of application of principles of natural justice may be challenged on the ground that such exclusion violates the Fundamental Rights of a citizen under Article 14 and Article 21. The earlier view that procedure established by law as found in Article 21 as held in A.K. Gopalan's case means procedure established by legislature has been superseded by later decisions of the Supreme Court, particularly in Maneka Gandhi's case wherein the concept of reasonable procedure has been brought in. As such, if the procedure established by legislature does not give fair procedure by not incorporating the principles of natural justice, the same may be challenged on the ground that it violates rights under Article 14 or Article 21 to the Constitution of India. In fact, the Hon'ble Supreme Court has laid down that principles of natural justice are on par with Fundamental rights and any fair procedure should not exclude the principles of natural justice.

Even in cases where the application of fair hearing is excluded at the time of the decision, there is an obligation to give a quick fair post decisional hearing. Under Income-tax Act, in case of search and seizure, such prompt hearing is provided under the provisions of S.132 of the Income-tax Act, 1961. As such exclusion from prior hearing does not authorise no hearing at all.

In the leading case of Tulsiram Patel, Hon'ble Mr. Justice Madon indicated that rules of natural justice are elevated to Fundamental Rights' status.

As far as the hearing by the legislature itself before the passing of laws is concerned, it has been accepted that the legislature may not hear the person affected before passing any law in question. Apart from the practical limitation involved in giving an opportunity of being heard to the party affected, it is justified on the ground that the legislature itself represents the will of the people, and that being overriding consideration while passing the law. But however, in case of delegated legislative power slowly and surely not it is recognised that in case of exercise of delegated legislative powers of making rules and regulations it may be necessary to follow the principles of natural justice. Though hints are given by the Supreme Court that the rule of exclusion of rules of natural justice applicable to the legislative acts may not be applicable to the exercise of delegated legislative power, the law is yet to be developed on this point.

## 10. SPEAKING ORDERS OR REASONED DECISIONS

The third principle of natural justice is that a party ought to know the result of the inquiry and the reasons for the decision. A 'speaking order' means an order speaking for itself by giving reasons. Speaking orders are necessary if the judicial review is to be effective. The party affected must know why and on what grounds an order has been passed against him. This is a new principle of natural justice which has been recognised in India and USA, but, however, yet to be recognised under English Law. There is no general rule of English law, that reasons must be given for administrative or even judicial decisions. In India also till very recently, it was not accepted that the requirement of passing speaking orders is one of the principles of natural justice. However, now it is well established principle of natural justice. The Courts have specifically held that passing of a speaking order is a part and parcel of natural justice. As the Hon'ble Supreme Court observed in *M.P. Industries vs. Union of India, AIR 1966 SC 671;* "So it is essential that some restrictions shall be imposed on Tribunals in the matter of passing orders affecting the rights of parties: and the least they should do is to give reasons for their orders." The courts have justified the requirement for a speaking order on three grounds:

(1) the party aggrieved has the opportunity to demonstrate before the appellate or revisional court that the reasons which persuaded the authority to reject his case were erroneous;

(2) the obligation to record reasons operates as a deterrent against possible arbitrary action by executive authority invested with judicial power; and

(3) it gives satisfaction to the party against whom the order is made. The power to refuse to disclose reasons in support of the order is of an exceptional nature and it ought to be exercised fairly, sparingly and only when fully justified by the exigencies of an uncommon situation.

The Supreme Court observed in *Siemens Engg. vs. Union of India, AIR 1976 SC 1785* "The rule requiring reasons to be given in support of an order is like the principle of audi alteram partem, a basis principle of natural justice, which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law."

Coming to the tax field in *CIT vs. Walchand, Justice Shah* observed. "The practice of recording a decision without reasons in support cannot, but be deprecated."

In respect of the speaking order, the law may be summarised as under:

(1) Where a statute requires recording of reasons in support of the order, it imposes an obligation on the adjudicating authority and the reasons must be recorded by the authority.

(2) Even when the statute does not lay down expressly the requirement of recording reasons, the same can be inferred from the facts and circumstances of the case.

(3) Mere fact that the proceedings were treated as confidential, does not dispense with the requirement of recording reasons.

(4) If the order is subject to appeal or revision, the necessity of recording reasons is greater as without reasons the appellate or revisional authority cannot exercise its power effectively inasmuch as it has no material on which it may determine whether the facts were correctly ascertained, law was properly applied and the decision was just and based on legal, relevant and existent grounds. Failure to disclose reason amounts to depriving the party of the right of appeal or revision.

(5) There is no prescribed form and the reasons recorded by the adjudicating authority need not be detailed or elaborate and the requirements of recording reasons will be satisfied if only relevant reasons are recorded.

(6) If the reasons recorded are totally irrelevant, the exercise of power would be bad and the order is liable to be set aside.

(7) It is not necessary to record reasons by the appellate authority when it affirms the order passed by the lower authority. (This proposition of law requires reconsideration).

(8) Where the lower authority does not record reasons for making an order and the appellate authority merely affirms the order without recording reasons, the order passed by the appellate authority is bad.

(9) Where the appellate authority reverses the order passed by the lower authority reasons must be recorded, as there is a vital difference between an order of reversal and an order of affirmation.

(10) The validity of the order passed by the statutory authority must be judged by the reasons recorded therein and cannot be construed in the light of subsequent

explanation given by the authority concerned or filing affidavit. Orders are not like old wine becoming better as they grow older.

(11) If the reasons are not recorded in the order, it does not always vitiate the action.

(12) The duty to record reasons is a responsibility and cannot be discharged by the use of vague general words.

(13) The reasons recorded by the statutory authority are always subject to judicial scrutiny.

The requirement to give reasons for one's decision is an effective safeguard against any arbitrary exercise of power by the adjudicating authority. As observed by the Hon'ble Supreme Court in Maneka Gandhi's case.

"The reasons, if disclosed, being open to judicial scrutiny for ascertaining their nexus with the order impounding the passport, the refusal to disclose the reasons would equally be open to the scrutiny of the court; or else, the wholesome power of a dispassionate judicial examination of executive orders could with impunity be set at naught by an obdurate determination to suppress the reasons. Law cannot permit the exercise of a power to keep the reasons undisclosed if the sole reason for doing so is to keep the reasons away from judicial scrutiny."

The principles of natural justice in taxation matters:

Taxation laws are no exception to application of principles of natural justice. As the courts have held; the principles of natural justice are applicable in tax matters, particularly in the case of assessment proceedings. In Surajmal's case, the Hon'ble Supreme Court observed:

"The assessment has to be made on relevant materials as evidenced and the assessee ordinarily has the fullest rights to inspect all records and materials that are to be used against him. Under the provisions of section 37 of the Indian Income-tax Act, 1922, the proceedings before the Income Tax Officer are judicial proceedings and all the incidence of such judicial proceedings are to be observed before the result is arrived at. In other words, the assessee would have a right to inspect the records and all relevant documents before he is called upon to lead evidence in rebuttal. The broad principles emerged in view of application of principles of natural justice are the assessing officers exercising quasi-judicial function would be governed in procedure by judicial consideration and must conform to the rules of natural justice. *(4 ITR 1; 96 ITR 97).* That is to say, he must proceed without bias and give sufficient opportunity to the assessee to place his case before the Department. He must conduct himself in accordance with the principles of justice, equity and good conscious *(5 ITR 464 and 12 ITR 390; 12 ITR 485).* The assessing officer cannot rely on any evidence or any fact in arriving in his conclusion without first pointing out the same to the assessee and giving him a reasonable opportunity of meeting the case which is ultimately made out in the assessment order *(See 13 ITR 245/256; 94 ITR 692 and 713; 101 ITR 121; 102 ITR 366).* In the case of Dhakeswari Cotton Mills, where the principle of natural justice were violated, the Supreme Court set aside the assessment."

Useful reference may be made to the following cases, wherein the issue of operation of Principles of Natural Justice was considered.

The Supreme Court in *CIT vs. Electro House (1971) (82 ITR 284)* set aside the order of the Commissioner u/s. 263 as the Commissioner has not given a reasonable opportunity of being heard to the assessee. However, the Hon'ble Supreme Court held that the violation of Rule affected only the order and not the jurisdiction of the Commissioner and as such, it held that, the Commissioner could pass a fresh order after hearing the assessee.

Similarly, the Hon'ble Andhra Pradesh High Court in *Moh. Begum vs. CIT (1986) (158 ITR 662)* held that the order passed in violation of principles of natural justice, does not make the whole proceedings invalid ab initio, but it only affects the order passed in violation of these principles.

In *Raja vs. CIT (1984) (147 ITR 212 (Mad))*, the Hon'ble Madras High Court held that any order passed in violation of principles of natural justice is null and void. However, as long as the order so passed is not set aside by the competent Court or Authority, it will continue to operate.

The Hon'ble Supreme Court again in *Supt. Excise vs. Pratap Rai (1978) (114 ITR 231)* and *CIT vs. National Taj Theatres (1980) (121 ITR 535)* held that the order passed in violation of natural justice, though void, it does not affect the jurisdiction otherwise vested in such authority and in exercise of such authority, it can pass fresh orders. The Hon'ble Court also held that the limitation to pass the order within two years under section 263 would be applicable only for passing the original order and not for passing a fresh order in pursuance of the Appellate or other order setting aside the original order.

The Courts have held that the Assessing Officer need not hear the assessee before recording the reasons for re-opening the completed assessment and before initiating re-assessment proceedings. Similarly, it has been held that the Wealth Tax Officer need not hear the assessee before referring the matter for valuation to the Valuation officer u/s.16A of the Wealth-tax Act, 1957 (1982) (135 ITR 29). However, the Courts have held that the Valuation Officer must hear the assessee before he makes his valuation report (142 ITR 804, 149 ITR 65).

In *Kapurchand vs. CIT (1981) (131 ITR 451) (SC)* the facts were that the Commissioner had passed an order in violation of principles of natural justice. In such cases, the Hon'ble Supreme Court held that the Tribunal, while cancelling the order ought to have directed the Commissioner to pass a fresh order.

In *Ajanta Industries vs. CBDT (1976) (102 ITR 281)*, The Hon'ble Supreme Court set aside an order u/s.127 of the Income-tax Act, 1961 for transferring the case of the assessee, because the reasons recorded for his satisfaction were not conveyed to the assessee, and as such, such order was passed in violation of the principles of natural justice.

In *Briharilal vs. CIT (1981) (131 ITR 129)*, the Hon'ble Supreme Court held that a garnishee order passed without hearing the person against whom it is passed in the course of recovery proceedings, is void because the same had violated principles of natural justice.

The rules of natural justice were fully applied in case of exercise of jurisdiction of the Commissioner u/s. 273A for waiver or reduction of penalty, interest etc. The Commissioner must pass a speaking order while exercising his jurisdiction u/s. 273A, giving reasons for his answer and non speaking order is liable to be set aside (95 ITR 435, 114 ITR 834, 121 ITR 219, 121 ITR 224, 140 ITR 801, 154 ITR 438). Similarly, while passing the order, he should take into account all material facts and should not take into account facts which are not material (130 ITR 162, 138 ITR 77, 140 ITR 801).

In case of the authorities exercising jurisdiction to grant approval or exemption and the tax-payer has a right to claim it on fulfilment of the statutory condition, the tax-payer should be given a reasonable opportunity of being heard, and the authority is bound to pass a speaking order and give reasons in support of his finding that the tax-payer is not entitled to the approval or exemption *(Bharat Nidhi vs. Union of India (1973) 92 ITR 1)*. Similarly, the assessing, appellate and revisional authorities must pass speaking orders (164 ITR 253, 7 ITR 21 (FB), 97 ITR 235, 177 ITR 176, 169 ITR 84, 96 ITR 310, 142 ITR 778, 95 ITR 435).

## 11. EFFECT OF VIOLATION OF PRINCIPLES OF NATURAL JUSTICE

Normally any decision taken in violation of principles of natural justice would be void and not merely voidable. However, a minor deviation from the principles may be cured by remanding the case for fresh decision, after giving proper opportunity of being heard. It may also be added that order passed in violation of principles of natural justice makes the order and not the entire proceedings invalid. As such, the officer can restart the proceedings and complete them after giving an opportunity of being heard.

The Hon'ble Supreme Court in *Kapurhand vs. CIT (1981) (131 ITR 451)* held that violation of principles of natural justice would invalidate the order passed and does not affect the jurisdiction. Similar view was taken by the Hon'ble Supreme Court in *CIT vs. Electro House (1971) 82 ITR 824* in *Pratap Raj (114 ITR 231).* The Hon'ble A.P. High Court in *CIT vs. Borna Surana (1980) 124 ITR 328* held that the whole proceedings are not invalidated and only that action which is taken in contravention of the principles of natural justice would be invalidated and therefore from the stage, from where proceedings were in contravention of principles of natural justice, the proceedings can be resumed, after giving reasonable opportunity of being heard, provided that such completion is within the period of limitation.

An interesting question arose before the Orissa High Court in *CIT vs. Gangaram Chopotia & Co. reported in (1990) 53 Taxman 183.* In that case for the Asst. Years 1968-69 and 1969-70, the assessments of the assessee firm were completed on 16-7-1971 and on 26-10-1971 respectively. There was a mistake in interest calculation u/s. 139 and u/s. 215 and therefore the ITO rectified it u/s. 154 by an order dated 20-10-1975. On appeal the AAC set aside the order us/. 154 on the ground that the assessee was not given an opportunity of being heard. The issue before the court was as to whether the order was passed within the period of limitation u/s.154(7). The High Court held that the original order u/s. 154, being in contravention of principles of natural justice was void and it could not be called in aid to save the proceedings if they were otherwise time barred. Though, on principles, the Hon'ble Court was right in holding that, the order passed without giving an opportunity of being heard is void. The ultimate decision of facts is doubtful in view of the decision of the Supreme Court in *CIT vs. National Taj Theatres (1980) (121 ITR 525).*

## 12. RECENT DEVELOPMENT

Originally no doubt the principles of natural justice were applied to all spheres of administration. In between for a period of fifty years the courts tried to restrict the application of these principles only to judicial or quasi-judicial powers. But this restriction was formally rejected and the courts have now held that these principles are equally applicable to administrative exercise of powers. In fact, these principles are made applicable where an adjudication is to be made irrespective of the fact whether it is statutory state authority or otherwise. Now the scope of principles of natural justice is even extended to societies or clubs or other organisations while disqualifying a member of the society or the club. As stated above, courts are now trying to apply these principles even in case of exercise of delegated legislative powers. The courts have also restricted the power of the legislature to exclude the application of natural justice to any proceedings if the same violates the Fundamental Rights of citizens under Article 14 or 21 of the Constitution of India as the concept of due process of law is sought to be brought under the purview of Article 21 of the Constitution of India. As such the sphere to which the application of principles of natural justice is made applicable is ever expanding. It may not be too far away when these principles are made applicable even to the legislative action. Today, as it is laid down that as a principle, the principles would be applicable where one has to decide a particular issue which has a financial, legal or civil consequence in respect of a citizen of a company.

The principles of natural justice have really become universal. The Universal Declaration of Human Rights adopted by the General Assembly of United Nations in 1948 provides:

### ARTICLE 10

Everyone is entitled to full equality to a fair and public hearing by an independent and impartial Tribunal in the determination of his rights and obligations and any criminal charge against him.

The classic modern example of operation of principles of natural justice, is the case of A.R. Antulay. In that case, the Supreme Court itself had withdrew the case of Mr. Antulay, from the Session Court transfer it to High C99ourt for trial. However, the accused was not

formally heard, though his counsel was present at the time of the passing of the order. The Supreme Court quashed its own earlier order, as the same was passed without giving a proper opportunity of being heard to the accused.

## CONCLUSION

In the final analysis, the concept and contents of natural justice go on changing, because in essence they reflect the values of the society accepted for time being. The successful working of these principles depend on our sense of fairness. It will depend on our willingness to make fair play our creed and decency the hall mark of our administration.

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# STATUTORY LIMITATIONS AS GUIDE TO INTERPRETATION

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## 1. INTRODUCTION

1. The subject chosen is wide and infinite and volumes can be written on commentary. Instead of remaining in the realm of wilderness, I prefer to note down a few of the points especially in the context of the modern trend of interpretation as applied to some topical subjects of current interest. Textbooks and chapters are too many for giving a glossary of the citations. By and large, the basic principles of taxation are common to all. Therefore, the issues like interpretation of charging section, burden of proof, benefit of doubt, common parlance, etc., are issues well discussed under the laws both direct and indirect. Indeed, the judgments quoted particularly in Excise are applied to interpretation of sales tax laws and vice versa, No wonder therefore that a greater volume of binding precedents come from Excise but on account of its impact on sales tax laws are also published under the Sales Tax Journals. I therefore prefer to touch a few judgments and issues that are topical and of general practical utility.

2. There are separate papers for Central Sales Tax, Works Contract etc. I therefore do not wish to dwell at length on issues that may encroach on those field, though at times the subjects may over lap.

3. The first and basic principle of interpretation for Sales Tax Laws is to ensure that the subject of interpretation falls within the jurisdictional legislative competence whether of the State or subordinate authorities. The subject of taxation must comply with the basics. The law ABOUT TAX ON SALE derives its birth from entry 54 of List II to the Seventh Schedule of the Constitution. That speaks of legislative power to tax sales of goods except when they take place in interstate trade, the taxing of inter-state transactions is the prerogative of the Union under entry 92A of List I. The power to tax consignments that is transfer of goods from one State to another without there being a sale is reserved by the Union legislature. Therefore any legislation will be interpreted firstly to see that the subject of tax is within the structure built on these basic foundation stones. In other words the interpretation which will restrict the subject matter to remain within the Constitutional jurisdiction will be preferred as far as possible. Therefore if on clear language or facts of a case, an act, rule or legislative provision by interpretation of its clear terms, is found to tread upon the legislative Lakshman Rekha, the law or the executive action, which brings the action or law to be offending the fundamental postulates of the Constitution for sales tax law, the same will be invalid and will have to be declared as such. This is how some of the offending rules or regulations are “read down” by Courts. The theory of reading down is nothing but interpreting a provision apparently offending the Constitutional limitations, to mean not so offending by restricting the interpretation in such manner as can save the provision or act from being declared ultra vires.

## 2. ESSENTIALS OF SALE

4. There are two essential requisites of sales tax liability. One which requires notice is that the power to tax is to tax completed sales and not merely agreements. Therefore any measures by legislation or executive action to tax a transection which has not resulted in

completed sale will be without jurisdiction and illegal. The second and one which is often ignored is that the tax is restricted to sale of "Goods" whether material, tangible goods or otherwise acceptable as goods. The deemed sales is a different chapter for comments but the extended definition merely includes certain rights pertaining to goods to be taxed, It does not extend to transfer of conceptual rights and liabilities. The articles must be "goods" in the legally acceptable parlance. The Constitution Bench in Builders Association case in 73 STC 370 (SC) has in terms referred to this aspect. It held that even in works contract there must be transfer of "chattels" as a chattel. Therefore an article which is not goods cannot be taxed. The necessary concomitment of an article falling within the term "goods" is that the same should be marketable goods. I need not cite a long line of judgments, of the Apex Court which in terms state that the term "goods" must mean marketable goods, generally in the context of the Excise Law.

5. The Bombay High Court however did touch upon the subject of the goods being movable and marketable in case of *Gannon Dunkerley & Co. Ltd. vs. Union of India, 135 STC 168 (Bom)*. The question of marketability and movability came up before the Bombay High Court. Though the case is under Excise law, the ratio is applicable equally well to the sales tax legislation. The Court held:

"that the first petitioner-company was executing works contracts. It was permitted to function on a part of the land of the concerned party to carry out the processing of the various items of raw material submitted to it. This work was as per the specifications of the concerned party. The first petitioner-company was expected to execute that work. Thereafter, since the factory shed was to be set up in a particular part of the huge land of the concerned party, the first petitioner-company was required to move these items from one part of the land to the place where the factory was to be set up by engaging transporters. This all resulted in the factory shed being set up. Although under section 3 of the Central Excise Act, there is no concept of marketability, the Supreme Court has read into this section the element of marketability and movability of the items which are manufactured. In the instant case, all these requirements were absent. There was no free marketability and what was finally produced was embedded in the soil and lost the character of being excisable goods for the purpose of section 3 of the Act. Merely because the first petitioner-company paid the sales tax under the Maharashtra Sales Tax on the Transfer of Property in Goods involved in the Execution of Works Contracts (Re-enacted) Act, 1989 that itself could not lead to on inference that the goods became excisable."

6. It must therefore be noted that even under the Sales Tax Laws, whether they are normal sales or deemed sales, the marketability must also remain an essential requisite for an article to be taxed.

7. The Fiscal laws like Sales Tax, Income Tax and Excise enactments, have many aspects of jurisprudence in common. Rather the case law of one is referable to another and the judgment law is developed upon accepting citations under any of the three enactments for the other while considering interpretation of any term. The law laid down by Courts therefore in these fiscal cases of Excise and Income Tax etc, will apply with equal force to interpretation of sales tax legislation unless the subject is not common. It is therefore that the question whether the goods sold under Sales Tax Laws must be marketable or not has not been decided by Apex Court, as an issue of law with any precise discussion for guidance. What is stated for the term "goods" under the Excise law must be therefore applicable to sales tax laws. Indeed in the Tribunals, the question whether the item sought to be taxed is marketable or not is debated and adjudicated upon. Therefore the law that the Sales Tax will be levied on sale of articles, only if the said article is marketable, is now accepted construction of the legislative competence to tax such article under the respective sales tax enactment.

## 3. EXEMPTIONS

8. This is a vast subject affecting every dealer either as a vendor or purchaser and is subject of common litigation. As to how the provisions for exemption should be interpreted is now settled, for most of its facets and implications. A few of the judgments are quoted hereinafter as indicative of the trend but the judgments do not exhaust the field. I dwell on the parameters of exemption. The exemptions may be:

## 4. GENERAL EXEMPTION

9. General exemption is one in respect of goods or particular article in general, that is, where the sale or purchase of that article is free from sales tax whether sold or purchased and whether it is sold by a registered dealer or otherwise. The article so notified, is normally couched in general terms. such as cereals, pulses, milk, oil seeds etc. The Courts have interpreted such exemptions liberally, that means the class of goods will include the said goods in all its forms. For example, the Bombay High Court has stated in case of *New Nagpur Copra Industries vs. The State reported in 60 STC 380 (Bom):*

"If two interpretations are reasonably possible, the one in favour of the tax-payer should be accepted.

The petitioner was carrying on the business of manufacture of copra oil and copra powder. It prepared copra powder by the simple process of crushing desiccated copra, which process did not involve either addition of new substance or subtracting any ingredients resulting in any chemical change in the substance of copra or loss of its identity. The assessing authority held that copra powder was altogether a different substance than copra and as it was not included either in Schedule B or in the exempted category of goods mentioned in Schedule A of the Bombay Sales Tax Act, 1959, it was subject to tax at 5 plus 3 per cent under residuary entry 22 of Schedule E of the Act as it stood at the relevant time; i.e., before its amendment by Maharashtra Act No. 32 of 1981. On a writ petition:

Held, that in the preparation of copra powder there was neither any additive nor there was a significant change in ingredients of copra. Clear ratio of the various decisions of the Supreme Court was that unless the nature of the original substance changed the derivative substance should be taxed as the original substance in the absence of specific provision to the contrary. The tests of end use of the articles and so also of retaining of the form of the original articles were pushed in background by the Supreme Court in a series of decisions. Therefore copra as found in entry 6(viii) in Schedule B, Part II, of the Act would take within its ambit copra powder as the substance of copra by the simple process of crushing did not undergo any change of substantial character.

*Sri Lakshmi Coconut Industries vs. State of Karnataka [1980] 46 STC 404* followed.

*Tungabhadra Industries Ltd. vs. Commercial Tax Officer [1960] 11 STC 827 (SC), State of Gujarat vs. Sakarwala Brothers [1967] 19 STC 24 (SC), Commissioner of Sales Tax vs. Jaswant Singh Charan Singh [1967] 19 STC 469 (SC), State of Gujarat vs. Prakash Trading Co. [1972] 30 STC 348 (SC)* and *Alladi Venkateshwarlu vs. Government of Andhra Pradesh [1978] 41 STC 394 (SC)* applied. *State of Travancore-Cochin vs. Shanmugha Vilas Cashew-nuts Factory [1953] 4 STC 205 (SC)* distinguished."

10. Similarly, the Apex Court has recently held likewise in *Elgi Equipments vs. Assistant Commissioner of Commercial Taxes, 136 STC 215 (SC).* The Supreme Court for the purpose of interpretation started to find out whether the tariff entry makes distinction between coated and uncoated tubes, and laid down law:

"If a tariff item makes no difference between coated and uncoated goods then the mere process of coating would not amount to manufacture of some new commodity. Merely because some extra process is carried out on the product would not by itself mean that a new item has come into existence."

11. What is stated hereinabove applies to all cases where the item is generally described mostly representing a class of goods and not as an article; i. e., class of articles such as earthenware, metal ware, Fabrics, chinaware, articles of food, wearing apparels, garments and the like terms.

12. To give this proposition indications of some factors of limitations, I quote the judgment of the *Supreme Court in 124 STC 59 (SC), the case of ACC Ltd. vs. Collector of Customs.* It must be noted that in that case, under the Customs law any design is liable to custom duty because there is separate entry for designs itself, Secondly, the customs law makes no difference between marketable or non marketable goods, since whatever is imported even as personal effects will also be subject to duty. Therefore if an article is separately listed as a category, the same will be interpreted according to the tenor of that entry.

## 5. CONTEXTUAL LIMITATIONS

13. But whether a term used for an article is subject to narrow or liberal interpretation has to be decided also in tune with the context in which that term is used and the purposes for which it is made out. The Court also deals with the purpose for which the statute is enacted and interprets the terms used for a commodity in a restricted manner if so required by the purposes of the legislation and the objects for which the same legislation was enacted.

14. Thus in *Balram Kumawat vs. Union of India, 134 STC 626 (SC)* – Larger Bench Judgment, the Court has gone behind the meaning of the term in general understanding and has tried to find out the object of the statute and therefore gives to the term "ivory" the dictionary meaning which includes elephant ivory and mammoth ivory. The Court held that the commercial and technical meanings are required to be taken when it is necessary for the purpose of meeting requirement of the law. Since the Wild Life (Protection) Act, 1972, prohibits trading ivory it cannot mean elephant ivory alone but it includes all types of ivory. States the Court:

"The clause of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject-matter. Even in relation to a penal statute, any narrow and pedantic, literal or lexical construction is not always to be given effect. The rule of strict construction of a regulatory/penal statute may not be adhered to, if thereby the plain intention of Parliament to combat crimes of special nature would be defeated."

15. In *Commissioner of Customs vs. P.S. Ltd.. 125 STC 255 (SC),* the Subject was the meaning of the term "book" under the Customs Act. The Supreme Court held :- The contest was whether instruction in design, manuals, printed drawing, design and plans under an agreement of transfer of technology for the purpose of setting of a plan can be said to be printed books, the assessee contended that they amounted to 'manual', the material was imported in twenty three volumes contained pictorial drawing and design and forty six volumes, textual material." Now there are quite a number of apparently conflicting judgments but after considering several decision regarding "Book" the Court held that the imported volumes are taxable as "plans, drawings and designs" where the duty is 10% while printed books, printed manual, loosely forms with binder were duty free.

16. The judgment is illustrative on one point: that the decision under one Act will not necessarily apply to another fiscal legislation. If the terms plans, drawing and design which are specified as an entry in the Customs Schedule, were absent, perhaps the decision of the Court could have been the other way around. We compare this judgment also with the judgment of the *Apex Court in 124 STC 59 (SC) the case of Associated Cements Companies Ltd.,* both the judgments are interpretations of specific entries in a Customs Schedule in the context of the entries, its collocation and purpose and the specifications in the Schedules.

17. As far as the last word is concerned, one may read the latest Supreme Court Larger Bench judgment in case of Tata Consultany, (not reported till date of this writing). Going by the newspaper reports, it has in terms stated that the entries for taxing sales will not include personalised articles, non commercial goods which are not marketable. But commercial articles will be taxed.

## 6. EXEMPTIONS LIMITED

18. There is however a class of exemption with reference to sales. Exemption by sales fall again in different classifications, such as sales by specific dealer or class of persons, The general qualifications may be by description in those notifications or by terms of qualifications. For example, all dealers having turnover not exceeding five lakhs will be exempt. In that case all dealers, whether dealing the taxable goods or tax free goods, whether selling to other dealers or consumers, will be free of tax.

## 7. QUALIFIED EXEMPTIONS

19. Where a qualification is prescribed by law, that qualification has to be strictly construed. Therefore where a turnover is prescribed as an outer limit for exemption of the dealer or the maximum turnover of particular goods is specified for exemption, even if turnover exceeds by one rupee, the dealer will immediately be liable to pay tax. Some enactments give deduction for the first turnover of such basic prescribed limit, some may not. But the point is that such qualifications are absolute and courts will not be justified in releasing a dealer from liability if the turnover exceeds by say ten rupees, only on the ground that the turnover has exceeded by a minimal amount though such a factor may be consideration for penalties. There is no marginal relief. Such provisions are part of charging provisions of a fiscal enactment and therefore no equitable construction can be given.

## 8. EXEMPTIONS BASED ON QUALIFICATIONS OF CLASS OF DEALERS

There are exemptions given qua dealers in general, such as, for example, small scale industries, charitable institutions and the like, The terms also may include the qualifying circumstances of the dealer being located in a backward area of the State and established in that remote area. Number of judgments have by now cropped up but the general consensus is that the approach to such exemptions as regards their qualifying circumstances, tenure and like aspects must be liberal. But in all such cases, the terms of the exemption will be interpreted as directory or mandatory only upon consideration of the intention rather the purpose of such provisions. Let us see what the position is if the subject of exemption for sales tax on resale is that the person who sells the goods must have purchased the goods from other registered dealer or where the exemption for tax is restricted to a sale on the purchasing dealer giving certain prescribed declaration. Normally in case of claim for exemption on resale, this is done by providing that the preceding seller certifies in the prescribed manner that he has paid tax or will pay tax or that he is registered dealer. Such a situation is normally under system of taxation which is single point system. In all such cases, the approach of the Courts is liberal. Firstly, in the single point levy it is not necessary to prove that the earlier selling dealer has paid the tax or not. Secondly, the single point system of tax should not be frustrated simply because a declaration in the prescribed form, has not been furnished by the preceding selling dealer. The purpose of such qualifications is to locate the seller. Therefore if a dealer can prove by any other evidence that he has purchased the goods, from a dealer who was a registered dealer, then merely because no declarations are issued by the selling dealer, the resale claim of the selling dealer will not be frustrated.

21. However a provision by which exemption or other benefits are provided by the Government in exercise of its statutory power, normally have some purpose and policy decision behind it – Such purpose is not to be defeated nor those who may be entitled for it are to be deprived by interpreting the notification which may give it some meaning other than what is clearly and plainly flowing from the terms of the grant. Thus, an exemption from

tax on sale to the purchasing dealer being qualified as a particular document holder and restricted to the purchaser giving declarations in the prescribed from, giving *inter alia* certain undertakings, stands on a different consideration. The terms may include the buyer holding a licence, permit, recognition or registration and also upon the buyer giving declarations in the prescribed form with certain undertakings. Therefore in such cases, the interpretation is that the seller must obtain the declaration in the prescribed form to avail of the exemption on sales. In the wake of VAT in the offing, this topic assumes importance and hence I have selected to deal the same with some emphasis and details. I consider some of the controversial judgments:-

22. Jute Mfg. case and New Prahlad Mills case, are cases in that category of the declaration of buyer being mandatory to avail of exemption, Both the cases relate to sales to a licensed holder and upon such dealer giving declaration or undertaking in the prescribed from. These judgments have no application to resale deduction such as, for example. deduction under section 8 of the Bombay Sales Tax Act, where the exemption is for resale of goods purchased from registered dealer but where the selling dealer giving prescribed certificate is considered necessary and therefore form is prescribed. I treat this aspect in some details since such issues are common in most of the sales tax laws.

ii) Firstly the case of *35 STC 352 (Bom): New Prahlad Mills vs. State of Maharashtra*, relates to exemption of payment of sales tax for sales made to licensed dealer upon the licence holding buyer furnishing prescribed undertaking for resale of the goods so purchased in the State in Form K signed by persons nominated in the licence. The Court has held that the terms of the declaration in the prescribed form to be signed by persons authorized to sign is a necessary condition for claiming exemption of sales tax in the hands of the seller. That fact is clear if the provision quoted at page 353 of the report, is read. The relevant clauses are at page 354. The mandate to the purchaser is that he has to furnish declaration to be signed by person nominated by him. The nomination column of the licence is required to be filled in as the same is appendix to the licence. This license was like a driving licence to be carried by the purchaser with him while making purchases. Therefore clause 8 provided mandate that the licensed purchaser must produce the licence before the vendors. The vendor was therefore supposed to inspect the licence and see the name and verify the signature of the person nominated signing the declaration and then sell the goods. These documents are given to qualifying persons, that is persons who have standing or who furnish security. Further the grant is also subject to certain conditions as specified in the specific clauses, The Court has noticed at page 355 the nature of declaration in case of Kedarnath case *(28 STC 672)*. The form of nomination and declaration referred to there are similar to the licence under the Bombay Sales Tax Act. It is not only a prescribed form but declaration form has to be obtained from the prescribed authority; in the same manner as one has to obtain form “C” and submit. Therefore, when the purchasing dealer does not furnish to the selling dealer declarations or undertaking in forms obtained from his sales tax officer, any other evidence can hardly be permitted. Therefore the observations of the Supreme Court in Kedarnath have to be taken in the light of the provisions dealt with by the Court.

(iii) The Bombay High Court dealing with the case of form “K” were dealing with identical case where the licence provided for nomination and the licence was required to be carried and shown to the selling dealer. However when it comes to exemption claimed for resale of goods purchased from registered dealer, giving prescribed certificate, there is no such requirement of registration certificate to be carried along with the dealer, which on the contrary is normally required to be displayed in the dealer’s place of business. Registration cannot be carried out of the registered place of business, unlike a licence, nor does the registration form give any information as to who are the partners, employees or persons appointed as manager or persons who

would sign any declarations under the Act. Therefore as far as the sale invoices issued by the selling dealer to a purchaser claiming resale exemption is concerned, the buyer claiming exemption on resale of goods purchased from a registered dealer, has no idea as to who is to sign a declaration or certificate on behalf of the seller nor is there any machinery provided for the buying dealer to find out the names of the persons much less the manner of signing. Therefore these facts cannot have binding effect on a third party, that is buyer claiming resale, who cannot be presumed to be aware of the contents of such documents of nomination for signature or the identity of the persons signing a certificate or declaration.

(iv) The same case of Kedarnath has been referred to and distinguished by the Bombay High Court and other Courts. For example, in *Commissioner of Sales Tax vs. Paper & Pulp Conversion Ltd., 41 STC 64 (Bom),* the Court adopts the same reasoning and distinguishing factors for claiming set off to be available and the prescribed terms thereto,

(v) Having pointed out that Kedarnath stands on a different footing of declarations supplied by the Sales Tax Department to be produced by the claimant, I refer to the earliest Supreme Court Judgment in case of *State of Orissa vs. Tulloch & Co; reported in 15 STC 641.(SC).* The particular provisions are reproduced at pages 642-643 of the report. The provisions are in respect of exemptions on sales but fit in case of resales out of purchases made from registered dealers. At page 643, last para, the Court states:

"It is plain from the terms of section 5(2)(a)(ii) that a selling dealer is entitled to a deduction in respect of the sales to a registered dealer of goods, if the goods are specified in the purchasing dealer's certificate of registration as being intended for resale by him in Orissa "..." and for that purpose it has chosen the exclusive method of proving the fact before a Sales Tax Officer. He further urges that no other method of proving that fact is permissible. Rule 27(2) is mandatory and if there is breach of it the selling dealer is not entitled to the deduction. The learned counsel for the respondent, on the other hand contends that rule 27(2) is directory. He points out that the word "shall" should be read as "may", in the context..... In our opinion, the rule 27(2) must be reconciled with the section and the rule can be reconciled by treating as directory. But if he is satisfied from other facts on the record, it is not necessary that the selling dealer should produce declaration in the form required by rule 27(2) before being entitled to a deduction.

....The High Court is correct in holding that the production of declaration under rule 27(2) is not always obligatory on the part of a selling dealer when claiming the exemption. It is open to him to claim the exemption by adducing other evidence so as to bring the transaction within the scope of section 5(2)(a)(ii) of the Act. In this case the Sales Tax Officer was satisfied by a mere statement of the dealer and it has not been shown that in fact the registration certificate of the buying dealer, M/s. S. Lal & Co; did not contain the statement that the goods were intended for resale by him in Orissa."

(vi) The Supreme Court in tune with the Tulloch case, has stated in case of *Gopiram Bhagwandas vs. State of Bihar reported in 28 STC 322(SC)* that :- @ page 324, last para:

"So long as the sales were to dealers who were registered under the relevant sales tax laws, and who had supplied declarations to the assessee in respect of the sales, the duty which was cast on the assessee, had been *prima facie* performed..... "

(vii) There are similar observations and reasoning in other Bombay High Court cases clarifying the parameters of claim for exemption of tax on resale on the dealer from

whom the goods were purchased, giving declaration, The same are *48 STC 207 (Bom); Suresh Trading Co. vs. The State of Maharashtra.* Confirmed by Supreme Court in *109 STC 439 (SC) State of Maharashtra vs. Suresh Trading Co:* It may be noted that the Courts have stated in terms that retrospective cancellation of a registered dealer does not affect the third parties who have dealt with such registered dealer on the basis of such dealer being a registered dealer at the time of the transaction. The retrospective cancellation is by the State and is a matter between the State and the Registered dealer whose registration is cancelled retrospectively, It may bind the parties to such order or action, that is the registered dealer whose RC is cancelled and the State and will not affect third party. The trading community in general are not affected. Therefore a retrospective cancellation may bind the dealer whose RC is canceled but will not affect the right of third parties who are not party to the action or order.

(viii) The Supreme Court has explained the nature of the provision regarding furnishing of a declaration to be directory in *Mangalore Chemical & Fertilizers Ltd. vs. Dy. Commr. of Commercial Taxes* reported in *83 STC 234 (SC).* The oft-quoted judgment of Kedarnath is dealt with in paragraph 10 and 11 at page 243-3. Supreme Court has dealt at length on the controversy about the jurisprudence of a provision being mandatory or directory provision of a statute and has dealt with the reliance of the Revenue on Kedarnath in paragraphs 10 and 11. Ultimately the Supreme Court at page 244 holds by quoting Lord Denning as follows:- "Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on a technicality and this is a technicality" *(See Wells vs. Minister of Housing and Local Government [1967] 1 WLR 1000 at 1007).* Francis Bennion in his Statutory Interpretation, 1984 edition, says at page 683 :

"Unnecessary technicality: Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the legislation."

(ix) As regards exemption, the Court recommends that liberal construction is required. I need not verbatim repeat it, but the Court has stated that "it must however be borne in mind that absurd results of construction should be avoided." The entire philosophy of strict and liberal construction is culled out on the same pages.

(x) There are many such cases following the principles enunciated by the Court as hereinbefore stated.

## 9. LEGISLATION REGARDING INDUSTRIES AND PARTICULARLY INDUSTRIES ESTABLISHED IN BACKWARD AREAS

23. THIS SUBJECT ASSUMES IMPORTANCE in view of the new crop of litigation now coming up in respect of the various aspects of such industries requiring judicial review. Therefore there is special consideration for industries established in backward areas while disposing of the disputes regarding executive actions in regard to administration of law and regulations to industries established in backward areas. The consensus is that the provisions of regulations and laws concerning the subject matter should be liberally construed in favour of the manufacturing unit, especially since the regulations, concessions and notifications, all aim to encourage establishment, maintenance and development of industries in the area. An enactment will be interpreted to give benefit to a citizen, even if the codified law does not permit within the parameters of the letters of law such a beneficial interpretation, I may cite the classic example of the case of *Printers (Mysore) Ltd. vs. ACTO;* and *Indian Newspapers Society vs. State of Karnataka reported in (1994) 93 STC 95 (SC).* I find that this is a landmark judgment in that the same term in the same sentence used at different places is interpreted differently. Says the Court at page 105 and 106:–

"Now coming back to the amendment of the definition of "goods" in section 2(d) of the Central Sales Tax Act, the said amendment, brought in with a view to bring the said definition in accord with the amendments brought in by the Constitution (Sixth Amendment) Act (referred to hereinbefore) was actuated by the very same concern; viz., to exempt the sale of newspapers from the levy of Central Sales Tax. The amendment was not intended to create a burden which was not there but to remove the burden, if any already existing on the newspapers – a policy evidenced by the enactment of the Taxes on Newspapers (Sales and Advertisements) Repeal Act, 1951. This concern must have to be borne in mind while understanding and interpreting the expression "goods" occurring in second half of section 8(3)(b). Now, the expression "goods" occurs on four occasions in section 8(3)(b). On the first three occasions, there is no doubt, it has to be understood in the sense it is defined in clause (d) of section 2. Indeed, in the first half of section 8(3)(b); i.e., on first three occasions. It is only when section 8(3)(b) uses the expression "goods" in the second half of the clause; i.e., on the fourth occasion that it does not and cannot be understood in the sense it is defined in section 2(d). In other words, the "goods" referred in the first half of clause (b) in section 8(3) refers to what may generally be referred to as raw material (in cases where they were purchased by a dealer for use in the manufacture of goods for sale) while the said word "goods" occurring for the fourth time (i.e., in the latter half) cannot obviously refer to raw material. It refers to manufactured "goods"; i.e., goods manufactured by such purchasing dealer – in this case, newspapers. If we attach the defined meaning to "goods" in the second half of section 8(3)(b), it would place the newspapers in a more unfavourable position than they were prior to the amendment of the definition in section 2(d). It should also be remembered that section 2 which defines certain expressions occurring in the Act opens with the words "in this Act, unless the context otherwise requires". This shows that wherever the word "goods" occurs in the enactment, it is not mandatory that one should mechanically attribute to the said expression the meaning assigned to it in clause (d). Ordinarily, that is so. But where the context does not permit or where the context requires otherwise, the meaning assigned to it in the said definition need not be applied. If we keep the above consideration in mind, it would be evident that the expression "goods" occurring in the second half of the section 8(3)(b) cannot be taken to exclude newspapers from its purview. The context does not permit it. It could never have been included by Parliament. Before the said amendment, the position was: the State could not levy tax on intra-State sale of newspapers; the Parliament could but it did not and entry 92-A of List I bars the Parliament from imposing tax on inter-state sale of newspapers; as a result of the above provisions, while the newspapers were not paying any tax on their sale, they were enjoying the benefit of section 8(3)(b) read with section 8(1)(b) and paying tax only at 4 per cent on non-declared goods which they required for printing and publishing newspapers. Their position could not be worse after the amendment which would be the case if we accept the contention of the revenue. If the contention of the revenue is accepted, the newspapers would now become liable to pay tax at 10 per cent on non-declared goods as prescribed in section 8(2). This would be the necessary consequence of the acceptance of revenue's submission inasmuch as the newspapers would be deprived of the benefit of section 8(3)(b) read with section 8(1)(b). We do not think that such was the intention behind the amendment of definition of the expression "goods" by the 1958 (Amendment) Act. Even apart from the opening words in section 2 referred to above, it is well-settled that where the context does not permit or where it would lead to absurd or unintended result, the definition of an expression need not be mechanically applied. *[Vide Kanniyan vs. Income Tax Officer [1968] 68 ITR 244 (SC; [1968] 2 SCR 103, Pushpa Devi vs. Milkhi Ram (dead) by his L.Rs. (1990) 2 SCC 134 at 140, para 14]* and *Commissioner of Income-tax vs. J.H. Gotla [1985] 156 ITR 323 (SC); (1985) 4 SCC 343."*

24. In the above case the Supreme Court has sought to find out the legislative intent, the legislative history and the object of the amendment and saved an industry from being deprived of the benefits of concessional purchase of raw materials under declarations which can be given only by a person who is a dealer and so registered. The Courts in anxiety to give benefits to an Industry may at times treat the limitation laid down by rules and the definition as merely directory. Next illustration is the case in the High Court of Gujarat. In the case of *State of Gujarat vs. Wood Polymers Ltd. reported in 50 STC 229*, the Court had a similar occasion. This was a case of giving benefit of set off to a new industry. The law provided "sale" to mean A SALE THAT IS WITHIN the state. Therefore set off was granted in terms of the Rules only for purchases of raw materials made if the sales of goods manufactured out of such materials, took place within the State. This was a statutory rule. The Court found that the industry will not get effective benefit of the grant of encouragement to the industry by way of set off of tax paid on purchase if the word "sale" has to be restricted to mean sale as defined by section 2 of the Sales Tax Act, to be a sale within the State of Gujarat. The Court therefore went out of the way to interpret the term "sale" and stated that whatever be the statutory provision, if the purpose is to give benefit to a newly established industry, that purpose has to be effectively given. The Court held that though the term "sale" would normally mean sale within the State, in the context of the fact that the law is made for benefit to backward area industries, the same would require to be interpreted as including sale outside the State. The Court at page 229 head note held as follows:-

> "In construing the expression used by the legislature" in manufacture of goods for sale" employed in the main enactment of rule 42-A of the Gujarat Sales Tax Rules, 1970, the context, the collocation and the objects of the rule have to be looked at and the meaning intended to be conveyed by the use of that expression, has to be interpreted, having overall consideration of the entire subject of set-off, and particularly set-off to a dealer establishing a new industry. So read, there is sufficient justification and warrant for departing from the legislative dictionary meaning of the term "sale", as defined to mean "sale of goods made within the State" in section 2(28) of the Gujarat Sales Tax Act, 1969, in interpreting the expression "used in manufacture of goods for sale" in rule 42-A of the Rules. Therefore, a recognized manufacturing dealer, who established a new industry, is entitled to set-off under rule 42-A of the Rules of the amount of tax paid in respect of purchases of raw materials used by him in the manufacture of goods which have been sold outside the State and purchase tax under section 15 and penalty under section 45(6) of the Act cannot be levied."

## 10. RULES DIRECTORY

25. The Supreme Court in another case of a backward industry reported in *83 STC 234, (SC);* i.e., *Mangalore Chemicals & Fertilizers Ltd. vs. DCCT* was confronted with case of new industries where the rules provided that till the permission was granted, the benefit will not be available even though the industry was eligible under the notifications. The Court at page 236, held as follows :-

> (ii) that the provisions of clause 3 and 5 of the 1975 notification were not imparted with matters of policy and were not therefore mandatory in character. The main exemption was under the 1969 notification. The subsequent notification of 1975 which contained the condition of prior permission clearly envisaged a procedure to give effect to the exemption. There was here only a pure technicality. Clause 3 of the notification left no discretion to the Deputy Commissioner to refuse the permission if the conditions were satisfied. The words used were to the effect that he "will grant". There was no disentitling circumstance which would justify refusal of permission. The appellant did not have permission because it was withheld

by the department without any justification. A permission of this nature was a technical requirement and could be issued making it operative from the time it was applied for.

The Supreme Court, accordingly, directed the Deputy Commissioner of Sales Tax (Administration) to grant the permission for three years operative from the dates of applications. The Court further directed that the permission shall entitle the appellant to adjustment of the refunds against the taxes due for the respective years.

By the COURT : (i) A distinction between the provisions of the statute which are of substantive character and were built in with certain specific objectives of policy on the one hand and those which are merely procedural and technical in their nature on the other must be kept clearly distinguished. It will thus be clear that the procedural Rules and provisions of technical requirements are subordinate to the substantive provision of the Act and if the object of the substantive provisions is frustrated, the subordinate rules and regulations can be ignored or treated as directory.

## 11. BENEFICIAL INTERPRETATION

26. Similarly in case of *Commissioner of Sales Tax vs. Industrial Coal Enterprises (SC)*, reported in *114 STC 365 (SC)*, the Supreme Court has considered the interpretation of provisions meant for and subject of grant of benefits to a backward area industry and has interpreted the terms of law beneficially. The benefit of exemption to sales was given to a SSI unit, only if its investment was not exceeding Rs.3 lakhs. The industry which was within the term of a SSI when established in that case, had to change its place of business, make some additional investments in the buildings etc. with the result that the capital investment increased and went beyond Rs 3 lakhs. The question was whether a running industry is disentitled to the benefit of exemption simply because it was disentitled on the ground of the capital investment going beyond Rs. 3 lakhs. The Supreme Court took a pragmatic view and stated that an approach to such provision should be liberal and it held as follows, as reported at page 366 of 114 STC as :-

> "The authorities took the view that the capital investment having increased to over Rs. 3 lakhs, registration under the Factories Act, 1948 was necessary, but since this was effective only from August 11, 1989, the four-year exemption period had meanwhile expired. The respondent filed a review petition which was dismissed. On a writ petition, the High Court directed the authorities to grant exemption for a period of four years from August 9, 1985. On appeal by State to the Supreme Court :
>
> Held, dismissing the appeal, that admittedly the respondent fulfilled the relevant conditions at the time when it applied for exemption as its capital investment did not exceed Rs. 3 lakhs. Under the notification dated January 29, 1985, the period of exemption in the case of units with capital investment not exceeding Rs. 3 lakhs was four years. Such period was to be reckoned from the date of first sale. Neither the section nor the notification contained any condition that if the capital investment of the unit exceeded Rs. 3 lakhs after the grant of exemption, such exemption would cease to operate unless and until the conditions prescribed for units having capital investment exceeding Rs.3 lakhs were fulfilled. In the absence of such express provision the exemption granted to the respondent from August 9, 1985 when it fulfilled all the prescribed conditions would not cease to operate just because the capital investment exceeded the limit of Rs. 3 lakhs on account of the respondent becoming the owner of the land and building to which the unit was shifted. The shifting only made it much more convenient and easier for the respondent to carry on the production of the goods undisturbed by the vagaries of the lessor and without any necessity to spend a part of its income on rent. No *mala fide* were pleaded on the

part of the respondent in obtaining exemption in the first instance as a unit with a capital investment below Rs.3 lakhs and increasing the capital investment subsequently to an amount exceeding Rs.3 lakhs with a view to defeat the provisions of any of the relevant statutes.

A provision granting incentive for promoting economic growth and development in taxing statutes should be liberally construed and restriction placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision. The object of granting exemption from payment of sales tax has always been for encouraging capital investment and establishment of industrial units for the purpose of increasing production of goods and promoting the development of industry in the State."

27. The Court has therefore kept in mind the guiding principle that the objects of an exemption should not be frustrated by a language or expression which may defeat the purpose. In fact to aid an industry, anything beneficial as a consequence of the exemption that has to be done, can be done, unless such action is prohibited specifically by that law.

28. An exemption granted has to be interpreted in a manner that it gives full and liberal benefits. *122 ELT 327 (SC): Collector of Central Excise vs. Himalayan Co-op. Milk Products Union Ltd.* is a case where the Apex Court directs exemption to be given full play. What is stated by the Supreme Court at page 366 is elaborated at page 372 in the following terms :-

'"6. Admittedly the provisions for exemption from sales tax have been introduced in the Act for the purpose of increasing the production of goods and for promoting the development of industries in the State. In fact, when the scheme called "Grant of Sales Tax Exemption Scheme, 1982 to industrial units under section 4-A of the Sales Tax Act" was originally framed, it was expressly stated that the Government granted the facility of exemption in order to encourage the capital investment and establishment of industrial units in the State. The scheme contained various rules for grant of such exemption. The section itself has referred to the purpose for which the Government could grant such exemption. Sub-section (1) of section 4-A prescribes the maximum period for which the exemption could be granted as 7 years. As per the section, such exemption should commence from the date of first sale by such manufacturer if such sales takes place within six months from the date of starting production and in any other case from the date following the expiration of six months from the date of starting production. The expression "date of starting production" has been defined in the Explanation as the date on which any raw material required for use in the manufacture or packing of the goods is purchased for the first time. The term "new unit" used in the section has also been defined in the Explanation. It is admitted that the respondent fulfilled the relevant conditions at the time when it applied for exemption, as its capital investment did not exceed Rs.3 lakhs. Under the notification extracted earlier, the period of exemption in case of unit with capital investment not exceeding Rs. 3 lakhs was four years. Such period was to be reckoned from the date of first sale if such sale took place not later than six months from the date of starting production and in other cases from the date following the expiration of six months from the date of starting production subject to the condition that the unit had not discontinued production of such goods for a period exceeding six months at a stretch in any assessment year. Neither the section nor the notification contains any condition that if the capital investment of the unit exceeds Rs. 3 lakhs after the grant of exemption, such exemption would cease to operate unless and until the conditions prescribed for units having capital investment exceeding Rs.3 lakhs are fulfilled. In the absence of such express provision there is no warrant for the stand taken by the appellant that after July 23, 1986 the unit was not entitled to the benefit of exemption as its capital investment exceeded Rs. 3 lakhs from such date.

29. But unless the legislative intent is frustrated, the Court may also allow full play to the literal letters of law. This case is another case in contradistinction to the case law. But the distinction has to be borne in mind, The exemption is based on statutory definition and in terms of language of statutory definition. Thus *Commercial Taxes Officer vs. Meera Granite Pvt. Ltd., 127 STC 586 (Raj)* is a case of a backward area unit. It is an interesting case revolving around the interpretation whether cutting of marbles amounts to manufacture. The sole question is whether the unit eligibility certificate for the sales tax exemption is valid in the context of the fact that the activity did not amount to manufacture under the Rajasthan Sales Tax Act. Now it is true that the term manufacture also included processing but it is held that the processing means to bring into existence a new commercial article so as to come within the definition of the term manufacture used in the Sales Tax Act. The Court has relied strictly on the sales tax law. It appears that in this case the exemption is given under the sales tax law in terms of the Sales tax law and not by a separate legislation or notification. Nor was there any indication or assurance that the process of cutting will be considered as a process eligible for grant of eligibility for exemption. The cases where the industry is set up based on certain representations of the State stand on a different footing and are dealt with separately.

## 12. STAGE WISE STRICT AND LIBERAL INTERPRETATION

30. The Supreme Court in case of *83 STC 234, (SC);* i.e., *Mangalore Chemicals & Fertilizers Ltd. vs. DCCT* has held as follows:

(ii) The choice between a strict and a liberal interpretation arises only in the case of doubt in regard to the intention of the Legislature manifest in the statutory language. Indeed, the need to resort to any interpretative process arises only when the meaning is not manifest on the plain words of the statute. If the words are plain and clear and directly convey the meaning, there is no need for any interpretation; and

(iii) liberal and strict construction of an exemption provision are, as stated in *Union of India vs. Wood Papers Ltd. [1991] 83 STC 251 (SC)* infra, to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in the nature of exception is to be construed strictly and against the subject. But once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction."

## 13. INTERPRETATION OF PROVISIONS ABOUT LIMITATION

31. Limitation is generally a matter of procedure and has to be construed favourably if the circumstances so demand. The Courts have always held that the provisions for limitation for filing appeal is procedural. Therefore, if there is unintended delay, that limit should not come as a bar to justice and can be extended in suitable cases. Now this is a provision in almost all situations in law, civil law as well as taxation law. At the earliest, the Apex Court had occasion to deal with such situation and held: "where no negligence nor in action or want of bona fide can be implied to the appellant, a liberal construction of the provision has to be made in order to advance substantial justice" This is in case of *Shakuntala Devi AIR 1969 SC 575.* It is a judgment of larger bench of 3 Judges and therefore gains importance and is a basis for liberal approach wherever limitation is concerned.

32. The Supreme Court had occasion to consider the case of a similar situation, in case of *Collector, Land Acquisition, vs. Mst. Khatiji and Ors. 66 STC 228 (SC).* This also is a case of limitation and an action taken beyond the period of limitation. States the Court: "When substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have a vested right in injustice being done because of a non-deliberate delay."

## 14. BACKWARD AREA UNIT PERIOD EXPIRED

33. What happens if the statutory limitation period for grant of benefits to a backward area industry is already expired at the time the Bombay High Court interpreted the terms of the grant of benefits favourably to an Industry in backward area?, The interpretation of provisions of a set off were beneficially construed by the Bombay High Court in case of *Multifilms Plastic P. Ltd. vs. SICOM reported in 105 STC 458* as against interpretation of the letter of law by the revenue. Here also was a case of relief under Writ against wrong orders, but by the time the Court ordered the relief the prescribed period for eligibility had long expired. The question was as to how to give the benefit granted under the Court order, to be made effective. The Court interpreted the construction of the provisions liberally and favourably in favour of the industry. But the question was, what can be done. The scheme had long expired and there was no provision in that law to extend the date after the scheme had long expired. The Court held as follows at page 464 :

> "Though by reason of wrongful attitude adopted by the first respondent, the period of benefit which the petitioners were entitled to avail of has been curtailed, and Mr. Joshi has submitted that for the balance amount of Rs. 10,77,220 (Rs. 54,62,100 minus Rs. 43,84,800) the first petitioner is still entitled to avail of the benefit and that the respondents should be directed to permit the first petitioner to avail of the said benefit under the 1979 Package Scheme during the current year by making adjustments in sales tax liability of the first petitioner, it is not possible to accede to the request made by Mr. Joshi as the said eligibility certificate dated 16th March, 1984 was issued having the validity for the period from 19th March, 1984 to 18th March, 1991. However, since the petitioner is made to suffer the loss of the benefit due to wrongful and illegal action on the part of the first respondent, it would be just and fair if the first respondent, by adopting such modality as permissive in law, allows the benefit up to the sum of Rs.10,77,220 to the petitioner in the current sales tax assessment.

## 15. PROMISSORY ESTOPPEL

34. The issue of Promissory estoppel arises in many ways under sales tax law. It may be by way of written assurance, or by interpretation or by circulars. It is now crystallized law that the benefits under such decisions has to go to the dealer if the industry is established on the basis of representation that a particular process amounts to manufacture, the Supreme Court has held that notwithstanding that the process may not amount to manufacture, the State must give the concession granted to the industry in terms of grant of such benefits under the backward area industries incentives.

35. Circumstances in the case of *Tata Iron & Steel Co. Ltd. vs. State of Jharkhand 137 STC 93 (SC).* may be noted. The controversy evolves around the issue whether cold rolled to hot rolled conversion of iron and steel amounts to manufacture. The Supreme Court has held that an Industrial policy can go beyond the codified Sales Tax Law of the State if according to the policy decision the directorate of industry granted the approval for an Industrial Unit regarding cold rolling mills. It cannot be argued later on that cold rolled products and hot rolled products are both under the same entry and therefore there was no process and therefore the unit was not entitled to exemption under the industrial policy. Even though under the Sales Tax Law both may be two commodities as in the same entry that could not *ipso facto* make interpretation that the commodities are same. The Supreme Court stated that: at page 103. Para 22:–

> "But in this case, we should notice the decision to establish an industrial unit was initiated by the appellant as far back as in the year 1997. Based on a promise made in the industrial policy of the State of Bihar, at every stage the appellants tried to verify and confirm whether they are entitled to the benefit of exemption or not and they were assured of that exemption. It is based on these assurances that the appellant is to the tune of Rs. 2,000 crores but the State says it may be to the tune of Rs. 1,400 crores. Whatever may be the figure, the fact still remains that the appellants have

invested huge sums of money in installing its new industrial unit. At every stage of the construction, progress and installation of the machineries, the concerned Government/authorities were informed and at no point of time it was suspected that the new unit was going to manufacture HRM. The process of manufacturing HRM and CRM as could be seen from the experts' opinion are totally different and the material on record also shows that the plant design for a new unit is for the purpose of manufacturing CRM. These factors coupled with the fact that at no stage of the proceedings which culminated in the judgment of the High Court, the respondent-State had questioned this fact except for the technical ground taken by the Joint Commissioner which is found to be erroneous, we find ends of justice would not be served by remanding the matter for further inquiry."

It will at once be seen that a representation made however unpalatable or wrong, has to be fulfilled. To the same effect is another judgment of the *Supreme Court in State of Punjab vs. Nestle India Ltd., 136 STC 34 (SC).* The case is a final topping up for the principle of estoppel but has much better relevance to industry established under one or the other promise of the State, Granting a state has power to exempt certain sales, any announcement pertaining to tax on particular item will amount to estoppel. Even if such a promise is not implemented by a Notification, no tax can be levied upon the dealers who have acted upon relying on such representation. The Government cannot rely on such representation but a citizen may rely and compel the Government to act on such a representation. It has relevance in that almost all the States do have package scheme of incentive and in a number of cases the States are trying to wiggle out of the promises later on. The Industrial policy is amended at times retrospectively and the incentives to backward area units are being curtailed in one or the other manner. I do not quote the extracts but the full judgment requires to be read.

## 16. CIRCULARS AND ITS EFFECTS

36. It may be noted that circulars are now stated to be binding the department as a matter of interpretation of law even if the circular holds something contrary to the law. The power of the Commissioner goes beyond what is contemplated by enactment. But whether the power is a beneficial use or misuse, the action taken, granted or circulars issued will be binding. Under the law as it stands, the executive authority is that of the Commissioner. He has all the powers, for carrying out the purposes of the Act. Now the purpose of the sales tax administration in granting certain exemptions is to encourage industries to be established. The Commissioner can interpret a provision, grant concession, create new concessions by executive action of trade circulars, generally giving such relief in keeping with the objects of the law and in keeping with the purposes of the law especially where the law is silent for such situations. A classical case is *122 STC 100 CST, UP vs. Indra Industries (SC).* This again is a decision of larger Bench of the Supreme Court. The entire law about circulars is restated. The head note states as follows:-

"A circular by the sales tax authorities is not binding on the Courts. It is not binding on the assessee. However, the interpretation that is thereby placed by the taxing authority on the law is binding on that taxing authority. In other words, the taxing authority cannot be heard to advance an argument that is contrary to that interpretation.

The respondent, a manufacturer of dal, had obtained an eligibility certificate under section 4-A of the U.P. Sales Tax Act, 1948, for four years. Penalty was sought to be imposed on the respondent on the ground that the respondent had effected sales through commission agents. The High Court set aside the order imposing penalty, relying on a circular dated January 19, 1991, issued by the Commissioner of Sales Tax, which stated that such sales were also to be included in the turnover for the

purposes of exemption under that section. The department preferred appeals to the Supreme Court and contended that the circular was contrary to the law.

Held accordingly, dismissing the appeals, that the sales tax authority could not advance an argument contrary to the interpretation placed by the Commissioner."

37. Now it is possible that such a circular can be against the law. In other words, the Commissioner grants something overriding the law. But that action also is upheld in case it is for the benefit of the dealers. The case on the point is *Binani Industries Ltd. vs. ACCT reported in 129 STC 199.* What the Court held is correctly brought out at page 201 as follows:-

"In issuing circular dated April 12, 1996 (subsequent to substitution of section 5-C in 1996 after the Court earlier struck down the provisions) assuming that what could be deducted with reference to section 5(3)(a) could also be deducted with reference to section 5-C for arriving at the taxable turnover, the Commissioner was wrong in his interpretation of section 5-C and rule 6(4)(i). Circular dated October 23, 1999 correctly interprets section 5-C to indicate that the goods which are subject to tax on their transfer of right to use (lease) cannot be subjected to tax under section 5-C when the right to use such goods is again transferred after the expiry of the specified period for which it was hired/leased earlier and therefore, the levy under the provisions is multi-point in nature.

When a circular is issued under section 119 of the Income-tax Act, 1961 or under section 3-A of the Karnataka Sales Tax Act, 1957 containing an interpretation or clarification favouring the dealer, the circular is binding on the department, in particular, the assessing authorities. The assessing authority cannot ignore the circular or refuse to follow the circular on the ground that the circular is not in accordance with the provisions of the Act. All circulars, even those that are ultimately found to contain a wrong interpretation of the provisions of law or at variance with the provisions of law but which are in favour of dealers, continue to be binding on the department until the circular is superseded or cancelled by a subsequent circular or held to be illegal and erroneous by Supreme Court or concerned High Court.

Therefore, the circular dated April 12, 1996 will apply in regard to the assessment periods April 1, 1996 to March 31, 1997, April 1, 1997 to March 31, 1998, April 1, 1998 to March 31, 1999 and April 1, 1999 to March 31, 2000.

Any circular which beneficially affects the rights of dealers, as it stood at the beginning of the assessment year will apply to the entire year and the modification/withdrawal of such circular will not be relevant for that current year but will only apply from the beginning of the next assessment year. Therefore for the assessment year April, 2000 to March 31, 2000 onwards, the circular dated October 23, 1999 will not apply in view of the insertion of the proviso to section 5-C with effect from April 1, 2000 to the effect that "no tax shall be levied under this section if the goods in respect of which the right to use is transferred, have been subjected to tax under section 5."

38. It may be noted that here the circular was issued on the basis that there was nothing in section 5-C to indicate that the goods which were subject to tax cannot be subjected to tax when the right to use such goods is again transferred after the expiry of specified period. However, this circular was subsequently changed by interpreting it the other way round. Therefore even if a circular is wrong as far as assessee is concerned, it is binding.

## 17. NO SUPERFLUOUSITY OF WORDS USED. PRINCIPLE OF EJUSDEM GENERIS

39. This is case of interpretation by the reference, to the terms used, without over looking the particular words used. Can the Court amend the language or subtract from the language if the terms are clear? This was the issue in *Grasim Industries Limited vs. Collector of*

*Customs, Bombay, 128 STC 349 (SC).* The case at length details the principles of interpretation of an entry from all angles. However the observations are of general application The principles are explained as follows:

> "No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. Every statute is an edict of the Legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sententia legis of the Legislature. Where the words are clear and there is no obscurity and the intention of the Legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or altering the statutory provisions. Wherever the language is clear the intention of the Legislature is to be gathered from the language used. While doing so what has been said in the statute and what has not been said has to be noted. A construction which requires for its support addition or substitution of words which results in rejection of words has to be avoided. The court cannot aid the Legislature's defective phrasing of an Act, the court cannot add or mend and by construction make up deficiencies which are left there. In the case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case.

The principle of ejusdem generis is applicable when particular words pertaining to a class, category or genus are followed by general words. In such a case the general words are construed as limited to things of the same kind as those specified. The rule apples only when: (i) the statute enumerates the specific words, (ii) the subjects of enumeration constitute a class or category, (iii) that class or category is not exhausted by the enumeration, (iv) the general terms follow the enumeration, and (v) there is no indication of a different legislative intent. If the subjects belongs to a broad based genus as also a narrower genus there is no principle that the general words should be confined to the narrower genus. the rule cannot be applied unless there is a genus constituted or a category disclosed. If the preceding words do not constitute mere specifications of a genus but constitute description of a complete genus, then the rule has no application."

40. It must be relevant to note that what the Court does to interpret the meaning of an item, the attempt is to assign the meaning to the entry by trying to understand the meaning of the "Term" which the legislature intended to use. This judgment therefore is good for rule of interpretation by seeking legislative intent.

## 18. LONG STANDING INTERPRETATION TO BE ACCEPTED

41. This is one principle of interpretation in considering the meaning of the terms used in entries of schedules for taxation. A long standing interpretation accepted by the trade and the department is a good interpretation and must be accepted, without attempting to have a new consideration of the terms used. In *Smith Kline Beecham Consumer Healthcare Ltd. vs. Dy. Commissioner Commercial Taxes, 128 STC 189 (W.B.T.T.).* The dispute was about interpretation of the term Horlicks, the observation of the Court is that the term "Such as" means illustrative and not exhaustive. Quite a number of proposition are given. It may be interesting to note that the department has accepted Horlicks as milk for several years, but tried to give it a different meaning for later one single year. Said the Court:-

> at page 202 end of para 14:
>
> "Therefore, the revenue accepted the principle for 38 or 39 years at a stretch. That being the position, on this ground also, the view differently taken by the authorities below for the period 12 months ending March, 1995, although there was no change of composition of Horlicks, or at least there was no evidence of change of such position,

cannot be sustained." The position is that even though the principle is that res judicata does not apply, it is not appropriate to allow to change in a fundamental aspect, permitting through different assessment years. It is also interesting to note that doctrine of contemporaneous exposition is stated to be applicable in interpreting model statute. The judgment contains a catalogue of precedents for and against.

42. To the same effect and interpretation of the principle is the decision of *Merind Ltd. vs. State of Maharashtra, 136 STC 462 (Bom).* Here also the question of long standing accepted decision being disturbed. The Court states:

> "While reintroducing medicinal formulations/preparations for diagnosis, within the meaning of drugs under entry 37 of Part II of Schedule C to the Act, the Legislature was aware of the judicial pronouncements holding the field for more than two decades, and yet no deviation was made in the entry restricting it to medicinal formulations/ preparations used upon the body.
>
> In the matter of a local statute, the view taken by the High Court over a number of years should normally be adhered to and not disturbed. A different view would not only introduce an element of uncertainty and confusion, it would also have the effect of unsettling transactions which might have been entered into on the faith of those decisions.
>
> *Raj Narain Pandey vs. Sant Prasad Tewari (1973) 2 SCC 35; AIR 1973 SC 291* and *Darshan Singh vs. Ram Pal Singh AIR 1991 SC 1654* relied on.
>
> Although the interpretation that a restricted meaning should be given to the entry is a possible view, it is unwarranted, because, firstly since 1965 the entry relating to medicines included medicinal formulations/preparations used internally for diagnosis of the diseases in human beings and also because the Commissioner of Sales Tax had held in the year 1977 under section 52 of the Act that diagnostic reagents though not used upon the human body would merit classification under the entry relating to medicines. That decision of the Commissioner of Sales Tax has held the field for nearly two decades. In these circumstances, it will not be proper to reverse that view, unless it is shown that the earlier view is patently erroneous or there are compelling reasons for taking a contrary view. It is well-established in law that the interpretation holding the field for a considerable period of time cannot be disturbed unless there are compelling reasons to do so. Such an interpretation which seeks to unsettle the longstanding interpretation is unwarranted.

## 19. INTERPRETATION OF ENTRIES

43. The principles of interpretation for entries in a schedule do crop up continuously. Though the principles are settled, they require often to be re-stated as it happened in case of *Commissioner of Central Excise vs. Sharma Chemical Works, 132 STC 251 (SC).* This is the case of interpretation of the meaning of the entries covered by entries 3003.30 vs. 3305.10 in the Excise Schedule. The principles which the court hold are this: (i) In matters of classification, one must refer to normal understanding of the term used. (ii) The burden to prove or the onus to prove that the products fall within particular entry is on the revenue. It may be noted the Court has considered composition of the product as not decisive of the issue as to under which entry the article will fall. The Court further held that in case of the doubt the matter should be decided to reference to the competent authority. It also appears that in interpreting such terms as Drugs or Medicine the decision of the Drug controller is indicative. In the words of the Court:

> "Another aspect to be kept in mind is that the revenue is bound by the circulars issued by the Board. The Board circular dated December 5, 1991, clearly stipulates that in case of doubt the matter should be referred to the Drug Controller. The matter

was referred to the Drug Controller who, as stated above, has opined that it is an Ayurvedic medicament. If the Department was still entertaining any doubts, they could have referred the matter to the Adviser, Ayurveda/ Sub-Commissioner in the office of Drug Controller, Director General of Health Services, New Delhi. This was not done."

## 20. LEGISLATIVE FICTION – ABIDE BY THE SAME SITUS OF A SALE

44. *Ashok Leyland Ltd. vs. State of Tamil Nadu, (2004) 134 STC 473 (SC).* is a very important judgment laying down several principles of interpretations and setting the controversy to rest. The Court has interpreted several principles for determining the character of a transaction. The first principle is regarding situs of a sale. The situs is to be legislated by the Central Sales Tax Act. State has no right to fix any situs. Secondly once there is determination in an order that the inter-state movement has not commenced by a reason of sale, as specified in Form 'F', the fiction is that there is no inter-state sale. That cannot be redetermined. A reassessment of transaction allowed in original assessment as transfer without a sale under form F is impermissible. The initial burden of proof is on the dealer to show that the moment of goods was occasioned by reason of transfer of such goods otherwise than by reason of sale. On a declaration followed by inquiry and order, the order is final according to legal fiction. This judgment is important for the jurisprudence of S. 6(A) and Form F under the CST Act 1956. Whenever a legal fiction is created by a statute, the same shall be given full effect.

## 21. NOTIFICATIONS OF EXEMPTIONS HOW INTERPRETED

### Effect of Reorganization of States

45. The case of *Commissioner of Commercial Taxes, Ranchi vs. Swarn Rekha Cokes And Coals Pvt. Ltd., Bhagwati Coke Industries Pvt. Ltd. vs. State of Jharkhand, (2004) 136 STC 57 (SC).* relates to interpretation of an exemption notification issued prior to Reorganization of the States. The case is important in that even though there are two States after Reorganization, the Notification issued prior to Reorganization holds the field and the transactions of an industry of interstate character by virtue of sale to newly born state dealers, will not be taxed though the transaction is not a local sale and what was exempted is local sales. Therefore exemption granted by erstwhile states will continue to apply after reorganization. The important point is that the sales from one bifurcated state to other bifurcated state is not to be treated as inter state sale. The Court held that if in a notification there is fiction created by way of exemption to sales, the Court must ascertain the purpose and assume all the fact, and consequence incidental and inevitable. A notification issued under a Finance Act would be law. In view of the wide definition of the Reorganization Act, the Notification issued prior to Reorganization, for new industrial undertaking, will continue to be applicable to both the parts of the State. A fiction is created under the reorganization Act that despite reorganization, the law in force before reorganization shall be binding to both unless legislature of the either state legislate to the contrary. Therefore even though upon bifurcation there are two states there is no interstate sales between the two after the reorganization of State in two different States. In the words of the Court:

> "It is well-settled that in interpreting a provision creating a legal fiction, the court must ascertain the purpose for which the fiction is created and having done so to assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. When the law requires that an imaginary state of affairs should be treated as real, then, unless prohibited from doing so, one must also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."

## 22. INTERPRETATION OF RETROSPECTIVE LAW, ACT AND RULES

46. Can such laws be interpreted as valid? Whether the Order of High Court can be subordinate to State Legislation? This issue arose in *N.O.C.I.L. vs. The State of Maharashtra, reported in (2004) 135 STC 50 (Bom).* It holds that once the High Court under the provisions of Companies Act declared that the amalgamation of the companies shall be effective from the particular date, from that date onward the corporate personality of the transferor company is destroyed completely. Therefore in exercise of its legislative power the State can not change this status. Such a law if made by the State encroaches upon the judicial domain and therefore invalid. Referring to the power of retrospective legislation if a law creates new liability it cannot enact a law to be retrospective. If it imposes new levy, a new principle and therefore cannot be said to be clarificatory or explanatory. While infirmity or deficiency pointed by a Court can be remedied no order of a Court can be varied by the Legislature.

47. To the same effect is the Supreme Court judgment in case of *Tata Motors Ltd. vs. State of Maharashtra, (2004) 136 STC 1.* Said the Apex Court:

> "It is no doubt true that the State has enormous powers of legislation in the matter of taxation laws. Great leverage is allowed because several fiscal adjustments have to be made by the Government depending upon the needs of the revenue and economic necessities prevailing in the State. Even so, an action taken by the State cannot be so irrational and so arbitrary as to introduce one set of rules for one period and another set of rules for another period by amending the laws in such a manner as to withdraw the benefit that has been given earlier resulting in higher burdens so far as the assessee is concerned without any reason. Retrospective withdrawal of the benefit of set off (of sales tax) only for a particular period should be justified on some tangible and rational ground, when challenged on the ground of unconstitutionality.
>
> But at the same time the Court also held that the benefit of a concession cannot be had, on the plea that condition prescribed are impossible of compliance; Says the Court:
>
> Inasmuch one of the conditions imposed by rule 41D was that dealer should have registered under the Central Sales Tax Act at the appropriate place to claim the benefit thereunder, the dealer was not entitled to claim the benefit of set off under rule 41D. Since what was claimed by the dealer was one in the nature of a benefit under a taxation law, all conditions relating thereto had to be complied with. The dealer could not put forward the ground that what was impossible of performance could not be done by him and, therefore, the condition should be ignored."

## 23. EXEMPTION OR DEDUCTION OR WHAT

48. The exemptions are as specified in sections of the Act. The charging section directs tax as provided in the Act. Normally sales tax law provides for levy of Single Point Sales tax at the first stage. The mandate is that the tax shall be levied after deducting therefrom the specified turnover. The charging section has to be strictly construed. Unless the assessee comes within charge he cannot be taxed. The Bombay High Court in case of *Suresh Trading Co. vs. State of Maharashtra, reported at (1981) 48 STC 207 (Bom),* has summarized the position that the resale is not an exemption,. At page 221 it observes:

> "In *Ramkrishna Kulwantrai vs the Commissioner of Sales Tax,* this High Court pointed out that under the said Act, tax is not imposed upon a dealer's turnover of sales of goods but only upon that part of the turnover which is arrived at after deducting from the total turnover the turnover in respect of certain sales or resales with respect to which the dealer is entitled to a deduction... ."

49. Having given virtually some variegated facets of Sales Tax Law in relation to interpretation in several peculiar situations, I lodge this caveat. Please do not read simple

conclusion in a judgment or read what is underlined. One cannot read any judgment in a detached manner. It has to be read fully to understand the ratio or the principles laid down by the Court. One has to learn the art of collecting facts in a given case, and comparing the same to a judgment to be quoted as a precedent for the purpose of the claim. Any hurried quotation will result in someone pointing out how the ratio quoted does not apply in facts of the case. The warning comes from the Apex Court in case of *Escorts Ltd. vs. Commissioner of Central Excise, Delhi-II, 173 ELT 113 (SC).* the Court held that:

> "Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgment. They interpret words of statutes; their words are not to be interpreted as statutes. In L*ondon Graving Dock Co. Ltd. vs. Horton (1951 AC 737 at p. 761) Lord Mac Dermot* observed:
>
> "The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."
>
> Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

50. I hope the warning will be well received. What I have tried to do is to place before the fraternity of the practitioners, the general principles as found by me. But to use the same in given circumstances is not a routine job. It will require labour of culling facts and application thereof to a given case.

□□

# SUBSIDIARY RULES AND SPECIAL MAXIMS AIDING INTERPRETATION

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## 1. INTRODUCTION

By interpretation or construction is meant the process by which the Courts seek to ascertain the meaning of the legislation through the medium of the authoritative forms in which it is expressed so said Salmond.

A Statute is the will of the Legislature. It is natural that even though the Legislature had a clear intent the draftsman must have, through oversight ignored certain words for he is after all human and sometimes ambiguities and loopholes do occur. Hence it is necessary to have a proper interpretation of the laws. The interpretation of laws will have to be within certain set of rules and principles. Most of these rules are discussed elsewhere in this book. Some of the subsidiary rules and some of the special maxims are discussed hereunder: –

Subsidiary rules

1. Liberal Construction
2. Harmonious Constructions
3. Beneficial Constructions

Special maxims

1. Rule of Ejusdem Generis
2. Reddendo Singula Singulis
3. Contemporanea Expositio
4. Casus Omissus
5. Autrefois Acquit/Autrefois Convict

### Liberal constructions

The rule of liberal construction does not give a freehand to the Court to stretch and strain the statutory language to accord with abstract notions of justice and fair play *(Prem Raj vs. Ram Charan (1974) 2 SCC 1).* If the statutory language is susceptible to two constructions the rule of liberal construction should incline the Court to prefer the one, which accomplishes the legislative purpose. But when the statutory language bears one and only one meaning, there is no room for the application of liberal construction. The Supreme Court held in a case that “the Law is not a brooding omnipotence in the sky but a pragmatic instrument of social order. It is an operational art controlling economic life and interpretative effort must be imbibed with the statutory purpose. A dynamic economic concept cannot be imprisoned into ineffectualness by a static, strict construction. A broadened, sophisticated, and spectral sense must be given to the words of economic connotation without being hidebound by lexicography of legalism *(Carew & Co. vs. UOI (1975) 2SCC 791).* If the language used in a statute can be construed widely so as to salvage the remedial intendment, the Court must adopt it. If the language in a statute does not admit the construction sought, wishful thinking is no substitute, and then, not the Court, but the

legislature is to blame for enacting damp squib statute. However, minor definitional disability divorced from the realities of industrial economics if stressed as the sole touchstone is sure to prove disastrous when interpreting economic legislation. So, when interpretations are feasible that which defines the remedy and suppress the evil as the legislature envisioned must find favour with the Court; and the definitions in the Act are a sort of statutory dictionary to be departed from when the context strongly suggests it.

In *Gurucharan Singh vs. Kamla Singh (1976) 2SCC 152*, the Apex Court while dealing with Tenancy Law held: interpretation of socio economic legislation should further the object and purpose of the legislation and legislative history becomes irrelevant when the Act seeks to usher in a new order.

In *State of M.P. vs. Galla Telhan Vyapari Sangh (1977) 1 SCC 657,* the Apex Court while interpreting sec. 37 (5)(a) of the M.P. Krishi Upaj Mandi Adhiniyam, 1972, in imposing upon every commission agent the liability to keep in safe custody the agricultural produce of the principal does not impose unreasonable restrictions observed: the main purpose of the Act is to secure a scientific method of storage, sale, distribution and marketing of agricultural produce and to cut out as far as possible, the middleman's profit. The Act therefore, contains provisions of a beneficial nature. It does not impose any hardship that can be termed as unreasonable as the agent is fully compensated. The Act being a social piece of legislation should be liberally construed so as to advance the object of the Act and fulfil the aims to be achieved thereby.

In *Union of India vs. B.N. Prasad (1978) 2 SCC 462,* while dealing with section 138 of Railways Act, 1870, in a complaint against the eviction of the Refreshment Contractor of a Railway Station after the expiry of the agreement period the Supreme Court held: "A close perusal of the section reveals that the provision has widest amplitude and takes within its fold not only a railway servant but even a contractor who is engaged for performing services to the railway and the termination of his contract by the railway amounts to his discharge as mentioned in the section. As the provision is in public interest meant to avoid inconvenience and expense for the travelling public and gear up efficiency of the railway administration, it must be construed liberally, broadly and meaningfully so as to advance the object sought to be achieved by the Railways Act. It is also pertinent to note that the general rule of interpretation, which is common to statutory provisions as well as to constitutional provisions, is to find out the expressed intention of the makers of the said provisions from the words of the provisions themselves. It is also equally well settled that, without doing violence to the language used, a constitutional provision shall receive fair liberal and progressive construction so that its true objects might be promoted.

The principle of adopting a liberal interpretation which advances the purpose and object of beneficent provisions cannot be carried to the extent of doing violence to the plain and simple language used in the enactment, it would not be reasonable or permissible for the Court to rewrite the section or substitute words of its own for the actual words employed, by the legislature, in the name of giving effect to the supposed underlying object. After all, the underlying object of any provision has to be gathered on a reasonable interpretation of the language employed by the legislature. *CIT vs. N.C. Budhiraja & Co. (1993) 204 ITR 412 (SC).*

Any legal system, especially one evolving in a developing country, might permit Judges to play a creative role and innovate to ensure justice without doing violence to the norms set by the legislation. *[CIT vs. Auraiya Chamber of Commerce (1987) 167 ITR 458 (SC)].*

**Harmonious constructions**

It is a cardinal rule of construction that when there are in a statute two provisions which are in conflict with each other, such that, both of them cannot stand, they should if possible, be so interpreted, that effect can be given to both and that construction which

renders either of them inoperative and useless should not be adopted except in the last resort *[Bengal immunity Co. vs. State of Bihar (1955) 6 STC 446 (SC)]*. This is what is known as the rule of harmonious construction.

The Supreme Court in a number of decisions made it compulsory that where a provision in a taxing statute can be reasonably interpreted in two ways, that interpretation which is favourable to the assessee has got to be accepted *[CIT vs. Vegetable Products Ltd. (1973) 88 ITR 192 (SC)]*. It is an elementary rule that construction of a section is to be made of all the parts together and not of one part only by itself, and that phrases are to be construed according to the rules of grammar. One of the established rules of construction is that every clause of a statute should be construed with reference to the context and that the other clause of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or service of statutes relating to the subject matter. *(Per Lord Davey in Canada Sugar Refining Co. vs. R (1898) AC 735)* The well established rule of constructions are (1) If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the Legislation to futility and should rather accept the bolder constructions based on the view that Parliament would legislate only for the purpose of bringing about an effective result. (2) Manifest absurdity or futility, palpable injustice or absurd inconvenience or anomaly is to be avoided (Craise on Statute Law 5th Edn. page 82) (3) Every clause of a statute should be construed with reference to the context, and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

It is well settled rule of interpretation that the provisions of a statute should be so read as to harmonise with one another and the provisions of one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Crawford in STATUTORY CONSTRUCTION stated the principle in the following words: “Hence, the Court should, when it seeks the legislative intent, construe all the constituent parts of the statute together and seek to ascertain the legislative intention from the whole Act, considering every provision thereof in the light of the general purpose and object of the Act itself and endeavouring to make every part effective, harmonise and sensible”. It clearly establishes that the Court should avoid absurd consequences in any part of the statute and refuse to regard any word, phrase, clause or sentence superfluous, unless such a result is clearly unavoidable.

The meaning of some words in a statute may be enlarged or restricted in order to harmonise them with the legislative intent of the entire statute. It is the spirit of the statute, which should govern the literal meaning *(Manohar N. Samarth vs. Marotrao (1979) 4 SCC 93)*. It is pertinent to note that every clause of a statute is to be construed with reference to the context and other provisions of the Act to make a consistent and harmonious meaning of the statute relating to the subject matter.

In *Sajjan Singh vs. State of Rajasthan (1965) 1 SCR 933 AIR 1965 SC 845*, the validity of the Constitution (17th Amendment) Act, 1964, was challenged. One of the questions was, what would be the requirement for making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment; the powers conferred on the High Courts under Article 226 are likely to be affected. The petitioners contended that the bill introduced for making such an amendment must attract the proviso to Article 368. It was held: The two parts of Article 368 must on a reasonable construction be harmonised with each other in the sense that the scope and effect of either of them should not be allowed to be unduly reduced or enlarged. In other words, in construing both parts of Article 368, the rule of harmonious construction requires that if the direct effect of the amendment of fundamental right is to make a substantial inroad on the High Court’s power under Article 226, it would become necessary to consider whether the proviso would cover such a case or

not. If the effect of the amendment made on the fundamental rights of the powers of the High Court, prescribed by Article 226, is indirect, incidental, or is otherwise of an insignificant order, it may be that the proviso will not apply.

But, if however, two constructions are possible then the court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory.

Where two alternative constructions are possible, the Court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment. These canons of construction apply to the interpretation of our Constitution with greater force because the Constitution is a living integrated organism, having a soul and conscience of its own. The pulse beats emanating from the spinal cord of its basic framework can be felt all over its body, even in the extremities of its limbs.

**Beneficial constructions**

The construction of a statute must not so strain the words as to include cases plainly omitted from the natural meaning of the language. However, where the usual meaning of the words falls short of the object of the legislature, a more extended meaning may be attributed to them, if they are fairly susceptible to it. This relaxation of strictly literal principles of interpretation is called as Beneficial Construction. Nowadays this rule has found favour with judiciary. In this process they shall definitely not supply omissions, but where they are faced with a choice between a wide meaning, which carries out what appears to have been the object of the legislature more fully, and a narrow meaning, which carries it out less fully or not at all, they will often choose the former. Beneficial Construction is a tendency, rather than a rule.

No question of beneficial construction of a statute arises where the words of this statute are quite unequivocal. *(Jaganath Agarwala vs. B.N. Dutta; AIR 1963 Cal. 26)*

It is a well-settled canon of construction that in construing the provisions of a beneficial legislation, the Court should adopt the construction, which advances, fulfils and furthers the object of the Act rather than the one, which would defeat the same and render the protection illusory.

Beneficial and social statutes should not be construed too rigidly as it was for the protection of certain class of persons that the statute was enacted. The intention of the legislature and the policy underlying it has also to be kept in mind. As far as possible, the language of the statute, unless it goes against the intention of the specific provisions must be construed consistent with the changing social attitudes.

Beneficial legislation should have liberal construction with a view to implementing the legislative intent, but where such beneficial legislation has a scheme of its own there is no warrant for the court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme. *(Regional Director, Employees' State Insurance Corporation, Trichur vs. Ramanuja Match Industries (1985) 1 S.C.C. 281)*

It is well settled that the language of beneficial statute must be construed so as to suppress the mischief and advance its object. *(State of U.P. vs. L.J. Johnson and Another, 1983 A.W.C. 789 S.C.)*

However, the principle of beneficial interpretation can be applied only in cases where there is an ambiguity in the language of the statute. Where the language is plain, precise and unambiguous, resort cannot be had to this principle to give benefit to the assessee, which the Legislature did not intend to give. *[Sam Fashion Wear Pvt. Ltd. vs. CIT (1994) 209 ITR 214 (Bom)].* Hence, it is absolutely not necessary to give a liberal interpretation in all the cases where a beneficial provision is enacted.

The well-settled principle of interpretation is that a statutory provision should be construed according to the plain natural meaning of its language. When the language of a particular provision is clear and according to the plain natural meaning thereof the assessee is not entitled to any rebate, relief or allowance, it is not for the Court to strain and stretch the language of the statutory provision to enable the assessee to get such relief. Such an approach will be against all accepted principles of interpretation.

The well-known rule of construction is that if two interpretations of a taxing statute are possible, the interpretation, which favours the assessee, must be adopted.

*[CIT vs. Sky Room Pvt. Ltd. (1992) 195 ITR 412 (Ker.);*

*Dr. P.K.P. Mohammad vs. CBDT (1993) 203 ITR 47 9 (Ker.);*

*Shankar Construction Co. vs. CIT (1991) 189 ITR 463 (Ker.)]*

The principle of beneficial interpretation or interpretation in favour of the assessee of a taxing statute has application only in case where, on a proper interpretation, the Court is in no doubt about the true scope and ambit of the provision or finds that two equally reasonable interpretations – one in favour of the assessee and the other in favour of the Revenue are possible. It is only in such a case where the words of statute are plain, precise and unambiguous that such a construction is possible. In such a case the well settled principle of interpretation is that the statutory provision should be construed according to the plain natural meaning thereof, the assessee is not entitled to any rebate, relief or allowance. It is not for the Court to strain and stretch the language of the statutory provision to enable the assessee to get such relief. Such an approach will be against all accepted principles of interpretation. *[M.H. Daryani vs. CIT (1993) 202 ITR 731 (Bom.)]*

The principles of interpretation that in case of any doubt with regard to interpretation that which is beneficial to the assessee should be preferred, applies only when there is reasonable and genuine doubt with regard to the interpretation of a particular provision. It has no application to a case where the provision is clear and the law is settled. *[CIT vs. Mirza Ataullaha Baig and Another (1993) 202 ITR 291 (Bom)].*

The Court has to interpret a provision according to the plain meaning of the section and cannot read more into the language of a provision than what is warranted by the express provisions of the section. Where the Legislature in the same provision it is not permissible to equate the scope and meaning of the two words uses two different words, which, on their plan language, are different. It is a well settled rule that when two interpretations are possible, or in other words, where the provision is capable of two alternative meanings, the one favouring the tax-payer is to be adopted, particularly when such a provision purports to impose penal interest. *[CIT vs. Indian Tube Co. Ltd. (1992) 197 ITR 522 (Cal.)]*

Taxing statutes are interpreted in favour of the assessee and the state shall not tax more than it has given itself an express power for. If the taxing provisions are to be interpreted against the taxing authorities, the refund giving provisions must, as a logical corollary, be interpreted liberally in favour of the assessee. *[Calcutta Electric Supply Corp. (India) Ltd. vs. ITO and Others (1992) 197 ITR 563 (Cal.)]*

It is well settled that a citizen is entitled to the benefit of every ambiguity in a taxing statute but where the law is clear, considerations of hardship, injustice or anomaly do not

afford justification for exempting income from taxation *[Grindlays Bank P.L.C. vs. CIT (1993) 202 ITR 148 (Cal.)]*

Literally, exemption is freedom from liability, tax or duty. Fiscally it may assume varying shapes, especially in a growing economy. For instance, tax holiday to new units, concessional rate of tax to goods or persons from limited period or with the specific objectives etc. That is why its construction unlike a changing provision, has to be tested on a different touchstone. In fact an exemption provision is like any exception and on the normal principle of construction or interpretation of statutes, it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provision intended to augment state revenue. But once the exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly speaking, liberal and strict construction of an exemption provision is to be invoked at different stages of interpreting it. When the question is whether a subject falls within the notification or in the exemption clause then it being in the nature of exception it is to be construed strictly and against the subject, but once ambiguity or doubt about applicability is lifted and subject falls within the notification then full play should be given to it and it calls for a wider and liberal construction. *[Union of India vs. Wood Papers Ltd. (1991) 83 STC 251; AIR (1991) SC 2049* followed in *R. Krishnamurthy vs. CIT (1993) 203 ITR 47 (Guj.)]* Moreover it is a well accepted principle that if two interpretations are possible of a provision in a fiscal statute, the interpretation which is favourable to the assessee is to be preferred especially when the provision is one intended to confer certain relief or exemptions in favour of assessee. *(Dr. P.K.P. Mohammad vs. CBDT (1993) 203 ITR 479 (Ker.).* Section 32A of the Income-tax Act, 1961, is a beneficial provision in a taxing statute and full effect has to be given to the language used by the Parliament.

There is no rule of construction, which says that, if the language of a section providing for any exemption or deduction is not clear, the assessee cannot take advantage of it. *[CIT vs. Shaan Finance (P) Ltd. (1993) 199 ITR 409 (Ker.)].*

## 3. SPECIAL MAXIMS

### Rule of Ejusdem Generis (“of the same kind and nature”)

Also known as Lord Tenderan’s rule, this rule provides that where words of specific meaning are followed by general words, the general words will be construed as being limited to persons or things of the same general kind or class as those enumerated by the specific words.

“By the application of the maxim Ejusdem Generis, which is only an illustration or specific application of the broader maxim noscitur a sociis, general and specific words which are capable of an analogous, meaning being, associated together, take colour from each other, so that the general words are restricted to a sense, analogous to the less general *(Mirch vs. Russel 12 LRA 125; AIR 1928 R. 31).*

According to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as Ejusdem Generis with those comprehended in the language of the legislature. In other words the Ejusdem Generis rule is the rule of generis words following more specific ones. Ejusdem Generis means “of the same kind and nature”. The rule is that when general words follow specific and particular words of the same nature, the general words must be confined to things of the same kind as those specified. [Lord Campbell in *R. vs. Edmundson (1859) 28 LJ MC 213*. General words in a statute should be taken ordinarily in their usual sense. General words, even when they follow specific words, should ordinarily be taken in their general sense, unless a more reasonable interpretation requires them to be used in a sense limited to things Elude Generic with those

specifically mentioned. If however the particular words exhaust the whole genus, the general words must be understood to refer to some larger genus.

The rule as stated by SALMOND on Jurisprudence (12th Edn. Page 135) is on the following terms:–

"Yet another example of a rule of language in a legal maxim is the Ejusdem Generis rule which serves to restrict the meaning of general words to things or matters of the same kind (genus) as the preceding particular words. So, for example, when the Sunday Observance Act, 1677, provided that no " tradesman, artificer, workman, labourer or other person whatsoever" should do certain things, the general phrase" Other person whatsoever" was held to refer only to persons within the class indicated by previous particular words' and not, therefore, to include such persons as farmers or barbers."

The rule of Ejusdem Generis must be applied with great caution, because it implies a departure from the natural meaning of words, in order to give them a meaning on a supposed intention of the legislature. CRAISE on STATUTE LAW (7th Edition P. 178) mentions that the Ejusdem Generis rule of limiting general words is one to be applied with caution and not pushed too far. To invoke the application of the rule, there must be a distinct genus or category. The specific words, the rule requires, are all of one genus, in which case, the general words may be presumed to be restricted to that genus. For example, the words "or otherwise" are generally used as ancillary to the specific proposition which precedes them.

SUTHERLAND in his STATUTORY CONSTRUCTION (3rd Edition, Vol. II P. 395) explained the following requisites for the application of the principle of Ejusdem Generis.

i) The statute contains an enumeration of specific words.

ii) The members of the enumeration constitute a class.

iii) The class is not exhausted by the enumeration.

iv) A general term follows the enumeration.

v) There is no clearly manifested intention that the general term is to be given a broader meaning than the doctrine require.

In the background of the above theoretical exposition of the principle by the most noted legal exponents, it can be seen that this rule has been applied in various cases by the Indian Courts viz.,

*Union Drug Co. Ltd. vs. CIT West Bengal (1974) 93 ITR 91 (Cal.).*

*Siddheshwari Cotton Mills vs. Union of India (1989) 39 E.L.T. 498 (SC) AIR 1989 SC 1019 at page 1023.*

*Mangalore Electric Supply Co. vs. CIT West Bengal AIR 1978 SC 1272.*

*CIT vs. Anglo Indian Jute Mills (1993) 202 ITR 104 (Cal).*

*CIT vs. Statesman (1992) 198 ITR 582 (Cal).*

It has been pointed out by FRANCIS BENNION in his "STATUTORY INTERPRETATION" (1984 Edn. page 828) that the Ejusdem Generis rule arises from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context. It may be regarded as AN instance of ellipsis or reliance on implication.

It is essential for application of the Ejusdem Generis rule that enumerated things before the general words must constitute a category or a genus or a family which admits a number of species or members. *(State of Bombay vs. Ali Gulshan, AIR 1955 SC 810; K.K.*

*Kochunni vs. State of Madras, AIR 1960 SC 1080).* "It is requisite that there must be a distinct genus, which must comprise more than one species" and it is clearly laid down by decided cases that the specific words must form a distinct genus or category. If the specified things preceding general words belong to different categories, this principle of construction will not apply *(Indramani Pyarelal Gupta (Dr.) vs. W.R. Natu, AIR 1965 SC 1167 at p. 1172).* Further, mention of a single species does not constitute a genus. Lord THANKERTON said "There is no room for the application of the principle of Ejusdem Generis in the absence of any mention of a genus, since the mention of a single species, for example, of water rates does not constitute a genus" *(United Town Electric Company Ltd. vs. A.G. for Newfoundland (1939) 1 All ER 423 (PC).*

The rule of "Ejusdem Generis" is a mere rule of construction and not a rule of substantive law and is not applicable where the intention of legislature is otherwise clear. *(Printers House vs. Mistry Lal, AIR 1970 P & H 1 at p. 7).* It is submitted that the rule of Ejusdem Generis should never be invoked where its application appears to defeat the general intent of the instrument to be construed *(G.D. Karkare vs. T.L. Shevde AIR 1952 Nag. 330, 334.).*

The rule of Ejusdem Generis has to be applied with care and caution. It is not an inviolable rule of law, but it is only a permissible inference in the absence of an indication to the contrary, and where context and the object and mischief of the enactment do not require restricted meaning to be attached to words of general import, it becomes the duty of the Courts to give those words, their plain and ordinary meaning. If the legislative purpose of a statute is such that a statutory series should be read Ejusdem Generis, so be it, the rule is helpful. But if it is not, the rule is more likely to defeat than to fulfil the purpose of the statute. "The rule like many other rules of statutory interpretation, is a useful servant but a bad master". *(Quazi vs. Quazi (1979) 3 All E.R. 897 at p. 916 (HL).* So a narrow construction on the basis of Ejusdem Generis rule may have to give way to a broader construction to give effect to the intention of Parliament by adopting a purposive construction.

It may also be noted that the rule of Ejusdem Generis has, it appears, no inverse application. General words preceding the enumeration of specific instances are not governed by this Rule and their import cannot be limited by any such principle. *(Thakur Amar Singh vs. State of Rajasthan, AIR 1955 SC 504,* at page 523). At any rate, when the Legislature before enumerating specific examples uses the word " Without prejudice to the generality of the foregoing provision" the preceding general provision cannot be restricted by applying the rule of "Ejusdem Generis" *(Shiv Kripal Singh vs. V.V. Giri AIR 1970 SC 2097 at page 2112).*

**Words of rank**

As an outcome of the rule of Ejusdem Generis, there is another rule that statutes which deal with persons or things of inferior rank are not extended to those of superior degree by introduction of general words and the general words following particular words will not cover anything of a class superior to those to which the particular words relate. (Canterbury's (Archbishop) case *(1596) 76 ER 519).* Thus, it has been held that a duty imposed on copper, brass, pewter, and tin and all other metals not enumerated did not cover silver or gold, these being of a superior kind to the particular metals enumerated *(Casher vs. Holmes (1831) 109 E.R. 1263).*

**Reddendo Singula Singulis (Giving each to each)**

This high sounding phrase only means that words should be read distributively, the sense produced by using the English word "respectively" whenever necessary, or "as" applicable *(Nagpur Electric Light & Power Co. Ltd. vs. Shreepathirao 1959 SCR 463; AIR 1958 SC 658).*

The maxim, according to Black's Interpretation of Law means that "Where a sentence in a statute contains several antecedents and several consequences, they are to be read

distributively; that is to say, each phrase or expression is to be referred to its appropriate object. *[Ulahannan Mathai vs. State AIR 1955 TC 82 (FB)]*. The term means "Giving each to each". A clause in an instrument is so read when one to two provisions in one sentence is appropriated to one of two objects in another sentence, and the other provision is similarly appropriated to the other object. Thus "I devise and bequeath all my real and personal property to A" will be construed reddendo singula singulis by applying "devise" to "real property" and "bequeath" to "personal property" and in the sentence: "If any one shall draw or load any sword or gun" the word "draw" is applied to "sword" only and the word "load" to "gun" only, because it is impossible to load a sword, or draw a gun. (WHARTON LAW LEXICON, 14th Edn. P. 850).

The different portions of a sentence, or different sentences, are to be referred respectfully to the other portion of sentences, to which we can see they respectively relate even if strict grammatical construction should demand otherwise.

Where a sentence in a statute contains several antecedent and consequent, this rule requires that each word or phrase is to be linked to where it belongs. For example, in the sentence "for money or other good consideration paid or given", the consequence "paid" is referred to the antecedent "money" and the consequent "given" to the antecedent consideration". In many such cases however an efficient draftsman can avoid this situation by using sentences having only one subject and one object.

An example of the application of the rule is found in the construction of the Proviso to Article 304 of the Constitution which reads:

" Provided that no Bill or amendment for the purpose of clause (b) shall be introduced or moved in the legislature of a state without the previous sanction of the President". It was held by the Supreme Court that the word "introduced" referred to "Bill" and the word "moved" to "Amendment".

*(K. V. Kamath vs. K. R. Baliga & Co. AIR 1969 SC 504 at P.511).*

Where there are general words of description, following an enumeration of particular thing such general words are to be construed distributively, reddendo singula singulis and if the general words will apply to some things and not to others, the general words are to be applied to those things to which they will, and not to those to which they will not apply, that rule is beyond all controversy.

**Contemporanea Expositio**

Contemporanea expositio est optima et fortissinia in lege: meaning Contemporaneous exposition is the best and strongest in law (Blacks Law Dictionary...Broom).

It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. (Maxwell on Interpretation of Statutes, 12th Edn. Page 264.) This maxim has been confirmed by the Apex Court in *Desh Bandhu Gupta vs. Delhi Stock Exchange Asson. Ltd. AIR 1979 SC 1049, 1054.* The maxim Contemporanea expositio as laid down by Lord Coke was applied to construing ancient statutes, but usually not applied to interpreting Acts or statutes which are comparatively modern. The meaning publicly given by contemporary or long professional usage is presumed to be true one, even where the language has etymologically or popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed, and those who lived at or near that time when it was passed may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions. Moreover, the long acquiescence of the legislature in the interpretation put upon its enactment by notorious

practice may, perhaps be regarded as some sanction and approval of it. *(R. vs. Casement (1917) I.K.B.98).*

"There would be no safety for property or liberty", said LORD CAMPBELL: "if it could be successfully contended that all lawyers and statesmen have been mistaken for centuries as to the true meaning of an old Act of Parliament". *Gorham vs. Exeter (BP), (1850) 15 QB 52, P. 74.* When the practice receives judicial or legislative approval it gains additional weight and is to be more respected. As stated by MARTIN, B: "In construing old statutes it has been usual to pay great regard to the construction put upon them by the judges who lived at or soon after the time when they were made, because they were best able to judge the intention of the makers at the time". *Morgan vs. Crawshay, (1871) LR 5 HL 304, p.315.* The doctrine of stare decisis may also be applied when the law is settled in a State for over 100 years by considered view of the High Court of that State. *(Ram Adhar Singh vs. Bansi, (1987) 2 SCC 482, p.485.)* As to legislative approval to a departmental practice LORD MACHNAGHTEN said, "When you find legislation following a continuous practice repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in reenacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive reenactment." Commissioner for Special Purposes of *Income-tax vs. Pemsel, (1891) AC 531, pp. 590, 591 (HL).*

It is respectfully submitted that even if the persons who dealt with the Act understood it in a particular manner, that does not prevent the Court in giving to the Act its true construction. *(Punjab Traders vs. State of Punjab AIR 1990 SC 2300 at page 2304).* The doctrine Contemporanea expositio is confined to the construction of ambiguous language used in very old statutes where in fact the language itself had a rather different meaning in those days. The Supreme Court has refused to apply the principle of Contemporanea expositio to the Telegraph Act, 1885, and the Evidence Act, 1872. However, this doctrine was applied in construing the Bombay Municipal Corporation Act, 1880 *(National & Grindlays Bank vs. Municipal Corporation of Gr. Bombay AIR 1969 SC 1048).*

The principle of Contemporanea expositio and executive construction though relevant for solving a case of an ambiguity cannot be used for bringing about an implied repeal or quasi repeal. (Municipal Corporation for the *City of Pune vs. Bharat Forge Co. Ltd. AIR 1996 SC 2856 at 2861).*

Contemporanea expositio, as a guide to the interpretation of documents, is often accompanied with danger and great care must be taken in its application. But however judges do not usually reject the assistance which it affords. The Sanad upon which these important rights are founded is a document of a general and informal character. It admittedly is capable of a variety of construction. The extreme literal construction is adopted by neither party and when the ambiguity covers the geographical and pecuniary extent of an admittedly ambiguous grant, their Lordships think it legitimate to observe what was the footing upon which the grantors from the date of the grant and for a long period of time proceeded.

However, general the words of an ancient grant may be, it is to be construed by evidence of the manner in which the thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended. So where the words of an instrument, ancient or modern are ambiguous, the Court may call in aid acts done under it as a clue to the intention *(Watchman vs. East Africa Protectorate 1919 AC 533).* Upon the same principle depends the great authority which, in construing an old statute, as attributed to the construction put upon it by Judges who lived at or soon after the time when the statute was made, as being best able to determine the intention of the legislature from their knowing the circumstances to which the statute related.

**Casus Omissus**

A point unprovided for by a statute (Wharton). It is an application of the same principle that a matter which should have been, but has not been provided for in a statute cannot be supplied by Courts, as to do so will be legislation and not construction. *(Waliram Waman Hiray (Dr.) vs. Mr. Justice B. Lentin AIR (1988) SC 2267 at page 2283).* But there is no presumption that a Casus Omissus exists and language permitting the court should avoid creating a Casus Omissus where there is none. A Casus Omissus will not be created by interpretation save where it is inevitable. Where there is a Casus Omissus in a statute the position is governed by the Common Law. *(Mersy Docks and Harbour Board vs. Hinderson Brothers (1988) 13 App. Cas 595 p. 602-3)* To advance a broader proposition to this rule is that what is not specifically mentioned in the statute must be deemed to be deliberately excluded from its purview, so that nothing short of a Constitutional amendment could authorise legislation upon it, is really to invent a "Casus Omissus" so as to apply the rule that, where there is such a gap in the law, the Court cannot fill it. The rule, however is equally clear that the Court cannot so interpret a statute as "to produce a Casus Omissus" where there is really none. It is true that under the guise of judicial interpretation the Court cannot apply Casus Omissus, but the Courts must always try to give effect to the intention of the legislature. The Courts should be slow to adopt a construction which tends to make any part of the statute meaningless or ineffective and an attempt must always be made to reconcile the relevant provisions so as to advance the remedy intended by the statute. It is one of the fundamental rules of interpretation that if the words of a statute are in themselves precise and unambiguous no more is necessary then to expound those in their natural and ordinary sense, the words themselves in such a case best declaring the intention of the legislature.

If the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute or even if there is Casus omissus in a statute the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it under the guise of interpretation by analogy or implication, something, which it thinks to be general principle of justice and equity. To do so, would be entrenching upon the preserves of the legislature. The primary function of a Court of law being jus dicere and not jus dare. The will of the legislature as the supreme law of the land demands perfect obedience. Judicial power is never exercised for the purpose of giving effect to the will of the judges but always for the purpose of giving effect to the will of the legislature, or in other words, to the will of the law. Therefore, where the legislature clearly declares its intent in the scheme of a language of the statute it is the duty of the court to give full effect to the same without scanning its wisdom or policy and without engrafting, adding or implying anything which is not congenial to or consistent with such express intent of the law maker. More so if the statute is a taxing statute.

The Law is what the judges interpret the statute to be, not what the experts in their monopoly of wisdom assert it to be. The duty of Court is to construe the law as it stands, and not to make a new, though it may be better law. It is quite true that in interpreting a statute, to meet the obvious intention of the legislature, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentences, but that is allowed only where the Court is coerced to do so to avoid some serious injustice or to prevent a statute from being reduced to a nullity, or for any other similar reason.

No Court is competent to proceed upon assumption that the legislature has made a mistake, because there is a strong presumption that the legislature does not make mistakes.

In *Smt. Tarulata Shyam vs. CIT (1977) 108 ITR 345 (SC) ;* the Supreme Court held:- In a taxing statute one has to look merely at what is normally said. There is no room for any intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. There is no scope for importing into the statute words which are not there. Even if there be a Casus Omissus, the defect can be remedied only by legislation and not by judicial interpretation.

In the case of *Hiradevi vs. District Board, Shahjahanpur, reported in AIR 1952 SC 362,* deciding the interpretation of sections 71 and 90 of the UP District Boards Act, 1922, Justice Bhagwati, as he then was, speaking for the Court said : "It was unfortunate that when the legislature came to amend the old section 71 of the Act, it forgot to amend section 90 in conformity with the amendment of section 71. But this lacuna cannot be supplied by any such liberal construction as the High Court sought to put upon. No doubt it is the duty of the Court to try and harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the word used by the Legislature to fill in gaps or omissions in the provisions of an Act.

However Lord DEVLIN L.J. pointed out the doctrine of Casus Omissus in the case of *Gladstone vs. Bower (1960) 3 All E.R. 353 (CA)* held :- " The Court will always allow the intention of a statute to override the defects of wording but he Court's ability to do so is limited by recognised canons of interpretation. The Court may, for example, prefer an alternative construction which is less well fitted to the words but better fitted to the intention of the Act. But here there is no alternative construction; it is simply a case of something being overlooked. We cannot legislate for Casus Omissus. I may be sure in this case that I know exactly what Parliament would if it perceived a gap. But if this rule were to be relaxed, sooner or later the Court would be saying what Parliament meant and might get it wrong and thus usurp the Law making function."

A contrary view was expounded by Lord Denning L.J. who said "When defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of the Parliament and then he must supplement the written words so as to give "force and life" to the intention of the Legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out ? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases *[Seaford Court Estates Ltd. vs. Asher) (1994) All. E.R. 155 @ page 164 (CA)].* In another occasion Lord Denning stated that " We set here to find out the intention of the Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making some of the enactments than by opening it up to destructive analysis. *[Magor & St. Mellons Rural District Council vs. New Port Corporation (1950) 2 All. E.R. 1226 Page 1236 (CA)].* Lord Denning again in a dissenting judgement reiterating his liberal views held, "How should we construe an act of Parliament? I have said before and I repeat it now, that we should so construe an Act of Parliament? I have said before and I repeat it now, that we should so construe an Act of Parliament as to effectuate the intention of makers of it and not to defeat it. If they have by mistake overlooked something, we should do our best to smooth it out. We should construe it so as to avoid absurdities and incongruities and to produce a consistent and just result." *Lucy vs. W.T. Honleys Telegraphs Works Co. Ltd. (1969) All E.R.456* at page 462, quoted by G.P. Singh in his book Principles of Statutory Interpretation)

The arguments of Lord Denning L.J. came up for severe criticism at the hands of House of Lords and were not approved. Lord Simonds said "It appears to me that it is a naked usurpation of the legislative function under the thin disguise of interpretation *[Magor & St. Mellons R.D.C. vs. Newport Corporation (1951) 2 All ER 839 (HL)].*

Lord Morton said "These heroics are out of place". The House of Lords finally held in a number of cases that Casus Omissus cannot be filled by the Court in the garb of interpretation. It is also pertinent to note that although a Court cannot supply a real Casus Omissus, it is equally clear that it should not so interpret a statute as to create a Casus Omissus when there is really none. *(Karnataka State vs. Union of India AIR 1978 SC 68 at page 107).*

**Autrefois Acquit**

The principle of the doctrine of Autrefois Acquit is codified in section 300 of the Code of Criminal Procedure. As per this doctrine a person cannot be prosecuted twice for the same offence. In other words, this doctrine can be applied only if a person is convicted or acquitted of an offence that cannot be again tried for the same offence or on the same facts for any other offence for which a different charge from the one made against him might have been framed. The exception is where the act for which a person has been tried leads to consequences which had not resulted earlier or were not known to the Court to have happened. Thus if an employee is charged of theft and is acquitted, he cannot be then charged for having committed criminal breach of trust. But if a person causes a grievous hurt to another and is convicted for this, he may be tried again for culpable homicide if the injured person subsequently succumbs to those injuries *(D.P. Mittal, in his book "Interpretation of Taxing Statutes").*

The principle underlying the plea of Autrefois Acquit is not fully stated merely by saying that an accused person should not be vexed twice by prosecution on the same set of facts. Autrefois Acquit is a plea by a criminal, that he was heretofore acquitted of the same offence. By this plea, a person charged with an offence pleads that he had been tried before and acquitted for the same offence by a competent court. By this plea it is bar to a criminal action, stating that the defendant has already been indicated and tried for the same alleged offence and has been acquitted.

Conversely the principle of Autrefois convict is also another doctrine which needs to be discussed. This rule has originally been enshrined in Article 20 of the Constitution of India which states that "no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence, and no person shall be prosecuted and punished for the same offence more than once." This rule to be studied more so in tax matters as there was a point to be discussed whether prosecution can be launched in a tax case where penalty is already levied.

The Supreme Court in *Maqbool Hussain vs. State of Bombay (AIR 1953 S. 325)* observed.

"Article 20(2) incorporates within its scope the plea of "autrefois convict " as known to the British Jurisprudence or the plea of double jeopardy as known to the American Constitution, but circumscribes it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence."

Article 20(2) contemplates proceedings of the nature of criminal proceedings and the prosecution in this context means an initiation of proceedings of a criminal nature. The first part of Article 20(1) prohibits a conviction while the second part deals with penalty that may be inflicted on conviction. The word "penalty" has been used to denote the sentence or punishment. Like Clause (2), Clause (1) also contemplates proceedings of a criminal nature.

A criminal proceeding may be defined as one, which if carried to its conclusion may result in imposition of sentence such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which, in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and orders aimed at preventing vagrancy are contemplated to be passed.

The imposition of penalty under the Income-tax Act is neither a prosecution nor a punishment for any offence and therefore, the accused is not exposed to any double jeopardy. The proceedings for the imposition of penalty taken against an assessee under the Income-tax Act, are distinct from the criminal complaints filed against him. They can, therefore, continue simultaneously. Even if the offences punishable under the provisions of section 277 of the Income-tax Act, 1961 and section 193 of the Indian Penal Code may be somewhat

similar, they are not identical. *[Gulabchand Sharma vs. H.P. Sharma, CIT (1974) 95 ITR 117 (Delhi)].*

Penalties are not in the nature of offences. In the Income-tax Act, Chapter XXI consisting of sections 271 to 273 deal with penalties imposable, while Chapter XXII consisting of sections 275A to 280 prescribe what are the offences under the Act and the punishment imposable for the said offences. In view of this position, penalty proceedings cannot be equated with criminal proceedings attracting punishment. The objects of the two provisions is clearly distinguishable and is different. The one entailing the prosecution and punishment is to vindicate public justice by punishing the offender, whereas the object of the penalty proceedings is to render evasion unprofitable and to secure to the State the compensation for the damages or attempted evasions. According to the decision of the Kerala High Court in *P. Ummali Umma vs. I.A.C. (1967) 64 ITR 669 (Ker.)* they are mutually exclusive remedies under the Income-tax Act, 1961.

These are concurrent remedies and the invocation of one does not necessarily dispense with, obviate or oust the other. The imposition of penalties under the Act by the authorities, and the conviction in a Court of law for an offence created by the Act, do not attract the principle of double jeopardy either. In ordinary circumstances, the decision to prosecute an assessee or a deemed assessee, under the penal provisions of the Act is a decision taken by the officer empowered to initiate action being satisfied on the objective material before him that there is a case for prosecution without a judicial determination under the Act as to taxability quantification of liability or liability to any penalty etc.

There are large number of cases where criminal law and civil law can run side by side. The object of the criminal law is to punish an offender, who commits an offence against a person, property of the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all or seeing the wrong doer in cases like arson, accident etc. It is anathema to suppose that when a civil remedy is available criminal prosecution is completely barred. The two types of actions are different in content, scope and import. *[Pratibha Rani vs. Suraj Kumar (1985) 155 ITR 190 (SC)].*

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# OPERATION, EXPIRY AND REPEAL OF STATUTES

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## 1. GENERAL

The topic of the article is vast and all embracing in its ambit and in this article one can only give the broad outline of the subject with special reference to the case law dealing with taxation statutes.

## 2. OPERATION

2.1 The making of the law and its commencement are different things. Operation of the statute starts from the date of its commencement. The commencement of the statute depends on the express words provided therein as to when it will come into operation but in absence of any special provision either with regard to the whole Act or portion thereof, an Act will come into operation on the day it receives assent of the President or the Governor, as the case may be, immediately on the expiration of the day it precedes its commencement — (Section 5 of the General Clauses Act, 1897). However, the commencement is often postponed to some specified future date or to such date as the appropriate government may appoint by a notification in the Official Gazette. In such cases, even assent by the President will not bring the Act into operation, till notification is issued and published in the Government Gazette, *B. Basavalingappa vis. State of Karnataka* (1985) 59 STC 1, 9 (Karn); *Dy. CTO vs. Sha Sukraj Peerajee AIR* (1968) SC 67, 70; *Haji Lal Mohd. Biri Works vs. State of U.P.* (1973) 32 STC 496, 500 (SC). Similarly, provision can be made for commencement of various parts of the statute on different dates. *K. Manikchand vs. Elias Saleh* AIR (1969) SC 751, 761.

2.2 Question has arisen as to whether the power to bring into force a statute can be exercised by a delegate such as the executive government. The answer is yes. Even in cases where at the time of bringing the statute into operation by the act of the delegate, the legislature may have ceased to be competent to enact the statute at that time. *Ishwar Das vs. Union of India* AIR (1972) SC 1193 and *State of Assam vs. K. B. Kurkalang* AIR (1972) SC 223.

2.3 A question has also arisen as to whether the court can direct the government to bring a statute into operation. The answer is generally in the negative but if a considerable time has elapsed since the passing of the statute, a writ can be issued by the court directing the government to decide whether the statute should be brought into force. *Altmesh vs. Union of India* AIR (1988) SC 1768, and *A. K Roy vs. U.O.I.* AIR (1982) (SC) 710, 732-733.

## 3. RETROSPECTIVE OPERATION

3.1 It is well settled that the Union as well as the State Legislatures have plenary powers of legislation and can legislate prospectively as well as retrospectively *A. Hajee Abdul Shukoor & Co. vs. State of Madras* AIR (1964) SC 1729 at 1735. Such retrospective legislation may either be made by express words or by necessary intendment. It, therefore, depends on the wording of the statute, where express words do not exist,

whether by necessary intendment retrospectively should be inferred and how far backwards.

**Statutes dealing with substantive rights**

3.2 However, there is a well accepted principle of interpretation that every statute is prima facie prospective in its operation so far as substantive rights are concerned, the reason being that the legislature could not have intended affecting vested rights or to impose new burdens retrospectively unless the words compel the court to give effect to it retrospectively. *R. Rajagopal Reddy vs. Padmini* (1995) 213 ITR 340 (SC); *CED vs. N. A. Merchant* (1989) 177 ITR 490 (SC).

3.3 However, a statute is not considered retrospective merely because part of the requisites for its operation is drawn from a time antecedent to its passing. *Rao Shiv Bahadur Singh vs. State of U.P.* AIR (1953) SC 394 at 398. Similarly, taking into account past events does not make the statute retrospective.

**Existing rights and vested rights**

3.4 A distinction has been drawn by various decisions between an existing right and a vested right and it is said that rule against retrospective construction is applied only to save vested rights and not existing rights. *Shri Bakul Oil Industries vs. State of Gujarat* AIR (1987) SC 122. Sometimes, in such a situation the word ”retroactive” is used instead of the word “retrospective”.

**Statutes dealing with procedure**

3.5 However, just as a statute affecting or creating substantive rights is presumed to be prospective, a statute dealing with matters of procedure is presumed to be retrospective unless the construction of the statute does not admit of such a presumption. What is a matter of procedure and what is a matter of substance is again to be decided on the wordings of each statute and the consequences involved. Statute dealing with matters of procedure will apply to all actions pending as well as future actions because no one has a vested right in any course of procedure. *CWT vs. Shravan Kumar Swarup* (1994) 210 ITR 886 (SC) holding Rule 1 BB of W.T Rules enacted w.e.f. 1-4-79 as retrospective from A. Y. 1965-66 onwards as the Rule was procedural as regards valuation. However, there are certain aspects dealing with procedure which may give rise to a vested right and a statute dealing with these rights may not be construed as retrospective in its operation unless it is expressly made retrospective e.g., though statute of limitation is a matter of procedure, on expiry of the period of limitation, a vested right arises and amendment of the period of limitation after the expiry of the said period in a given case will not revive the period of limitation but if the earlier period has still not expired, the new provision will extend that period. *J.P. Jani ITO vs. Induprasad D. Bhatt* (1969) 72 ITR 595 (SC).

*Right of Appeal*

3.6 Similarly, though Appeal is a procedural part of the law, it is considered as a substantive and a vested right in a litigant and such a vested right cannot be presumed to have been taken away by construing the statute as retrospective unless such a construction would become necessary because of express provisions made in that behalf. A change of forum, for enforcing rights except in pending proceedings, is considered as a matter of procedure and new forum has to be resorted to even in respect of old cause of action. *New India Ass. Co. Ltd. vs. Shanti Misra* AIR (1976) SC 237. Though right of Appeal is considered as a vested right and cannot be effective retrospectively as held in *Hussein Kasarn Dada (India) Ltd. vs. State of M. P.* AIR (1953) SC 221, a right of Appeal pre-supposes existence of a court to which Appeal

lies. If that court itself is abolished and no new forum is provided for the vested right of Appeal which might have to be filed or which is pending, such right will perish. *Ittyavira Mathai vs. Varkey* AIR (1964) SC 907 at 914.

**Fiscal statutes**

3.7 As regards fiscal legislation, it is generally presumed that the legislation is not to be construed as retrospective unless it deals with procedure.

3.8 It is common knowledge that Income-tax Act is to be applied as in force on the first day of the assessment year. *Reliance Jute & Ind. vs. CIT* (1979) 120 ITR 921 (SC). Any subsequent legislation enacted during the course of the assessment year will not be applicable for that assessment year or part thereof *Karimtharuvi Tea Estate vs. State of Kerala* (1966) 60 ITR 262 (SC) unless by express words or by necessary implication it has been made applicable from the date the subsequent legislation has been enacted. *CIT vs. Best & Co*. (1979) 119 ITR 830 (Mad).

3.9 Similarly, even a procedural provision which effects finality of tax assessment or reopens a liability which is time barred, cannot be so construed as it is considered a vested right in that respect. *J.P. Jani vs. Induprasad Devshankar Bhatt* (1969) 72 ITR 595(SC).

**Penal statutes**

3.10 Penal statutes which create offences or which has the effect of increasing penalties for existing offences can only be prospective by reason of constitutional prohibition regarding retrospectivity imposed by Article 20 of the Constitution. However, in the case of *State (through CBI, Delhi) vs. Gian Singh* AIR (1999) SC 3450 it is held that if any subsequent legislation downgrades the harshness of the sentence for the same offence, the benefit of the new legislation can be extended to an accused committing the offence prior to the new legislation who is still to be finally sentenced. However, Constitutional prohibition would not apply to penalties levied under tax laws, as " the proceedings in that behalf though considered quasi-criminal, do not constitute offences which only are hit by Article 20.

**Remedial Statutes**

3.11 However, a slightly different view has been taken with regard to statutes conferring prospective benefits on antecedent facts. Such statutes are called remedial statutes. The view has been taken that a prospective benefit under a statutory provision which is in certain cases to be measured by or depends on antecedent facts does not necessarily make the provision retrospective. Thus, a statute can be prospective even when part of the requisite of its action of operation is drawn from the time antecedent to its passing. Similar is the position with regard to **Validating Acts** which cure the defect in the previous legislation which resulted in the Court holding it invalid." Such legislation is necessarily made retrospective, curing the defect and saving consequences of illegality. *Ujagar Prints v/s. U.O.I.* (1989) 179 ITR 317 (SC). However, without curing the defect or lacuna in the law, validating Act cannot merely render judicial verdict invalid as it would amount to exercise of judicial power by the legislature *State of Haryana vs. Karnal Co-op. Farmers' Society* AIR (1994) SC 1.

**New remedies for existing rights**

3.12 Similarly, statutes providing new remedies for enforcement of existing rights will apply to future as well as past causes of action, the reason being that such statutes since they do not affect the existing rights are classified as procedural. *Dena Bank vs. Bhikabhai Prabhudas Parekh* AIR (2000) SC 3654 at 3660.

**Declaratory statutes**

3.13 Declaratory statutes are not governed by the well known presumption against retrospectivity. Such Acts are usually held to be retrospective because the reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error in interpretation. However, mere use of the words "It is hereby declared" or the words "for the removal of doubts" do not make the statute retrospective and in spite of these words the intended declaration or removal of doubt may only be operative from the date the said statute is enacted and not for any earlier period. There are decisions of the Supreme Court on both the sides of this view and ultimately it depends on the nature of phraseology, the intention of the legislature/the judicial error sought to be removed etc. Sometimes, even stronger words have been used such as "shall be deemed always to have been meant" or "shall be deemed never to have included". These words are very strongly indicative of retrospectivity. Following cases show division of Judicial opinion at the level of Supreme Court also: —

(1) In *CIT vs. ISR Patton* (1992) 193 ITR 49 (Ker) at P. 53-56 affirmed in 233 ITR 166 (SC) (on ground that it is pure question of fact) Expl. to s. 9 (1)(ii) of Income-tax Act added by Finance Act 1983 was held effective only from 1-4-1979 and was not applicable to A.Ys. 1973-74 and 1976-77. Explanation used words "for the removal of doubts, it is hereby declared". Even then it was not considered to effect prior to 1-4-1979.

(2) *CIT vs. Patel Bros.* (1994) 215 ITR 165 (SC) Explanation 2 was added by Finance Act 1983 defining "entertainment expenditure" w.e.f. 1-4-1976 words used "for the removal of doubts, it is hereby declared. It was held to be not applicable for assessment years prior to 1976-77.

(3) *K. M. Sharma vs. ITO* (2003) 354 ITR 773 (SC). It was held that lifting of bar of limitation by Direct Tax Laws amendment Act, 1987 w.e.f 1-4-1989 for reassessment on basis of order passed by Court in any other proceeding under any other law did not apply to earlier A. Ys. which were already barred on 1-4-1989.

(4) *CIT vs. Kerala Electric Lamp Works* (2003) 261 ITR 721 (Kerala). Explanation 5 to s. 32 was added by Finance Act, 2001 stating that depreciation would be allowed even when not claimed. It was held that it is not retrospective but effective from A.Y 1-4-2002. The amendment was to supersede judgment of Supreme Court in Mahendra Mills case (2000) 243 ITR 56. Words used in the amendment were "for the removal of doubts, it is hereby declared".

(5) On the other hand, in *Allied Motors (Pvt) Ltd. vs. CIT* AIR (1997) SC 1361 proviso to s. 43B added from 1-4-1988 was given retrospective effect from the date S. 43B was introduced; i.e, 1-4-1984 on the ground that proviso was to remedy unintended consequences and supply obvious omission.

(6) *Similarly in CIT vs. Podar Cement Pvt. Ltd.* AIR (1997) SC 2523 at 2538, 226 ITR 625 (SC) it was held that amendments in s. 27 (iii), (iiia) and (iiib) defining "owner of house property" introduced by Finance Act, 1987 was declaratory and clarificatory in nature and was consequently retrospective.

**Finality or orders**

3.14 Similarly, an order which is final on the date on which it is made creates a vested right and a subsequent change in the law giving rise to new right of Appeal or Revision is presumed not to affect the finality of the orders already made. *Dafedar*

*Niranjan Singh vs. Custodian Evacuee Property* AIR (1961) SC 1425 and *Keshavlal Jethalal Shah vs. Mohanlal* AIR (1968) SC 1336. However, such a right to finality can only arise if the order is made. If pending the proceedings, further right of Appeal or Revision is conferred, such rights will be available as the order has not been made. *Indira Sohanlal vs. Custodian of Evacuee Property* AIR (1956) SC 77 at 84 and *Moti Ram vs. Suraj Bhan* AIR (1960) SC 655 at 657.

3.15 However, generally a statute affecting rights in existence is not readily construed to affect the adjudication of pending proceedings. Unless, therefore, there is a specific provision dealing with pending proceedings on the date the statute comes into operation the pending proceedings will continue as before.

## 4. EXPIRY OF THE STATUTE

### Perpetual

4.1 Statute is perpetual when no time is fixed for its duration. Such a statute remains in force until it is repealed expressly or impliedly. However, there cannot be a permanent statute which cannot be touched or amended by a subsequent legislature. It is only in this sense that the statute is called a perpetual statute.

### Temporary statute

4.2 However, a temporary statute is one where the duration is specified. Such a statute expires on the expiry of specified time unless it is earlier repealed. However, a temporary statute may be extended from time to time by fresh statute or by a power conferred under the original statute. However, once a temporary statute has expired, it cannot be made effective by merely amending the same. It has to be re-enacted. *Jotindranath vs. Province of Bihar* AIR (1949) F.C 175.

### Effect of expiry of temporary statutes

4.3 Section 6 of the General Clauses Act, 1897 applies only to repeals and would not have any application when a temporary statute expires. The effect of such expiry will, therefore, depend on the construction of that statute alone.

### Legal proceedings under expired statute

4.4 A question arises as to the legal proceedings in relation to matters connected with a temporary Act. Can they be continued or initiated after the Act has expired? The answer to the question depends as to whether a saving provision similar in effect to section 6 of the General Clauses Act, 1897 has been enacted in the temporary Act. If there is no such saving provision, the pending proceedings will terminate on the expiry of the statute. A person can neither be prosecuted or convicted for an offence under a temporary Act after its expiration in the absence of a saving provision.

4.5 On the same principle, when a temporary Act expires the normal rule is that any appointment, notification order, scheme, rules made under the Act will also come to an end with the expiry of the Act and will not be continued even if the provision of the expired Act are re-enacted, the reason being that section 24 of the General Clauses Act, 1897 which only applies to repeals etc. does not apply to such a situation.

4.6 However, it may be noted that even in absence of saving provision like section 6 of the General Clauses Act, 1897, a temporary statute is not dead for all purposes and rights and obligations resulting from the provisions of the temporary Act may endure even after its expiry e.g., a person sentenced under the temporary Act cannot be released before he serves out his sentence even if temporary Act expires before the expiry of the sentence. *State of Orissa vs. Bhupendra Kumar* AlR (1962) SC 945 at 953, 954.

4.7 When a temporary statute effects a repeal of an existing statute, the question arises whether the repealed statute revives on the expiry of the repealing temporary statute. Sections 6 and 7 of the General Clauses Act, 1897 do not give a clear answer to this situation and ultimately the courts have observed that the answer will depend upon the construction of the repealing statute. See State of *Orissa vs. Bhupendra Kumar* AIR (1962) SC 945 at 954.

4.8 It may be incidentally mentioned that power to repeal is co-extensive with the power to enact such a law. If the legislature has no power to enact a law on a particular subject, it has also no power to repeal the same. See *Ramakrishna vs. Janpad Sabha* AIR (1962) SC 1073 at 1080.

## 5. EXPRESS REPEAL

5.1 Express repeal does not require any particular form or words. However, the usual phraseology is "is or are hereby repealed. Similarly, the words "shall cease to have effect" are also used as also the words "shall be omitted". There can be a simple repeal or an amendment repealing the statute and re-enacting part of it. It has the same effect. However sometimes when the legislature is repealing many statutes by a single Act it also uses the words "all provisions inconsistent with this Act" are hereby repealed. However, such a formula leaves the debate open as to what is inconsistent which is repealed.

## 6. IMPLIED REPEAL

6.1 Implied repeal arises if it is necessarily to be read in view of contrary provision in the amended Act. If the continuance of the existing legislation is inconsistent with the new provisions, the implied repeal may be presumed though the burden to show that there has been implied repeal lies on the party assenting the same. If the two statutes; i.e., existing statute and the new statute are so inconsistent that the two cannot stand together implied repeal has to be accepted. But if the two legislations may be read together and some application may be made of the words in the earlier Act, a repeal will not be inferred. It may be noted that S. 6 of the General Clauses Act 1897 equally applies to implied repeal.

6.2 Another principle of implied repeal arises for consideration when there is a prior law on a particular or special subject followed by a later general enactment. In such a situation reconciliation is normally possible on the principle that the particular or special law is construed as an exception or qualification of the general Act.

6.3 Conversely, a prior general Act may be followed by a subsequent particular or special Act. In such a case, the operation of the particular Act may have the effect of partially repealing the general Act or curtailing its operation.

## 7. CONSEQUENCES OF REPEAL

7.1 A general provision has been made in section 6 of the General Clauses Act, 1897 and also in corresponding State legislations. The said section operates unless there is something contrary in the repealing statute. Section 6 applies to all types of repeals whether express or implied, entire or partial or whether a repeal simpliciter or a repeal accompanied by fresh legislation. It also applies when a temporary statute is repealed before its expiry but it has no application when such a statute is not repealed but comes to an end by expiry. It may however be noted that repeal of a rule by another rule will not attract section 6 of the General Clauses Act, 1897. *Rayala Corporation vs. Director of Enforcement* AIR (1970) SC 494 at 503 and *Kolhapur Cane Sugar Works vs. Union of India* AIR (2000) SC 811 at 819.

In these two cases it has also been held that s. 6 applies only to "repeals" and not to "omissions". This view may require reconsideration. However, these decisions have been followed in *General Finance Co. vs. Asst.* CIT AIR (2002) SC 3126, taking the view that on omission of s. 276 DD of I.T. Act w.e.f. 1-4-1989, prosecution could not be continued nor punishment imposed, as s. 6 was not applicable to "omissions" .

7.2 In absence, therefore, of operation of section 6 proceedings initiated under the omitted rule cannot continue unless the new rule contains a saving clause to that effect. Earlier, before enactment of section 6(a) and 7 the General Clauses Act, 1897 the common law rule was of revival meaning thereby that if one Act is repealed by another Act and the repealing Act is repealed by a third Act, the first Act would revive. This is not the position now because of sections 6(a) and 7 of the General Clauses Act, 1897. Thus, unless the third Act makes an express provision to revive the first Act, there is no rule of revival now applicable. It may also be noted that clauses (c) to (e) of section 6 of the General Clauses Act, 1897 prevents obliteration of the repealed statute and keeps intact rights acquired or accrued and the liability incurred during its operation and permits continuance or initiation of any legal proceedings or recourse to any remedy which may have been available before the repeal for enforcement of such rights and liability. The debate, therefore, will now be what is and what is not a right preserved by section 6 of the General Clauses Act, 1897. It has to be a right acquired or accrued and not a mere hope or expectation. Therefore, inchoate acts done under an Act before maturing into a right or liability cannot survive the repeal of the Act followed by fresh legislation containing the saving clause to preserve "nothing done etc." under the repealed Act so as to continue under the corresponding provisions of the new Act in so far as they are not inconsistent with the provisions of the new Act.

**Consequences of repeal on subordinate legislation**

7.3 As a consequence of repeal of the statute, subordinate legislation made under the statute would cease to have effect after the repeal of the statute. This result can be avoided by insertion of saving clause providing to the contrary. However, when a statute is repealed and re-enacted, section 24 of the General Clauses Act, 1897 provides for continuance of any appointment, notification, order, scheme, rule, form or bye-law made or issued under the repealed statute in so far as it is not inconsistent with the provisions re-enacted.

## 8. CONCLUSION

8.1 The aforesaid principles of law are in general and the wording of each legislation as to whether there is a saving clause or any other provision regarding the actions, liabilities, obligations under the repealed Act will be material for consideration in reaching a final conclusion.

8.2 The aforesaid discussion only gives a general view as regards operation, expiry and repeal of statutes and the final effect has to be determined only after taking into account the relevant wordings of statutes and various other aspects indicated above.

Extracts from General Clauses Act, 1897.

**Section 5 : Coming into operation of enactments :**

(1) Where any Central Act is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent

(a) in the case of a Central Act made before commencement of the Constitution, of the Governor General, and

(b) in the case of an Act of Parliament, of the President.

(2) Unless the contrary is expressed a Central Act or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.

**Section 6: Effect of repeal**

Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made, or hereafter to be made, then, unless a different intention appears, the repeal shall not —

(a) revive anything not in force or existing at the time at which the repeal takes effect, or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, penalty, forfeiture or punishment as aforesaid.

And any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

**Section 7 : Revival of repealed enactments**

(1) In any Central Act or Regulation made after the commencement of this Act, it shall be necessary, for the purpose of reviving either wholly or partially any enactment wholly or partially repealed, expressly to state that purpose.

(2) This section applies also to all Central Acts made after the third day of January, 1868 and to all Regulations made on or after the fourteenth day of January, 1887.

**Section 24 — Continuation of orders etc. issued under enactments repealed and re-enacted**

Where any Central Act or Regulation is, after the commencement of this Act, repealed and re-enacted with or without modification, then unless it is otherwise expressly provided, any, appointment, notification, order, scheme, rule, form or bye-law made or issued under the repealed Act or Regulation, shall so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification, order scheme, rule form or bye-law made or issued under the provisions so re-enacted and when any Central Act or Regulation which, by a notification under section 5 or 5-A of the Scheduled District Act, 1874 (XIV of 1974) or any like law, has been extended to any local area, has by a subsequent notification, been withdrawn from and re-extended to such area or any part thereof, the provisions of such Act or Regulation shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this section.

**References:**

1. Principles of Statutory Interpretation by G. P. Singh.

2. Chaturvedi's Income Tax Law.

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# INTERPRETATION OF REVENUE STATUTE

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## 1. INTRODUCTION

In any democratic society which is governed by the Rule of Law, economic stability of the country largely depends upon true and correctly explaining the provisions relating to the taxation and Revenue by the Court of Law and obviously by the Apex Court of the Country.

India, as the preamble of the Constitution says, is a Democratic, Social and Republic Country, it proclaims also to be a welfare society.

As such the Revenue of the Union of India and the component states are collected under different heads of direct and indirect taxes as also by levy of fees. In a welfare state task, responsibilities and duties of the machinery, both administrative and quasi-judicial, of the country unlike capitalistic country are both qualitatively and quantitatively larger.

Then again Article 265 of the Constitution provides that —

"No tax should be levied or collected except by authority of law". So far as levy of fees are concerned this is done in view of the last entry of Lists I, II and III of 7th Schedule which provides that such fees may be as related to one or more entry in that list.

All such laws must obey the mandate of Article 13; i.e., Fundamental rights unless they are protected by umbrella of Articles 31A, 31B and 31C read with the 9th Schedule of the Constitution. There are further limitations laid down in Part 13 of the Constitution such as Articles 301 and 304.

I need not refer to other restriction upon the legislature relating to making of revenue or taxation laws because in this short discourse emphasis is laid upon interpretation of revenue laws and in so doing discuss how far such laws are to be treated as mandatory or directory.

## 2. RULES OF INTERPRETATION

In every treatise upon interpretation of statutes, different attitudes are attributed to the subject matter or nature of the statute so as to consider as to the effect of the object of the particular statute which is sought to be achieved. For such purpose the expressions "shall" or "may" or laying down an affirmative procedure etc. used in the statute frequently came for judicial consideration. Having regard to the subject matter of statute such in as beneficial or welfare legislature the word "may" which generally confer a discretion upon the authority exercising the power is very often construed as a discretion coupled with duty so as to construe the expression "may" as a mandatory provision in that what was not explicitly stated in the statute is construed as mandatory, as if this is implicit in the statute (see *Julius vs. Bishop of Oxford* 5 Appeal Cases 214 )

## 3. REVENUE STATUTE

In a revenue statute where by the legislature by an enactment imposes a tax or charge the rule of construction or interpretation of such statute has been more or less unanimously construed by Courts in England as also in India in a simpler manner.

The classic passage in the words of the *Late Rowlatt J (Cape Brandy Syndicate vs. I R C 1921 (1) KD 64, 71)* explained the rule of interpretation of revenue statute in the following words:

> "In a taxing enactment, one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

In the words of Lord Thankerton in the case of *I R C vs. Ross and Coulter 1948 (1) All E.R. 616 at 625 (H.L.)* observed "counsel are apt to use the adjective 'Penal' in describing the harsh consequences the taxing provisions, but if the meaning of the provisions, is reasonably clear, the Courts have no jurisdiction to mitigate such harshness. On the other hand, if the provision is capable of two alternative meanings, the Courts will prefer that meaning more favourable to the subject. If the provision is so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect."

These fundamental principles have been accepted by Supreme Court in a number of cases. To illustrate Bhagawati J. stated the principle as follows:

> "In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of law. If the revenue satisfies the court that the case falls strictly with the provisions of the law, the subject can be taxed, If, on the other hand, the case is not covered within the four corners of the provisions of the statute, no tax can be imposed by inference or by analogy or by trying to prove into the intentions of the legislature and by considering what was the substance of the matter".

Long days back the House of Lord expressly affirmed the cardinal principles of *Duke of Westminster vs. I.R. (19 TC 490, 520, 524)* in applying the principle of construction implicit in a revenue statute that the citizen has the legal right to dispose of his capital and income so as to attract upon himself the least amount of tax. Avoidance of tax is not a tax evasion and it carries no ignominy with it anybody can so arrange his affairs so as to reduce the burden of tax to minimum. In the case of Duke of Westminster the House of Lords so observed that "given that a document of transaction is genuine the Court cannot go behind it to some supposed underlying substance". However, the Supreme Court in a Sales Tax case in *McDowell vs. CTO (1985) (154 ITR 148 (SC))* took the view that the legal position in case of tax avoidance should be taken as altered in the light of three judgments of the House of Lords (i) *Ramsay vs I R (54 T C 101)* (ii) *I R vs. Burmah Oil (54 T C 200)* (iii) *Furniss vs Dawon (55 T C 324).*

The eminent jurist Mr. N. A. Palkhivala in one of his books "WE THE NATION, THE LOST DECADES" in an illuminating article have analysed the judgment of Supreme Court in *McDowell vs. CTO 154 ITR 148* and considered the validity of ruling of the Supreme Court blurring the distinction between tax avoidance which is legitimate and tax evasion. By an indepth analysing the said judgment in McDowell's case, Mr. Palkhivala observed that the Courts' pronouncement obliterating such distinction is patently incorrect and proceeds on a total misreading of three decisions of the House of Lords. The said article of Mr. Palkhivala is published at page 130 in his famous book "WE THE NATION, THE LOST DECADES". In this article the whole object is that in a taxing statute the courts have little scope to find out the underlying intention of the legislature beyond what is stated in the plain language of the statute.

## 4. INTERPRETATION OF MANDATORY AND DIRECTORY STATUTE

Thus far it has been stated that a revenue statute imposing a tax or a charge confer little scope to the court of law to give any other meaning in finding out the real intention of the statute except what the plain language of the statute mean. The English Courts, however, expressed that it is not a universal or invariable rule that in a taxing statute the Courts are powerless to search into the factors leading to the express words of the enactment. In *Attorney General vs Carloun Bank* (1899 (2) QB 158 at 164) Lord Rusell of Killowen C.J. said: "I see no reason why any special cannons of constructions should be applied to any act

of Parliament, and I know of no authority for saying that a taxing statute is to be construed differently from any other Act.

In India, however, the Courts of law in construing a taxing statute lean on the ratio of the case of Cape Brandy Syndicate and goes by the words used in the statute without searching for any intendment of use of such expressions as they often do in construing different nature of statute such as beneficial statute, welfare statute more particularly the legislation relating to protection of the rights of industrial workers. However, an exception to this rule has been made by the Supreme Court in the case of *State of Orissa vs. M. A. Tullock & Co. [1964 (15) STC 641 (SC)]*. In that case while the statute namely sec. 5 (2)(a)(ii) of the Orissa Sales Tax Act, 1947 did not make it mandatory for a dealer that he must produce a true declaration in writing by the purchasing dealer or by such responsible person as may be authorised in writing in this behalf by dealer that the goods in question are specified in that purchasing dealer's certificate of registration being required for resale by him or in the execution of a contract the rule made by the rule making authority made it mandatory. The Supreme Court held in the case of *Kedarnath Jute Manufacturing Co. vs. CTO (AIR 1966 SC 12)* that the said mandatory provision in the Orissa Sales Tax Rule was inconsistent with sec. 5(2)(a)(ii) of the Orissa Sales Tax Act and to avoid that conflict that notwithstanding the use of the expression "shall produce a true declaration" that the rule was only directory and therefore it would be enough if it was substantially complied.

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# INTERPRETATION OF STATUTES WITH REGARD TO BENEFIT, DEDUCTION AND EXEMPTIONS UNDER THE INCOME-TAX ACT

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## 1. INTRODUCTION

1.1 As far as taxing statute is concerned, greater latitude has been given to the Legislature keeping in view the sensitive and the complex nature of economic mechanism, fabric and difficulties inherent in providing various incentives, benefits, deductions and exemptions.

1.2 The Constitution Bench in *R. K. Garg vs. Union of India*, 133 ITR 239 at Pg. 255 observed:

> "Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion., etc. It has been said by no less person than Holmes J. that the Legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in the case of legislation dealing with economic matters where, having regard to the nature of the problem required to be dealt with, greater play in the joints has to be allowed to the Legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.

1.3 Nowhere has this admonition been more felicitously expressed than in *Morey vs. Deud* (1957) 354 US 457, where Frankfurter J. said in his inimitable style:—

> "In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The Courts have only the power to destroy not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

1.4 That the Court must always remember that, 'legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry' that exact wisdom and nice adaptation of remedy are not always possible and that 'Judgment is largely a prophecy based on meagre and uninterpreted experience'.

1.5 Every legislation particularly in economic matters is essentially impiric and it is based on experimentation or what one may call trial and error method and, therefore, it cannot provide for all possible situations or anticipate all possible

abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid.

1.6 The Courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture vs. Central Reig Refining Co.* 1950, 94 L.Ed. 381, be converted into Tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation because it is not possible for any Legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation, which may be made by those subject to its provisions, and to provide against such distortions and abuses.

1.7 Indeed, howsoever, great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity.

The Court must, therefore, adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions.

1.8 If any crudities, inequities or possibilities of abuse come to light, the Legislature can always step in and enact suitable amendatory legislation. That is the essence of the pragmatic approach which must guide and in spite the Legislature in dealing with complex economic issues.

## 2. INTERPRETATION REGARDING BENEFIT OF DEDUCTION

2.1 In analysing benefit of deduction, the words used in a particular context should be so interpreted so as to give benefit and allow deduction. A classic instance is the case of interpretation of the term “New Machinery” which is to be interpreted in juxaposition with the terms “utilisation” or “purchase”. The benefit of deduction is to be allowed also in those case where the entire machinery has not been purchased from the market but the same has been fabricated or assembled by the assessee. *Twenty First Century Steels vs. DCIT (2004) 269 ITR 173* observations by Special Bench of Delhi Tribunal.

2.2.1 Under sec. 32AB benefit of deduction is available where the assessee has out of his income chargeable to tax utilised any amount during the previous year for the purchase of any new ship, aircraft, new machinery or plant without depositing any amount in the Deposit Account under clause (a) of sec. 32AB(1).

2.2.2 The issue arises is whether raw materials is plant? By no stretch of imagination can purchase of raw material be equated as purchase of machinery or plant. The words “Plant or Machinery” are not defined in the Income-tax Act. However, it is possible to interprete that raw material claimed as converted into dies would be synonym to machinery or plant.

2.2.3 It is true that a provision granting deduction should be liberally construed. Liberal construction must also flow from the language used and the rule of interpretation of taxing statute does not permit placing of and unnatural interpretation on words contained in the enactment. Thus if mere dyes are purchased, it would be difficult to construe the same as purchase of plant and machinery.

2.3 In interpreting benefit to be given with regard to a particular section, the following points must be considered; (a) the object for incorporating the provision, (b) legislative history and (c) the aim sought to be achieved. In interpreting the provisions of a section, we cannot add or subtract any word as against the word already existing in the enactment.

2.4 The Legislative intention must be to avoid absurdity and such approach is applied in interpreting taxing statute as laid down in the case of *Hindustan Petroleum Corporation vs. Collector of Central Excise* 1995 3 Scale 1, at Pages 8 and 9.

2.5 In confirming benefits some times the Court shift from "literal to purposive construction". This could be supplemented only when the situation warrants.

2.6 Another instance is the case of *CIT vs. Gwalior Rayon Silk Mfg. Co. Ltd. (1992), 196 ITR l49 (SC)* where the assessee has claimed depreciation on written down value of the road constructed, forming part of the factory building. The issue was whether depreciation was admissible on written down value, on the grounds that roads in factory constituted "Building". The Supreme Court held that the roads are covered within the definition of building and depreciation is admissible. The Supreme Court made the following observations (Head Note):

"It is settled law that the expressions used in a taxing statute would ordinarily be understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative intention. It is equally settled law that, if the language is plain and unambiguous, one can only look fairly at the language used and interpret it to give effect to the legislative intention. Nevertheless, tax laws have to be interpreted reasonably and in consonance with justice adopting a purposive approach. The contextual meaning has to be ascertained and given effect to. A provision for deduction, exemption or relief should be construed reasonably and in favour of the assessee."

2.7.1 The issue is that one cannot stretch the intention of legislature to get benefit of exemption. The rule of interpretation of statute is to go by the plain language, if there is ambiguity in the language. Sec. 53 of the I.T. Act leaves no doubt that the benefit is available to the assessee being an "individual". Question arose whether a Trust can avail of the benefit of sec. 53 as regards Exemption of Capital Gains on transfer of residential house. It is clear that Sec.53 applies only to individuals and would not be applicable to AOP. Trusts are assessed as AOP and, therefore, the *Rajasthan High Court in CIT vs. Madan Parnami Family Trust* (2004) 269 ITR 16 (Raj) came to the conclusion that since the trust is assessed as AOP exemption u/s. 53 cannot be claimed merely because the income is ultimately received by individual beneficiaries.

2.7.2 While interpreting the words "individual and HUF" in sec. 53, the Court observed that 'the Trust has been assessed as AOP and only when the assessee is an individual, the exemption from tax of capital gains would be available. There is no justification to "stretch the intention" of the legislation to extend the benefit of exemption u/s. 53 to any other assessee other than "individual".

2.8 Another section of the Act being an incentive provision, should be construed liberally so as to achieve the objective for which deductions are provided in the Act. An example in this connection would be the provisions of sec. 10A of the I.T. Act. In interpreting sec. 10A the principle laid down by the Supreme Court in *Bajaj Tempo Ltd. vs. CIT* (1992) 196 ITR 188 (SC) would require consideration viz., that the provision for incentive for growth and development should be interpreted liberally.

2.9 Another issue is can benefit granted be forgone. The term "Spending", "Expenditure" and "Loss" have different connotation. Therefore, loss could not be construed to be expenditure and sec.14A of the Act would be applicable qua expenditure and not qua the loss.

2.10 Sec. 10A of the Act is a beneficial provision. It is a code by itself. If the assessee does not wish to avail of the benefit for some reason, the benefit "cannot" be forced upon

him. This proposition is laid down in *CIT vs. Mahendra Mills* (2000) 243 ITR 56 (SC) where it was held that a privilege cannot be to a disadvantage and an option cannot become an obligatory. If the assessee does not wish to avail of a benefit contemplated in the Act for some reason, the benefit cannot be forced upon him.

2.11.1 In confirming benefit of deduction, some times simple terms can have complex meaning. Take the instance under the Wealth Tax Act where one house belonging to an assessee is exempt. The issue arises regarding the meaning and interpretation of "House". Issue arose whether cinema hall can be considered as a house?

2.11.2 All buildings cannot be regarded as house. In common parlance a house means a place where people live. However, the point to be noted is that residential buildings can also be given for commercial purposes and if given purely for business purpose, whether it would still continue to remain "house".

2.11.3 *The Rajasthan High Court in CWT vs. Tulsi Dass* (2002) 256 ITR 73 (Raj) held that cinema hall is a house. On the other hand the *Allahabad High Court in CIT vs. Jai Kishan Gupta* (2003) 264 ITR 482 (All) dissented from the Rajasthan High Court and came to the conclusion that looking to the common parlance a house means a place where people live and therefore, cinema hall cannot be regarded as a house. The Court observed that "no one ever calls a cinema hall a house".

2 .12.1 Thus while interpreting benefit of deduction it is well settled principle of interpretation that the popular or commonsense meaning of words or expression should be preferred : *Airfreight Ltd. vs. State of Karnataka* 1999 6 SCC 561 and *Davis vs. Sebastian* (1999) 6 SCC 604 (SC).

2.12.2 In the absence of statutory definition of a word or expression the common parlance meaning should be applied: *Aspinwall and Co. Ltd. vs. CIT* 2001 251 ITR 323 and *State of Kerala vs. V. Padmanabhan* 2000 9 SCC 262.

2.12.3 In Municipal Corporation of Greater Bombay vs. Mafatlal Industries AIR 1996 SC 1541 the Supreme Court held that plain and ordinary meaning of a word or expression should be ascribed to it unless the context otherwise requires.

## 3. INTERPRETATION WITH REGARD TO DEDUCTIONS CLAIMED

3.1 A section which has come up for interpretation by various Courts is sec. 80HHC. In a recent decision *CIT vs. G. Krishnan Nair* (2003) 259 ITR 727 (Ker.), the Court adopted a liberal interpretation of the provisions contained in sec. 80HHC by observing that the intention of the provisions contained in sub-section (4A) of section 80HHC is to encourage export, and to give incentive to develop export business. It was observed that though normally strict construction is advocated with reference to taxing provisions, when exemptions are made with a beneficent object such as to give incentive to co-operative movement or for encouraging investment in new machinery or plant, such provisions have to be liberally construed.

3.2.1 The meaning of the word "profit" occurring in sec. 80HHC sub-sections (1) and (3), as held by the Supreme Court in IPCA Laboratory's case *(2004) 266 ITR 521,* is the same and that is positive profit worked out after taking into consideration the losses. The meaning of the word "Profit" in the proviso appended to sub-sec. ( 3)(c) is no different.

3.2.2 The Court observed that proviso surely is not an independent provision. Normally a proviso is to be construed in relation to the subject matter covered by the section to which the proviso is appended. The known rule of construction of a statutory provision is that a proviso to a particular provision of a statute only embraces the

field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and no other. Moreover, the language of the main provision, namely, sub-section (3) of sec. 80HHC, is very clear and has been held to be so by the Supreme Court, the word "Profit" understood in the main provision has to be understood the same way in the proviso appended thereto.

3.3 Sub-section (3)(c) says that "Profit from such exports" has to be profits of exports of self manufactured goods as well as trading goods. The words "profits derived from such exports" together with the word "and" clearly indicate that the profits have to be calculated by counting both the exports. I am of the opinion that the decision of the Bombay High Court in IPCA's case affirmed by the Supreme Court has correctly interpreted sub-secs. (1) and (3) of section 80HHC.

3.4.1 In Chapter VIA very often in a number of sections the word "ANY" is used which has come up for interpretation. The word "any" may have one of several meanings. According to the circumstances, it may mean also "all", "each", "every", "some" or "one or more" out of several.

3.4.2 In *Gangadhar Narasingdas Agarwal vs. Union of India 1967 1 MLJ 197*, it was held that the word "any" means all except where this wide construction is limited by the subject matter and context of a particular statute.

3.4.3 In *Ashiq Hassan Khan vs. Sub-Divisional Officer, AIR 1965 Patna 446* and *Chandi Prasad vs. Rameshwar Prasad Agarwal, AIR 1961 Patna 41*, it was held that the expression given to the word "any" in certain context and subject matter excludes limitation or qualification. Thus considering the object and purpose and to facilitate effective benefit and relief the term "any" has to be liberally construed.

3.5.1 In Chapter VIA also the terms "means" and "includes" come up for interpretation, here we have also to see the actual word "used" and go by the letter of law.

3.5.2 The word "means" can only have one meaning that is, it is an exclusive definition: *P. Kasilingam vs. P. S .G. College of Technology 1995 Supp. 2 SCC 348*. In *Krishi Utpadan Mandi Samiti vs. Shankar Industries* 1993 Supp. 3 SCC 361 (II), question arose for interpretation about the definition of "Agricultural Produce". The Supreme Court observed at Page 364 as follows :—

"It is a well settled rule of interpretation that where the Legislature uses the words "means" and "includes" such definition is to be given a wider meaning and is not exhaustive or restricted to the items contained or included in such definition. Thus the meaning of "agricultural produce" in the above definition is not restricted to any products of agriculture as specified in the Schedule but also includes such items which come into being a processed form and further includes such items which are called as gur, rab, shakkar, khandsari and jaggery."

3.6.1 Another section which requires consideration is interpretation of sec. 80RRA where the proposition is that rigidity in the case of a charging section is not to be mechanically applied while considering the beneficial deduction provisions.

3.6.2 Section 80RRA provides for special deduction in respect of remuneration received for services rendered outside India. The Legislature has clearly specified in other provisions that stay outside India is necessary which is not a requirement specified in sec. 80RRA. Therefore, in *A. S. Mani vs. Union of India* 2003 264 ITR 5 (Karn.) it was held that it is not necessary for a technician to be physically outside India for the purpose of claiming the deduction.

3.6.3 In these days of technological development, one can render service without physically going outside India in terms of section 80RRA. Section 80RRA only provides for deduction for any service rendered by him outside India. Rendering service outside India need not be physical outside service as contended by the respondents.

3.6.4 The object of beneficial deduction is defeated if narrow interpretation is given which would also result in the country losing foreign exchange in addition to losing service as technician, who is also available in India for rendering service from India to other countries. Hence to earn deduction u/s. 80RRA physical stay outside or physical work outside is not necessary and beneficial interpretation has to be given.

## 4. INTERPRETATION REGARDING EXEMPTIONS

4.1 In case of *Mysore Minerals Ltd. vs. CIT* (1999) 239 ITR 775 (SC), it was held that a provision enacted for the benefit of an assessee should be so construed which enables the assessee to get its benefits. In this case, the term "owned" in relation to a building in sec. 32 which allows depreciation was interpreted to mean to signify "dominion and entitlement to the use of the building".

4.2 As regards construction of exemption is concerned, the allowance can be granted with a beneficent object to give incentive to a "particular class of assessee". Thus in *CIT vs. Sham Finance (1998) 231 ITR 308 (SC)* and *CIT vs. Digvijay Cement Co. Ltd. (1998) 232 ITR 709 (SC),* it was held that a provision made for encouraging new machinery or plant have to be liberally construed to give benefit to a particular class of assessee.

4.3 Where two different views of two Government Departments on a same subject arises, what would be the position? It is well settled that two wings of Government cannot take two different views of the same transaction. Say for example, two wings; i.e., Customs and Income-Tax are part of the same Ministry and on a same issue it would not be correct that two Government Departments give different views. The Delhi High Court in the case of *CIT vs. Shriram Pistons & Rings (1990) 181 ITR 230* held that when remuneration is approved by Company Law Board under the Companies Act, the Income Tax Department cannot take a contrary view that it is excessive or unreasonable for the purpose of sec. 40(C).

4.4.1 While interpreting exemption sections, certain terms have to be defined with reference to Dictionaries.

4.4.2 The Income-tax Act contains sections 10A and 10B which deal with export incentives and exempt income, question arises of interpretation of certain terms relating to computer programme and software.

4.4.3 The Supreme Court in *ACC vs. Commr. of Customs (2001) 124 STC 59* held that even drawings and designs could be considered as goods. Further technical advice or information technology may be an intangible assets, but the moment the information on or advice is put on media, then it becomes chattel.

4.4.4 In *Ambience Space Sellers vs. Asia Industrial Technology P. Ltd. 1998 PTC 19,* it was held that broadcasting of signals through satellite for transmission on television are movable properties within the meaning of the Sale of Goods Act.

4.5 The term "goods" or "merchandise" is not defined and hence in absence of any statutory guidelines under the Act, the dictionaries can be consulted to find out the meaning of a particular word or phrase. Though dictionaries are not to be taken as

authoritative exponent of the meaning of the statutory language, it is permissible to seek instruction from them to understand the ordinary meaning of the word.

4.6 Samuel Johnson observed in the following words: "Dictionaries are like watches, the worst is better than none, and the best cannot be expected to go quite true. Every honest lexicographer agrees knowing that no matter how keenly he strives to make his book 'go true' he would inevitably lose the battle with what might be called linguistic indeterminacy. Since indeterminacy will be the *prima facie* of his professional life, he will often be tempted to deny and resent, like the grammarians of the 11th and 18th centuries, the radical instability of languages."

4.7.1 It is true that speeches made by the Members of the Legislature on the floor of the House when a Bill is introduced and debated are inadmissible for the purpose of interpreting the statutory provisions, but the speech made by the mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation.

4.7.2 In fact in Sole Trustee, *Loka Shikshana Trust vs. CIT (1975) 101 ITR 234 (SC)*, *Indian Chamber of Commerce vs. CIT 1975 101 ITR 796 (BC)* and *Addl. CIT vs. Surat Art Silk Cloth Mfg. Assn. (1980) 121 ITR 1 (SC)*, the Supreme Court relied upon the speech made by the Finance Minister while moving the Bill and for the purpose of interpretation of see. 2(15) of the I.T. Act. The reason was that the speech reflected the object and the purpose and the intention for introducing the said amendment.

4.8.1 Finally, it may be noted that an unfair dealing cannot be a ground to seek exemption. With reference to sections 11 and 12 of the I.T. Act with regards to the application and investments of trust funds, exemption cannot be claimed if it is a case of "unfair dealing",.

4.8.2 It may be noted that where there is stigma of misutilisation of funds, an interpretation that requires to be given should be denied, since it would amount to a glaring misuse of provision which cannot escape the clutches of law, nor any sympathy or equities in cases where donations received purely for the welfare of the under privileged and needy class of the society is misapplied.

4.8.3 In *A.W.A.R.E. vs. DCIT (2003) 263 ITR 13 (AP)*, the Court was of the view that moneys received by way of donation for a specific purpose for utilisation on welfare scheme were invested in the Fixed Deposit of the name of the Trustee and, therefore, the exemption provision should not be literally construed. It was further argued that only portion of the amount which was misutilised should be brought to tax and the balance should be granted benefit u/s. 11. The Court correctly held that the Trust forfeits the benefit of the entire amount of money received. Drawing inspiration from the quotation of the Supreme Court in *Petron Engineering Construction vs. CBDT (1989) 175 ITR 523 (SC) at Page 506.*

"It is true that an exemption provision should be liberally construed, but this does not mean that such liberal construction should be made even by doing violence to the plain meaning of such exemption provision. Liberal construction will be made wherever it is possible to be made without impairing the legislative requirement and the spirit of the provision. "

**CONCLUSION**

The Hon'ble Supreme Court in the cases of *Bajaj Tempo Ltd. (1992) 196 ITR 188* and *Gwalior Rayon Silk Mfg. Co. Ltd. (1992) 196 ITR 149 (SC)*, while interpreting the incentive provisions, has held that if there are two interpretations possible, the interpretation, which is

harmonious with the object of the statute to effectuate the legislative intention and in consonance with the justice, a purposive approach should be adopted. So also, the provision for deduction, exemption or relief should be construed reasonably and in favour of the assessee.

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# RELEVANCE OF FOREIGN JUDGMENTS AND OTHER FOREIGN AUTHORITIES ON TAXATION TO THE INTERPRETATION OF TAX LAWS

**ANNAPOORNA JAYASEELAN & BIJAL AJINKYA**
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This article seeks to examine the role of foreign judgments and of other foreign authorities on taxation in the interpretation of tax laws by the Indian Judiciary.

**FOREIGN JUDGMENTS**

It may be useful to examine the basic rules regarding the interpretation of a taxing statute, in order to determine the role of foreign judgments in the same.

We find that in the interpretation of the provisions of a taxing statute, the Indian Courts have repeatedly taken a view that a taxing statute must be interpreted strictly, without too much leeway for what might be argued to be the more just or equitable interpretation. There has traditionally been hesitance in interfering with what has been viewed as the arena of fiscal policy, something left to the Government[1].

It is apparent, therefore, that the emphasis has been on internal aids to interpretation as far as taxing statutes are concerned, with arguments regarding the purpose, social context and source of legislation taking a backseat in comparison to the plain reading of a statute.

It is, however, of significance that one of the central rules in the interpretation of taxing statutes, the rule of strict interpretation, finds its origins in the decisions of foreign courts. Our Courts have time and again relied upon English case law in ruling that a taxing statute must be interpreted strictly, and that the words of a statute are to be given their natural meaning[2]. That internal interpretational tools are to be relied upon is a principle derived from the external interpretational tool; foreign judgments.

The case of *Income-tax Officer, Tuticorin vs. T.S. Devinath Nadar and Ors*[3], ("**Devinath Nadar case**") deserves mention in this regard, for having referred to both English case law and English treatise on taxing statutes in support of the application of the rule of strict interpretation. The Court also noted at paragraphs 35 and 37, that taxing statutes are to be interpreted in favour of the assessee. Referring to the Halsbury's Laws of England and to the case of *Cape Brandy Syndicate vs. Inland Revenue Commissioners*[4] the Supreme Court has held as follows:

"37. These principles have been accepted as correct both by the English Courts and the superior courts in this country. It is now well settled that if the interpretation of a fiscal enactment is in doubt, the construction most beneficial to the subject should be adopted even if it results in obtaining an advantage to the subject; the subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot avail the department."

The practice of referring to English case law to determine the principles applicable to the interpretation of taxing statutes is very much prevalent even today, in spite of there being Indian precedents in these areas. The necessity for the study of foreign trends has far from diminished, given especially the economic liberalization of India. In this context, the case of *Union of India (UOI) and Anr. vs. Azadi Bachao Andolan and Anr*[5] ("**Azadi Bachao case**"), a decision of the Supreme Court regarding the validity of the use of a low tax country for the routing of foreign investments into India, which relied quite significantly on foreign case law and foreign principles to validate its stand on the issue, merits discussion in some detail.

In this case, another significant rule of the interpretation of tax statutes has been revisited; that an assessee is entitled to arrange his affairs so as to minimize his liability to tax, as long as the assessee remains within the four corners of the law. The rule of giving effect to the form of taxing legislation rather than the substance of the same is one that has been the subject of debate in the interpretation of tax statutes.

The Azadi Bachao case, in the above context, referred to the case of *McDowell and Company Ltd. vs. Commercial Tax Officer*[6] ("**McDowell case**"), where the distinction between tax evasion and tax avoidance had been somewhat obscured. The McDowell case had referred to the English cases of *IRC vs. Fisher's Executors*[7] and *IRC vs. Duke of Westminster*[8], cases that had upheld the right of the assessee to arrange his affairs so as to minimize tax, and found that the principle had undergone change post the Second World War. In support of this they had referred to certain later English cases; *Lord Howard de Walden vs. IRC*[9], *Lord Simon in Latilla vs. IRC*[10], *Campbell vs. IRC*[11], *Greenberg vs. IRC*[12] and *W.T. Ramsay Ltd. vs. IRC*[13] being some of them. The McDowell case had held that where the sole purpose of certain transactions was to avoid tax, the same would be ignored for the purposes of the determination of tax liability.

The Azadi Bachao case, however, disagreed with the conclusion in the McDowell case by citing *Craven vs. White*[14], and *MacNiven (Inspector of Taxes) vs. Westmorland Investments Ltd.*[15] as later English decisions which reiterated the principle enshrined in the Westminster and Fisher's cases.

In the Azadi Bachao case, we see a detailed study of the position of foreign judgments on an interpretational issue, which shows that Indian law derives much from internationally accepted principles.

What is significant about the Azadi Bachao case is that apart from English case law, which has regularly found mention in Indian judgments due to the fact that Indian law has derived its colour and substance from English law, it discusses American[16], Australian and Canadian[17] case law in some detail. Irrespective of whether the principles in the cases referred to have been followed, the reference to these cases is of significance in as much as it indicates that the Supreme Court has gone further than simply English Law, to study trends in other parts of the world. The Supreme Court, in this case, has referred also to internationally accepted authorities on tax treaty interpretation, the OECD commentaries, and the works of Dr. Philip Baker and Klaus Vogel being some of the works referred to. The decision in the Azadi Bachao case is one that has taken into account the treatment of tax avoidance measures in different economies of the world, a matter of significance in the present time.

The other significant case that deserves mention in the context of the relevance of foreign judgments is that of *Commissioner of Income Tax, A. P. I. vs. Visakhapatnam Port Trust*[18]. ("**Port Trust case**") The judgment in this case refers to commentaries and articles on the O.E.C.D. Model Convention, and German and Swiss judicial decisions regarding the interpretation of the terms of a tax treaty. The Court also looked at British publications and Canadian and American Government tax publications with regard to the issues before them.

The significance of this judgment is that it is a recognition of the importance of uniformity in the interpretation of certain tax legislation for the purpose of giving effect to the same, especially with regard to issues arising from cross border trade. Also, given that India is not party to the O.E.C.D., it is significant that the Court looked to commentaries on the O.E.C.D. model as an external tool of interpretation. Also notable is the fact that the judgment has referred to civil law as an interpretational tool, a reference not seen in Indian judgments as often as references to common law.

## THE USE OF OTHER FOREIGN AUTHORITIES IN THE INTERPRETATION OF TAX LAWS

The use of foreign authorities like commentaries regarding the OECD Model Convention on double taxation avoidance, has already found brief mention in the earlier part of this article, in discussions of the Azadi Bachao, Port Trust and Devinath Nadar cases. However, this external aid to interpretation merits discussion under a separate head, as its use and implications vary from that of foreign judgments.

The use of the commentaries on the interpretation of the OECD Model Convention in Indian judgments has become almost commonplace after the judgment in the Port Trust case. In addition to these commentaries, the works of authorities like Dr. Philip Baker and Klaus Vogel have often been used as an external aid in the interpretation of taxing provisions, specifically in the field of treaty interpretation and international taxation. Rarely has a reference by a litigant to these authorities been dismissed as irrelevant, and often these authorities have been of persuasive value.

In a discussion of the scope of the term "professional services" in a tax treaty, the Court in the case of *Maharashtra State Electricity Board vs. Deputy Commissioner of Income Tax*[19] turned to interpretational aids like dictionaries and Indian case law *after* noting the absence of a discussion of the term in the commentaries on the various model conventions. One of the cases referred to by the Court was *Graphite India Limited vs. Deputy Commissioner*[20], which had also noted the absence of commentaries on model conventions that addressed the question at hand. If the persuasive value of this aid to interpretation were to be gauged from the above cases, it would appear that the persuasive value of these commentaries is almost at par with that of Indian case law, the latter being binding as precedent.

Similarly, in the case of *Deputy Commissioner of Income Tax vs. I.T.C. Ltd*[21], regarding the withholding of taxes by an Indian entity on behalf of an Austrian entity and the applicability of Article VII (applicable to an "enterprise") of the Indo-Austrian tax treaty of 1963, the Court discussed the meaning of the term "enterprise", a term not defined in the treaty, and in this context referred to various authorities, including Van Radd K and Klaus Vogel. Importantly, the Court in this case, referring to the Port Trust case spoke of the importance of these sources as follows:

*"OECD model conventions and commentaries thereon constitutes international tax language and the meanings assigned by such literature to various technical terms are to be given due weightage. In our considered view the views expressed by bodies like OECD, which has made major contribution towards development of the tax treaties between various countries, constitute 'contemporanea expositio'[22] as much as the meanings indicated by various expressions in the tax treaties are usually the meanings, normally understood in, to use the words approved by Hon'ble Andhra Pradesh High Court, 'international tax language' developed by institutions like OECD."*

The repeated reference by the Indian judiciary to these authorities, like in the case of *Commissioner of Income Tax vs. Vijay Ship Breaking Corporation*[23] (which has, in the interpretation of the provisions of a tax treaty referred to the work of Klaus Vogel) and various decisions of the Authority for Advance Rulings serves to impress further into the

Indian tax system, the relevance and importance of the internationally accepted understanding of international tax law.

While, as stated above, generally, a reference to the OECD commentaries on the model convention or internationally renowned jurists is not rejected, there are instances where the judiciary has found the subject of such references inapplicable. The case of *In Re: Flakt (India) Ltd.*[24] ("**Flakt case**") might seem an example of this. However, a closer look at this case shows that the judgment in question does not dilute the persuasive power of these international authorities on the Indian judiciary in its understanding of international tax law, as the references made by the counsel in this case to the OECD commentaries has been little more than cursory, and in such a manner that one cannot judge the context or comprehensive meaning of what is quoted.

The Flakt case raised an interesting issue; where monies accrued to non-residents under IP and trademark license agreements, but were not actually paid to non-residents, would the Indian payer be required to withhold and remit tax on the same? In examining the issue, and the relevant provisions of the tax treaties applicable, the counsel for the applicant sought to persuade the authority that as per the definition of the term "royalty", the amount in question would have to be *paid* in order for the same to be considered royalty. He then relied on the commentaries of the OECD to examine the meaning of the term, and quoted the following:

*"The term 'paid' has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by contract or by custom."*

The Authority rejected his argument. The rejection was, however, of the attempt to construe the requirement to *pay* as key to the understanding of the term royalty, and is of no consequence to the persuasive value of the OECD commentaries.

The case of *Clifford Chance vs. Deputy Commissioner of Income Tax*[25] ("**Clifford Chance case**") is an example of a case where the Indian Courts have not been completely persuaded by the work of jurists. The Clifford Chance case concerned the tax liability in India of a firm of UK professionals. In debating their liability to tax, it was examined if they had rendered professional services from a "fixed base" for the requisite time, thus making them taxable in India. The counsel for the assessee sought to cite the work of Dr. Philip Baker, and quoted a paragraph to demonstrate that a "fixed base" could not be equated with a "permanent establishment". Dr. Baker had discussed a case to demonstrate that the existence of a permanent establishment did not necessarily imply the existence of a "fixed base" as well. The Court however, found that both the terms "fixed base" and "permanent establishment" denoted a certain permanency in the connection of a non-resident with India, and found that the two terms were "in a way", similar.

The case of *Commissioner of Income-tax vs. Vr.S.R.M. Firm*[26], upheld by the Supreme Court decision in *Commissioner of Income Tax vs. P.V.A.L. Kulandagan Chettiar (dead) through L.Rs.*[27], which held that the commentaries in regard to the OECD Model Convention were inapplicable and "misleading", is of no consequence where the persuasive value of these authorities are concerned, given its specific factual circumstances. The case concerned the interpretation of the tax treaty between India and Malaysia existent before the commentaries on the 1977 OECD Model Convention were published. In this specific context the Madras High Court had found the commentaries inapplicable, and the Supreme Court, in its decision had found it unnecessary to refer to these commentaries in light of the specific facts. Neither of these cases is a statement about the persuasive value of the authorities discussed.

Perhaps the most essential difference between studying the persuasive value of foreign judgments and the persuasive value of commentaries and works on international

taxation is that we end up looking at the value of the former with respect to domestic tax law as a whole while the latter has been referred to in the context of international tax law which is a sub set of domestic tax law.

Domestic tax law, a matter of internal policy, and a law to be interpreted strictly, owes no allegiance to international trends, and it is only the recent consciousness of the Indian Courts to the impact of a tax regime on international trade that has caused them to refer to foreign judgments (apart from the regular reference to English case law as the source of the rules of interpretation of taxing provisions).

International tax law, the body of which is largely comprised by treaty law, serves the purpose of toning down domestic tax regimes to make the international environment stable and uniform, so as to encourage international trade. It is therefore but natural that internationally accepted principles, embodied in the works of jurists and international bodies, heavily influence the understanding of such law. The persuasive value of such works are therefore bound to be different from that of foreign judgments in general, given the different bodies of law examined. Thus, it is not possible to compare the persuasive value of these works to that of the persuasive value of foreign judgments, as they have applied by courts in different contexts.

The case of *Commissioner of Wealth Tax vs. Dr Karan Singh and Ors*[28] is therefore of special interest in this discussion, given that there is herein a reference to OECD commentaries in the context of domestic tax laws. This case was with regard to the extension by the Parliament of the Wealth Tax Act, 1957 to Jammu and Kashmir. It was contended that the extension was ultra vires the power of the Parliament under the Constitution of India, as under the Constitution, the residuary power (i.e., power not in any of the three lists in Schedule 7 of the Constitution of India, generally vested with the Union Government vide entry 97 of List I) in the case of Jammu and Kashmir vested with the state, and the act in question would fall under this power.

On the other hand, it was contended that the act corresponded to the power under Entry 86 of List I, dealing with the “capital value of assets”.

Therefore, there ensued arguments about the meanings of the terms “net wealth”, which was what the Wealth Tax Act sought to tax, and the “capital value of assets”. In this context, counsel for the state referred to certain commentaries by the OECD, to persuade the court that the underlying philosophy of Entry 86 and of the Wealth Tax Act was the same. Unfortunately, the Court in this case has not discussed in any detail the implications of this commentary, perhaps due to the fact that the brief quote did not have too great an implication on the issue at hand, thus shedding little light on the value of such commentaries in the interpretation of domestic law.

The importance of foreign judgments and other foreign commentaries on taxation have found reference in Indian judgments, and are significant influencers of the way Indian tax law is interpreted, although in different fields, and for different reasons.

Today, in light of the phenomenon of the global village, and of the volume of cross border trade increasing by leaps and bounds, the importance of international trends is ever increasing. Even where domestic law is concerned, after liberalisation, perhaps policy in other countries has more to offer India than earlier suspected. The receptiveness of the Indian judiciary to relevant references to international sources can therefore only be a positive trait, in the context of law in general and tax law in particular.

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[1] See *Zodiac Advertisers vs. Union of India*, [2004] 265 ITR 262 (Ker), where, upon reference to *Secretary to Government of Madras v. P. R. Sriramulu* [1996] 1 SCC 345, and *State of U. P. vs. Kamla Palace* [2000] 1 SCC 557 the Kerala High Court held: "Whom the Legislature should tax, in what manner, and to what extent, is totally left to the wisdom of the Legislature. It is not for the courts to interfere in such exercise of discretion. Interference with a fiscal statute under Article 14 must be very seldom and for explicit reasons."

[2] See "Principles of Statutory Interpretation", Singh, G.P., 7th edn., 1999, Wadhwa and Co., Nagpur, p. 578, in reference to *St. Aubyn (LM) vs. A.G.*, (1951) 2 All ER 473.
[3] AIR 1968 SC 623
[4] [1921] 1 K.B. 64.
[5] [2003] 263 ITR 707 (SC)
[6] [1985] 154 ITR 148

[7] [1926] AC 395
[8] [1936] AC I; 19 TC 490
[9] [1942] 1 KB 389; 25 TC 13 1
[10] [1943] AC 377; 25 TC 107
[11] [1967] Ch 651
[12] [1971] 3 All ER 136; 3 WLR 386
[13] [1982] AC 300; [1981] 2 WLR 449 (HL)
[14] (1988) 3 All ER 495
[15] (2001) 1 All ER 865
[16] The right of an assessee to arrange his affairs so as to minimize tax liability has been supported by reference to American case law, some of them being *Gregory vs. Helvering* 293 US 465, 469 55 S.Ct. 226, 267, 78 L.ed.566, 97 ALR 1335; *Helvering vs. St. Louis Trust Company* 296 US 48, 56 S.Ct. 78, 80L; *Becker vs. St.Louis Union Trust Company* 296 US 48, 56 S.Ct. 78, 80L.
[17] The case of *Estate of Michel Hausmann vs. Her Majesty The Queen*, 1998 Can. Tax Ct. LEXIS 1140 was referred to in a discussion of the availability of benefits under a tax treaty.
[18] 144 ITR 146 (AP)
[19] (2004) 270 ITR 36 (AT)
[20] (2003) 86 ITD 384 (Cal)
[21] (2003) 80 TTJ (ITAT) 798
[22] The term has been discussed as follows in the Azadi Bachao case, at paragraph 38:
*"38. The Rule of* contemporanea expositio *is that "administrative construction (i.e., contemporaneous construction placed by administrative or executive officers) generally should be clearly wrong before it is overturned; such a construction commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight, it is highly persuasive..."*
[23] (2003) 261 ITR 113 (Guj.)
[24] (2004) 267 ITR 727 (AAR)
[25] MANU/IT/0219/2002
[26] (1994) 208 ITR 0400 (Mad)
[27] (2004) 267 ITR 654 (SC)
[28] 1993 Supp (4) SCC 500

# AIDS TO INTERPRETATION (EXTERNAL & INTERNAL)

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1. While interpreting the meaning of provisions contained in any statute, judges and lawyers rely upon certain aids to construction which will enable them to know as to what the Legislature meant when it enacted a particular statute. There are two types of aids to construction of statutes : (i) Internal aids to construction; and (ii) External aids to construction.

2. Examples of internal aids to construction will be : preamble to the Act, headings, marginal notes, definition sections, provisos, explanation, schedules, etc. These are internal aids to construction because they are contained in the statute itself.

3. As opposed to internal aids to construction there are certain aids which are external to the statute. Such aids will include parliamentary history of the legislation, historical facts and surrounding circumstances in which the statute came to be enacted, reference to other statutes, use of dictionaries, use of foreign decisions, etc.

4. In the present article a short note is prepared dealing with some of the internal and external aids to construction of fiscal statutes.

## INTERNAL AIDS TO CONSTRUCTION

### 1. Long title

A long title of a Legislation may not control, circumscribe or widen the scope of the legislation, if the provisions thereof are otherwise clear and unambiguous, but if the terms of the legislation are capable of both a wider and a narrower construction, that construction which would be in tune with the avowed object manifested in the preamble or declared in the long title, ought to be accepted. *[Urmila Bala Dasi vs. Probodh Chandra Ghosh (1990) 184 ITR 604 (Cal)]*

### 2. Exemptions

An exemption clause in a taxing statute must be, as far as possible, liberally construed and in favour of the assessee, provided no violence is done to the language used. *[CIT vs. Dungarmal Tainwala (1991) 191 ITR 445 (Patna)]*

"It is true that an exemption provision should be liberally construed, but this does not mean that such liberal construction should be made even by doing violence to the plain meaning of such exemption provision. Liberal construction will be made wherever it is possible to be made without impairing the legislative requirement and the spirit of the provision." *[Petron Engineering Construction Pvt. Ltd. vs. CBDT (1989) 175 ITR 523 (SC)]*

### 3. Provisos

The normal function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case.

"The main function of a proviso is to carve out an exception to the main enactment. It cannot, normally, be so interpreted as to set at naught the real object of the main enactment." *[CIT vs. Pyarilal Kasam Manji & Co. 198 ITR 110 (Ori.)].*

A proviso cannot be held to control the main enactment or to withdraw, by mere implication, any part of what the main provision has given. But it cannot enable something to be done which is not to be found in the enacting clause itself, on the ground that otherwise the proviso would be meaningless and senseless.

"There may be cases in which the language of the statute may be so clear that a proviso may be construed as a substantive clause. But whether a proviso is construed as restricting the main provision or as a substantive clause, it cannot be divorced from the provision to which it stands as a proviso. It must be construed harmoniously with the main enactment." *[CIT vs. Ajax Products Ltd. (1964) 55 ITR 741 (SC)]*

## 4. Explanation

Sometimes an Explanation is added to a section to elaborate upon and explain the meaning of the words appearing in the section. Such an Explanation becomes an integral part of the main enactment.

"An Explanation to a statutory provision has to be read with the main provision to which it is added as an Explanation. An Explanation appended to a section or a sub-section becomes an integral part of it and has no independent existence apart from it. There is, in the eye of law, only one enactment, of which both the section or sub-section and the Explanation are two inseparable parts. In the absence of anything repugnant in the subject or context, the words and expressions used in the Explanation are to be given the same meaning as given to them in the main provision itself." *[CIT vs. Reunion Engineering Co. (P) Ltd. (1993) 203 ITR 274 (Bom.)]*

The purpose of an Explanation is not to limit the scope of the main section. An Explanation is quite different in nature from a proviso; the latter excludes, excepts and restricts while the former explains, clarifies or subtracts or includes something by introducing a legal fiction.

"An Explanation may be appended to a section to explain the meaning of the words used in the section. There is no presumption that an Explanation which is inserted subsequently introduces something new which was not present in the section before. Ordinarily, an Explanation is inserted to clear up any ambiguity in the section and it should be so read as to harmonise it with the section and to clear up any ambiguity in the main section." *[CIT vs. Voltas Ltd. (1994) 205 ITR 569 (Bom)].*

"The normal principle in construing an Explanation is to understand it as explaining the meaning of the provision to which it is added; the Explanation does not enlarge or limit the provision, unless the Explanation purports to be a definition or a deeming clause; if the intention of the Legislature is not fully conveyed earlier or there has been a misconception about the scope of a provision, the Legislature steps in to explain the purport of the provision; such an Explanation has to be given effect to, as pointing out the real meaning of the provision all along." *[CIT vs. Mangalore Ganesh Beedi Works 193 ITR 77 (Kar)].*

## 5. Non-obstante clauses

"A non-obstante clause is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in the provision mentioned in such non-obstante clause. In case there is any inconsistency or a departure between the non-obstante clause and another provision, one of the objects of such a clause is to indicate that it is the

non-obstante clause which would prevail over the other clause." *[Parasuramaiah vs. Lakshamma AIR 1965 AP 220]*

## 6. Marginal notes and headings

"The marginal note to a section cannot be referred to for the purpose of construing the section but it can certainly be relied upon as indicating the drift of the section or to show what the section is dealing with. It cannot control the interpretation of the words of a section, particularly when the language of the section is clear and unambiguous but, being part of the statute, it prima facie furnishes some clue as to the meaning and purpose of the section." *[K.P. Varghese vs. ITO 131 ITR 597 (SC)].*

"Marginal notes are not decisive in interpreting a substantive provision of law, but, in case of doubt, they can be relied upon as one of the aids for construction." *R.B. Shreeram Religious & Charitable Trust vs. CIT (1988) 172 ITR 373 (Bom)]*

## 7. Punctuation

"There are three activities serially set out in that sub-clause, namely, construction, manufacture or production. A comma is, therefore, legitimately and as per the rules of grammar, required after the first activity to separate it from the second activity of manufacture. Since the second activity is followed by the word "or", no comma is required after the second activity to separate it from the third activity. Therefore, punctuation is put as grammatically required. It does not disclose any intention of providing for a separate kind of business altogether. Punctuation, in any case, is a minor element in the construction of a statute. Only when a statute is carefully punctuated and there is no doubt about its meaning can weight be given to punctuation. It cannot, however, be regarded as a controlling element for determining the meaning of a statute." *[Hindustan Construction vs. CIT (1994) 208 ITR 291 (Bom)].*

## 8. Definition clause and undefined words

### *(a) Judicially defined words*

"It has long been a well-established principle to be applied in the construction of an Act of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it." *[Barras vs. Aberdeen Steam Trawling and Fishing Co. Ltd. (1933) AC 402 (HL)]*

"Interpretation of a provision in a taxing statute rendered years back and accepted and acted upon by the department should not be easily departed from." *[CIT vs. Balkrishna Malhotra (1971) 81 ITR 759 (SC)]*

### *(b) Rule of Ejusdem generis*

The maxim ejusdem generis serves to restrict the meaning of a general word to things or matters of the same genus as the preceding particular words. It is well recognised rule of construction that when two or more words which are susceptible of analogous meaning are coupled together noscitur a sociis, they are understood to be used in their cognate sense. They take their colour from each other that is, the more general is restricted to a sense analogous to the less general.

In order to attract the principle of ejusdem generis, it is essential that a distinct genus or category must be discernible in the words under examination. Where the statute imposes restriction on advertisement, publicity and sales promotion, the expression "sales promotion" cannot include selling expenses incurred in the ordinary course of business. *[CIT vs. Statesman Ltd. (1992) 198 ITR 582 (Cal.)].* Similarly, the words "other stationary plant"

must be construed ejusdem generis with switchgears and transformers. *[CIT vs. Anglo India Jute Mills Co. Ltd. (1993) 202 ITR 104 (Cal.)]*

The rule of ejusdem generis is to be applied "with caution" and "not pushed too far". It may not be interpreted too narrowly and unnecessarily if broad based genus could be found so as to avoid cutting down words to dwarf size. *[U.P. State Electricity Board vs. Hari Shanker Jain AIR 1979 (SC) 65]*

**9. Schedule**

The Schedules appended to a statute form part of it. They are generally added to avoid encumbering the statute with matters of excessive details, guidelines to work out the policy of the statute, transitory provisions, rules and forms which need frequent amendment and the like. Much importance is not given to the forms unless they contain requirements of a mandatory nature.

## EXTERNAL AIDS TO CONSTRUCTION

**1. Legislative history and background**

"For determining the purpose or object of the legislation, it is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of that law. For the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady."

"To sustain the presumption of constitutionality, consideration may be had even to matters of common knowledge, the history of the times and every conceivable state of facts existing at the time of legislation which can be assumed. Even though for the purpose of construing the meaning of the enacted provision, it is not permissible to use these aids, yet it is permissible to look into the historical facts and surrounding circumstances for ascertaining the evil sought to be remedied.". *[Shashikant Laxman Kale vs. Union of India 185 ITR 104 (SC)]*

"The Court may consider the general history of the statute, including its derivation, that is, the various steps leading up to and attending its enactment in its effort to ascertain the intention of the Legislature where it is in doubt". *[S.P. Gupta vs. Union of India and Another (1982) AIR 149 (SC)]*

"The dominant purpose in construing a statute is to ascertain the intention of the Legislature as expressed in the statute considering it as a whole and in its context. That intention, would, therefore give the meaning of the statute and is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand." *[(1988) 2 SCC 299 Daypack Systems P. Ltd.]*

**2. Circulars and interpretation by tax authorities**

"Circulars issued by the Central Board of Direct Taxes can bind the Income-tax Officer but will not bind the appellate authority or the Tribunal or the court or even the assessee." *[ITO vs. V.D. Manoharlal Kothari, 236 ITR 357 (Mad.)].*

"The interpretation placed by the department in the Income-tax Manual has been held not to be a proper guide when the construction of a statute is involved." *[CIT vs. V. K. Srinivasan and K. Gopalan (1953) 23 ITR 87 (SC)].*

The officers of the department are bound to follow the circulars issued by the Board. *[CIT vs. Sanwarmal Shivkumar (1988) 171 ITR 377 (Raj)]*

The circulars issued by the CBDT would be binding on officers and persons employed in the execution of the Income-tax Act and the effect of the circular was taken into account in deciding the constitutionality of a provision contained in the Act. *[Navnitlal Zaveri vs. K.K. Sen (1965) 56 ITR 198 (SC)]*

Whenever there is any instruction which is in favour of the assessee, the income-tax authorities would not be permitted to go back on these instructions or circulars. This principle is based on the principle of estoppel. However, a circular or a direction cannot be permitted to curtail the provisions of the Act. They cannot curtail the statute or whittle down its effect. Instructions cannot cut down the scope of a notification prescribing qualifications for a certain exemption. *[State of Madhya Pradesh & Anr. vs. G.S. Dall & Flour Mills (1991) 187 ITR 478 (SC)]*

**3. Speech of a Minister**

Except for the limited purpose of ascertaining the mischief which the Act seeks to remedy, the speech of the Minister should not be looked into.

*(1991) 190 ITR 418 (Cal) Soorajmal Nagarmal vs. CIT*

*(1991) 190 ITR 361 (Gauhati) Assam Frontier vs. UOI*

*(1991) 189 ITR 81 (Delhi) Escorts Ltd. vs. UOI*

*(1988) 173 ITR 433 (Bom) B.R. Sound N Music vs. Bhardwaj (O.P.)*

"It is true that the speeches made by the Members of the Legislature on the floor of the House when a bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the mover of the bill explaining the reasons for the introduction of the bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and the purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of intention of the Legislature, everything which is logically relevant should be admissible." *[K.P. Varghese vs. ITO (1981) 131 ITR 597 (SC)]*

"The Lok Sabha Debates and the Rajya Sabha Debates are reported in the journals of the two Houses of Parliament which are printed and published by them. The Court has to take judicial notice of the proceedings of both the Houses of Parliament and is expected to treat the proceedings of the two Houses of Parliament as proved on the production of the copies of the journals or the reports containing proceedings of the two Houses of Parliament which are published by them." *[Baburao alias P.S. Samant vs. Union of India and Others (1988) AIR 440 (SC)]*

If there is no ambiguity in the language of a particular provision, notes on clauses and memorandum explaining the provision cannot be referred to as aid in interpretation. *[CIT vs. Central Bank of India Ltd. (1990) 185 ITR 6 (Bom) (FB)]*

**4. Statement of objects and reasons**

If the language of the statute is clear and admits of no ambiguity, recourse to the statement of objects and reasons for the purpose of construing a statutory provision is not permissible. *(1985) 155 ITR 144 (SC)* Govind Saran Ganga Saran.

It is well settled that the Objects and Reasons are only an aid to the construction and a statute may undergo a metamorphosis during its passage in the Legislature. Where the language of the statute is clear and categoric, the same cannot be nullified by what might, at the initial stage, have been the views of the proposer of the bill in introducing it in the Legislature. *[Ramkishan Mandal vs. State of Bihar (1987) AIR 250 (Patna)]*

The Income-tax Act is a consolidating and amending statute. The Courts must, therefore, construe the provisions of the Act as forming a code complete in itself and exhaustive of the matters dealt with therein and ascertain what their true scope is *[Rao Bahadur Ravulu Subba Rao & Ors. vs. CIT (1956) 30 ITR 163 (SC)]*

**5. Reports of Commissions**

"More often an Expert Committee or a Joint Parliamentary Committee examines the provisions of the proposed legislation. But language being an inadequate vehicle of thought comprising intention, the eyes scanning the statute would be presented with varied meanings. If the basic purpose underlying construction of a legislation is to ascertain the real intention of the Parliament, why should the aids which Parliament availed of such as report of a Special Committee preceding the enactment, and the object sought to be achieved, be denied to Court whose function is primarily to give effect to the real intention of the Parliament in enacting the legislation. Such denial would deprive the Court of a substantial and illuminating aid to construction. Therefore, departing from the earlier English decisions we are of the opinion that reports of the Committee which preceded the enactment of the legislation, reports of Joint Parliamentary Committee, report of a Commission set up for collecting information leading to the enactment are permissible external aids to construction." *[R. S. Nayak vs. A.R. Antulay (1984) AIR 684 (SC)]*

**6. Previous judicial interpretation of legislation.**

"My Lords, it appears to me that to construe the statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the latter Act which provided the remedy. These three things being compared, I cannot doubt the conclusion."— *[(1898) AC 571 Eastman Photographic Materials Co.]*

**7. Provision of other statutes and subsequent enactments**

"The Indian Income-tax Act is not in pari materia with the British income-tax statutes, it is less elaborate in many ways, subject to fewer refinements and in arrangement and language it differs greatly from the provisions with which the courts in England have had to deal. Little help can therefore be gained by attempting to construe the Indian Income-tax Act in the light of decisions bearing upon the meaning of the income-tax legislation in England." *[CIT vs. Vazir Sultan & Sons (1959) 36 ITR 175 (SC)] [Joyanarayan Panigrahi vs. CIT (1974) 93 ITR 102 (Orissa)]*

The provisions of the Indian Income-tax Act had to be construed on their own terms without drawing any analogy from the English statutes whose terms may superficially appear to be the same but on a deeper scrutiny may reveal differences not only in the expressions used but also in the meaning a particular expression had acquired in the context of the development of law in India. *[CIT vs. A. Gajapathy Naidu (1964) 53 ITR 114 (SC)].*

The decisions of the English courts given on provisions differently worded appearing in a different context are not helpful in determining the true scope and effect of a particular provisions of the Income-tax Act. *[CIT vs. Manilal Dhanji. (1962) 44 ITR 876 (SC)]*

The definitions given for the terms in one statute cannot automatically be imported for the interpretation of the same word in another statute. It is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act; more so, if the two Acts in which the same words are used are not cognate Acts. *[V.V Trans-Investment vs. CIT (1994) 207 ITR 508 (AP)]*

**8. Integrated scheme of direct taxation and equities**

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." *[CIT*

*vs. Ajax Products Ltd. (1965) 55 ITR 741 (SC)] [CED vs. Sileshkumar R. Mehta (1990) 181 ITR 10 (Mad) (FB)]*

"Where, however, the provisions are couched in language which is not free from ambiguity and admits of two interpretations a view which is favourable to the subject should be adopted. The fact that such an interpretation is also in consonance with ordinary notions of equity and fairness would further fortify the court in adopting such a course." *[CIT vs. Madho Prasad Jatia (1976) 105 ITR 179 (SC)]*

There is no reason why special canons of construction should be applied to any Act of Parliament, and there is not authority for saying that a taxing Act is to be considered differently from any other Act. The duty of the Court is, in all cases the same, whether the Act to be construed relates to taxation or to any other subject viz. to give effect to the intention of the Legislature. *[Keshavji Ravji & Co. vs. CIT (1990) 183 ITR 1 (SC)]*

"But the Income-tax Act, as we have often observed, unfortunately does not concern itself with moral considerations. The Income-tax Act is concerned with a very limited question as to whether the amount brought to tax constitutes the income of the assessee." *[Ramdas Dossa & Co. vs. CIT (1956) 29 ITR 1001 (Bom)]*

**9. Dictionary meanings**

"Words in the section of a statute are not to be interpreted by having those words in one hand and the dictionary in the other. In spelling out the meaning of the words in a section, one must take into consideration the setting in which those terms are used and the purpose that they are intended to serve." *[CGT vs. N.S. Getti Chettiar (1971) 82 ITR 599 (SC)]*

The dictionary meaning of a word cannot be looked at where the word has been statutorily defined or judicially interpreted. But where there is no such definition or interpretation, the court may take aid of dictionaries to ascertain the meanings of a word in common parlance, bearing in mind that a word is used in different senses according to its context and a dictionary gives all the meanings of a word and the court has, therefore, the context in which it has to interpret that word. *[Titaghur Paper Mills Co. Ltd. vs. State of Orissa (1983) 142 ITR 663 (SC)]*

The fair rule, therefore, is to adopt a reasonable construction of the words used in the Act without leaning to the one side or the other, i.e., neither as a guardian of the revenue nor as the protector of the subject. The duty of the Court is colourless. *[M.C.T. Bank Ltd. (in liquidation) vs. CIT (1963) 48 ITR 678 at 692 (Mad.)]*

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# PRESUMPTION IN STATUTORY INTERPRETATION

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This article owes its origin to a request for an article on Presumption from the All India Federation of Tax Practitioners. As it is from a body of Tax Practitioners that the request has come, the author has tried to restrict his narration and observations to the field of Taxation only rather than venture into the vast field of all laws and legislation. Even in the field of Taxation he has taken into consideration the law of income-tax only as contained in the Income-tax Act, 1961.

"Presumption — what does the word mean?"

The word "presumption" has been given the meaning in the Concise Oxford Dictionary (Tenth Edition) as follows:

"presumption * n. 1 an act or instance of presuming something to be the case. an idea that is presumed to be true. chiefly Law — an attitude adopted towards something in the absence of contrary factors. 2. presumptuous behaviour.

— ORIGIN ME: from OFr. presumpcion, from L. praesumption (n) 'anticipation', from preaesumere (see **presume**)".

The word "presume" has been defined in the same dictionary to mean—

"v. 1. suppose that something is the case on the basis of probability take for granted. 2. be arrogant or impertinent enough to do something. (presume on/upon) unjustifiably regard (something) entitling one to privileges" is the literary meaning of the world. The author has now to consider what is the legal meaning of this expression in the context of the Income-tax Act, 1961.

For the purposes of this article, the author proceeds with the idea that the third meaning given to the word "presumption", i.e., "an attitude adopted towards something in the absence of contrary factors" is appropriate for this discussion.

In legal decision makings presumptions are of material significance. The expression has been explained in various Court decisions, text books on Jurisprudence and in many statutes also, e.g., the Income-tax Act, 1961 operative in India.

While discussing the issue of presumptions in statutory interpretations one has to remember that any presumption in a statute which imposes a restraint must be reasonable and as Viscount Haldane said in *North Western Salt Co. Ltd. vs. Electrolyte Corporation Ltd.* 1914 AC 461 — "To be valid, a clause imposing restraint must be reasonable." He further went on to say that "he who says that a restraint is so, must make it out." But when one looks at the three kinds of presumptions contained in sections 132(4A), 278D and 278E of the Income-tax Act, 1961, can it be said that these represent restrictive clauses? Section 132(4A) presumes that certain things discovered in the course of a search and seizure operation shall be presumed to belong to the person whose premises are searched. This is a sort of natural presumption and can it be said that there is any case of restraint here? The persons concerned is at liberty to prove that the materials found belong to someone else and, immediately, the presumption of ownership is gone. But Viscount Haldane's statement was made in the context of a contractual dispute between private parties and the author feels that

when the presumption arises in the course of proceedings under the Income-tax Act, the strict rule set by Viscount Haldane loses its force considerably.

This article is concerned with taxation laws generally, and the author would like to refer here to a denial of presumption when such presumption apparently represented a truth, but the relevant law refused to recognise it for a pretty long time.

It is a well known and well established fact that till about the last quarter of the nineteenth century the English Statutes on Taxation did not recognise a fact always existent, and the Courts of Law failed to recognise the reality. The author talks about allowance of depreciation in income-tax assessments of business profits or losses. No logic or presumption was allowed to prevail over the absence of any statutory provisions for granting a wear and tear allowance to an assessee who had been carrying on business and using plant and machinery and other depreciable assets for carrying on his business. It was denied by the Court as the statutes on taxation did not refer to it. Depreciation is a reality and not of presumption. It required more than 75 years for the English income-tax statute to recognise the necessity of enacting provisions therefor in English laws of income-tax and no presumption in this regard could be legally made for a long time in English business income tax assessments. There are assumptions some of which laws generally recognise but which may be nullified by enacted law if the law-making authorities decide so by enacting a formal provision in the relevant statute.

It is important to note that the Income-tax Act, 1961 contains several provisions which use the expression “deem” or its derivatives to contemplate a situation which also are instances of presumptions. As Winderer J. stated in *Hnter Douglaas Australia Pty. vs. Perma Blinds* (1979) 44A.L.J.R. — “Deemed” as used in statutory definition ‘to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient device for reducing the verbiage of enactment, but that does not mean that wherever it is used “ it has that effect; or meaning which some matter or thing has — the way in which it is to be adjusted, this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion.” The word “deemed” is not entirely unlike the expression “presumption”.

In *CIT vs. Calcutta Stock Exchange Association Ltd. [1959] 36 ITR 232 (SC)* the Supreme Court held that the use of the word “deemed” showed that the Legislature deliberately used the fiction of treating something which otherwise it might not have been. This is akin to presumption. Then again in *CIT vs. Bhogilal Laherchand [1954] 25 ITR 50 (SC)* the Supreme Court ruled that the term “deemed” brought within the net of chargeability, income not actually accruing but which is supposed notionally to have accrued. By statutory fiction income which can in no sense be said to accrue at all may be considered as accruing. It is not a case of “presumption”? The case of *Keshar Mills Ltd. vs. CIT [1953] 23 ITR 250 (SC)* also illustrates how the same fiction of law can bring about a situation which does not exist in fact, but is presumed by law as existent. This is another instance of presumption in the law of income-tax.

The three Indian cases cited above, all arising out of presumptions of the law of income-tax operating in India provide for fictions to operate, fictions which are presumptive and operative only because of presumptive statutory provisions.

The author now proceeds to discuss the provisions of the Income-tax Act which declare the statutory provisions of the Income-tax Act, 1961 in regard to “presumption”.

The Income-tax Act, 1961 contains quite a few presumptive sections, viz., sections 132(4A), 277A, 278D and 278E, inserted by the Finance Act and/or Taxation Laws (Amendment) Act from time to time. The four sections viz., sections 132(4A), 277A, 278D and 278E now discussed.

Section 132 —

(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed—

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true;

and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

In the course of a search under the Act, the officials carrying out the search may come across books of account, documents, money, bullion, jewellery or other valuable articles or things which are in the possession or control of a particular person. In such a case the authorities may presume—

"(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true;

and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested." The author has quoted verbatim the portion from the Act itself.

The presumptions mentioned in section 132(4A) are self-explanatory and do not require any further clarification or comments.

It may be mentioned here, that the presumptions made under section 132(4A) are rebuttable presumptions. By providing proper evidence it may be proved by the party concerned that the valuable things and articles, the books of account and other documents actually belong to other person or persons or are in the handwriting of some other person or persons, as the case may be.

But something more is to be said in regard to the documents found in the premises of the party whose premises are searched. Sub-section (4) of section 278D is relevant in this regard. This issue has been discussed later when the provisions of section 278D, another presumptive section, are considered.

The author now proceeds to discuss the provisions of sections 277A, 278D and 278E.

**Falsification of books of account or document, etc.**

**277A**. If any person (hereafter in this section referred to as the first person) wilfully and with intent to enable any other person (hereafter in this section referred to as the second person) to evade any tax or interest or penalty chargeable and imposable under this Act,

makes or causes to be made any entry or statement which is false and which the first person either knows to be false or does not believe to be true, in any books of account or other document relevant to or useful in any proceedings against the first person or the second person, under this Act, the first person shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

**Explanation.** — For the purposes of establishing the charge under this section, it shall not be necessary to prove that the second person has actually evaded any tax, penalty or interest chargeable or imposable under this Act."

The section, effective from October 1, 2004, contemplates the existence of an adviser or instigator and of another person to whom such advice is given/offered. The advice or instigation must be in regard to some tax or interest or penalty chargeable under the Income-tax Act, 1961 and leviable in the hands of the second person, the recipient of the advice or instigation. The adviser, in order to come under the mischief of the provisions of this section, must be acting wilfully and with intent to enable the other person to evade the tax, interest or penalty, in other words, to defraud revenue.

The punishment for the offence prescribed is as follows:

For the adviser — Rigorous imprisonment for at least three months which may be extended to three years. There shall also be the imposition of a fine.

The Explanation at the end of the section 277A makes it clear that for the purposes of establishing the charge it shall not be necessary for the accusing person to prove that the person advised had actually evaded any tax, penalty or interest.

The case is one of falsification of books of account or documents, etc. relevant for the purposes of making an assessment of an assessee. The case must be one where any evasion of tax or interest or penalty chargeable or imposable under the Act is attempted by an assessee. The person who is found to have advised the assessee to evade the tax or interest or penalty shall be punishable with imprisonment and also with fine.

If the second person named in section 277A, i.e., the person to whom the advice is given, actually gives effect to such wrong advice, the infraction of law committed by him makes him liable to proceedings for penalties and prosecution separately provided for under some specific other sections of the Act. Section 277A does not provide for any separate penalty or prosecution for his wrong action. Section 277A is directed only against the first person, the adviser.

A question now arises. If the second person does not follow the advice of the first person and prepares the relevant papers, statements or accounts ignoring the advice of the first person, does the mischief of the section still apply to the first person? In the opinion of the author, irrespective of the consideration as to whether the second person acts in accordance with the provisions of the Act rejecting the wrong advice, the very act of tendering a wrong advice to the second person, the first person, i.e., the instigator, makes himself liable to the proceedings against him as contemplated in the newly inserted section 277A of the Income-tax Act, 1961. The author lays emphasis on the fact that section 277A is designed for punishment of the wrongful adviser and the very act of giving the criminal advice makes the adviser liable to punishment as provided under the section.

It is essential to remember that the provisions of this section are attracted if there is **wilful action** on the part of the adviser, by which there is an attempt to advise a person to do any of the wrong things contemplated in the section. Whether a person had given such advice, is a matter which has to be verified. Even after that, the proof has to be given by the accusing person that the wrongful action had been **wilfully committed** by the adviser. The use of the word "wifully" makes it clear that it is not enough to show that the adviser had

given him the advice. The onus of providing such wilfulness, strictly in law, rests on the accuser and none else.

In order to bring the section into operation it is not enough to show that there has been a wilful action committed. The section itself states that there must be the intention to enable another person, i.e., the second person, to evade any tax or interest or penalty chargeable and imposable under the Income-tax Act. The responsibility lies squarely on the accuser to prove that there has been a 'wilful' action and that such action has been committed with "the intention to enable any other person to evade" a liability to tax or interest or penalty chargeable or imposable under the Act.

The presumption of guilt does not come automatically. The positive proof has to be rendered to show that the action of the person concerned was done "wilfully and with intent to enable any other person" to do the wrongful act referred to in the section. To sum up, in order to bring this section into operation the authorities must demonstrate that *mens rea* was present when the advice was given.

Section 277A is designed to punish a wrongful tax adviser and every person who in any way advises or assists the concerned assessee on the tax matters relating to preparation of statements, declarations, accounts, etc. required to be produced before the authorities or used in any manner in the course of proceedings under the Income-tax Act must be conscious of his heavy responsibility in this matter. An illegal act on his part in the manner referred to in section 277A renders him liable to severe penal actions against him. The section is a severe warning to the tax practitioner — "Do not mislead your clients to wrongful deeds with the aim of cheating the Government."

However, when talking about *mens rea* one has to consider the provisions of section 278E also which assumes that the person concerned is to be presumed to have such a culpable mind.

**"Presumption as to assets, books of account, etc., in certain cases.**

**278D.** (1) Where during the course of any search made under section 132, any money, bullion, jewellery or other valuable article or thing (hereafter in this section referred to as the assets) or any books of account or other documents has or have been found in the possession or control of any person and such assets or books of account or other documents are tendered by the prosecution in evidence against such person or against such person and the person referred to in section 278 for an offence under this Act, the provisions of sub-section (4A) of section 132 shall, so far as may be, apply in relation to such assets or books of account or other documents.

(2) Where any assets or books of account or other documents taken into custody, from the possession or control of any person, by the officer or authority referred to in clause (a) or clause (b) or clause (c), as the case may be, of sub-section (1) of section 132A are delivered to the requisitioning officer under sub-section (2) of that section and such assets, books of account or other documents are tendered by the prosecution in evidence against such person or against such person and the person referred to in section 278 for an offence under this Act, the provisions of sub-section (4A) of section 132 shall, so far as may be, apply in relation to such assets or books of account or other documents".

The third case of 'presumption' in the Income-tax Act, 1961 is taken up now. While the first case concerns itself with Search and Seizure Matters, the present section is styled as "Presumption as to assets, books of account, etc. in certain cases". The relevant provisions are contained in section 278D which have been effective from October 1, 1975 and it had been inserted by the Taxation Laws (Amendment) Act, 1975. The section refers to several other sections of the Income-tax Act, 1961, viz., sections 132, 132A, 132(4A) and 278.

Section 132 of the Income-tax Act, 1961 referred to in section 278D deals with cases of "Search and seizure" carried out by the designated authorities under the Income-tax Act,

1961. Section 132A narrates the “Power to requisition books of account, etc.” and section 278 deals with cases of “Abetment of false return, etc.”

In making proper assessments, the authorities require relevant books of account, documents and essential information concerning the incomes of assessees. Consequently, the Income-tax Act, 1961 contains provisions empowering authorised officials to raid premises of assessee in suitable cases after obtaining due authorization from designated Senior Officials of the Income-tax Department. All the four sections named above, viz., sections 132, 132A, 132(4A) and 278 of the Income-tax Act, 1961 are relevant in this regard.

The seizure of assets or of any books of account or other documents found in a search and seizure proceeding may be followed by legal action against the person or persons concerned in a Court of Law. Section 278D states that in such prosecution proceedings, the seized assets or books of account, etc. may be produced before the Court and the presumptions referred to in section 132(4A), discussed earlier, may be tendered as evidence against the party concerned. The prosecution proceedings, it is mentioned in this section, may be launched against any person or persons, who

(a) contravenes an order made under section 132(3); or

(b) fails to comply with the provisions of section 132(1)(iiib); or

(c) fraudulently removes, conceals, transfers or delivers property to thwart tax recovery; or

(d) makes a wilful attempt to evade tax, etc.; or

(e) fails to furnish prescribed returns of income; or

(f) fails to furnish returns of income in search cases; or

(g) fails to produce accounts and documents;

(h) makes a false statement in any verification required under the Income-tax Act; or

(i) falsifies books of account or documents; or

(j) abates or induces any person to make a false or false statements.

For the purposes of section 278D the primary requirement is that the offences narrated above are committed by persons who are subjected to search and seizure proceedings. The prosection contemplated in section 278 can be only such persons as have been subjected to such proceedings and seizures have taken place in such searches. The evidences referred to in the section must be referable to proceedings of search and seizure as contemplated in the section of the Income-tax relevant to such operations.

**Presumption as to culpable mental state**

**278E.** (1) In any prosecution for any offence under this Act which requires a culpable mental state on the art of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

**Explanation.**— In this sub-section, “culpable mental state” includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.”

Section 278E comes into play in any proceedings before a Court of Law for an offence under the Income-tax Act, 1961 alleged to have been committed by the accused person. The

provisions are not restricted to search and seizure proceedings only but to any kind of offence under the Act as appear in the sections relating to “Offences and Prosecutions” described in Chapter XXII of the Income-tax Act, 1961.

The section has been operative since September 10, 1986. It was inserted in the Income-tax Act, 1961 by the Taxation Laws (Amendment & Miscellaneous Provisions) Act, 1986 and the provisions have been effective since September 10, 1986.

But one should remember here, that section 277A requires the proof of existence of *mens rea* for the applicability of the provisions thereof. In a sense, the protection of *mens rea* under that section is largely taken away.

Like the other two provisions discussed earlier, viz., those of sections 277A and 278D, the provisions of this section also are derogatory to the interest of the assessee or the other persons against whom prosecutions may be launched by the Taxation Authorities.

Section 278E, the last of the four sections relating to presumption in the context of proceedings under the Income-tax Act, 1961, is relevant only in proceedings before a Court of Law when a person is charged with a culpable act alleged to have been committed by such person in income-tax matters and proceedings.

The normal rule is that where a person is accused to have committed an offence, the prosecutor has to prove before the Court where the prosecution takes place, that the accused person had committed the offence with a culpable state of mind. Section 278E relieves the complainant, i.e., the prosecutor from such a responsibility. The section states that such culpable state of mind of the person proceeded against, has to be presumed to exist. No proof in this regard is required to be presented before the prosecuting court as section 278E provides for a statutory presumption that the person proceeded against did have such a culpable mind when he committed the offence complained of.

The accused person however will have the right to rebut such presumption by producing evidence against such presumption.

**CONCLUSION**

The three sections, viz., sections 277A, 278D and 278E clearly demonstrate the anxiety of Parliament to ensure that the proper revenue prescribed by the law of income-tax is duly paid. Stringent penal provisions have been inserted in the laws of taxation with this sole motive, so that the tax-payer may think twice before indulging in any action with a view to defrauding the State of the revenue properly due to it.

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# INTERPRETATION OF INDIRECT TAXES (EXCISE & CUSTOMS)

The rules regarding interpretation of taxing statutes are the same as for other statutes. However, for taxing statutes certain important principles have to be noted. This article seeks to briefly discuss these principles with reference to Supreme Court and High Court decisions. The article is divided into two parts:

I. General principles/rules of interpretation.

II. Interpretation of Tariff headings and principles relating to classification.

## 1. GENERAL PRINCIPLES

**1. Rules of strict construction.** — The first rule of interpretation is that the rules of interpretation are merely aids to construction and cannot be used for controlling and stultifying the law.[1] The language of a statute imposing a tax, duty or charge must receive a strict construction in the sense that there is no room for any intendment and regard must be had to the clear meaning of the words. There is no rule admitting equitable construction of a taxing statute: that is to say, cases which are not within the actual words of the statute cannot be brought within the statute by consideration of its governing principle or intention.[2] If the words of the taxing statute fail, then so must the tax. The courts cannot, except rarely and in clear cases, help the draftsman by a favourable construction.[3] Equally important is the rule of construction that if the words of a statute are precise and unambiguous, they must be accepted as declaring the express intention of the legislature.[4] If the words are plain and clear and directly convey the meaning, there is no need for any interpretation. The choice between a strict and a liberal construction arises only in case of doubt in regard to the intention of the legislature manifest on the statutory language.[5]

When the phraseology of a particular section of the statute takes within its sweep the transaction which is taxable, it is not for the court to strain and strengthen the language of the section so as to enable the tax-payer to escape the tax.[6]

The consideration whether a levy is just or unjust, whether it is equitable or not is wholly irrelevant in considering the validity of a levy.[7] No tax can be imposed by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter.[8] The classic words of Rowlatt J. have been quoted several times with approval by the Supreme Court. As one of the outstanding pronouncements in fiscal jurisprudence, they deserve to be reproduced: “In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used”.[9]

No rule or principle of construction requires that close reasoning should not be employed to arrive at the true meaning of a badly drafted entry in an Excise Act.[10]

One of the principles of construction is that a statute ought to be so construed that, if possible, no word shall be superfluous, void or insignificant.[11] While interpreting statutory provisions, one should not pay too much attention to one word and too little attention to other words.[12] According to the tradition of our law, primacy is to be given to the text in which the intention of the law-giver has been expressed. It was held as not correct that the Judge must seek to harmonise, in statutory interpretation, the statutory text and the intention of the Parliament.[13]

**2. Limitations of Court's Powers. —** Where the intendment is clear, courts can interpret ambiguities, and even inept and injudicious expressions. But they cannot introduce in a legislation words of their own to fill in the gap.[14]

**3. Interpretation to be reasonable.** — It is true that a taxing provision must receive a strict construction at the hands of the court but it is not the same as saying that a taxing provision should not receive a reasonable construction. If the intention of the legislature is clear beyond doubt then the fact that the provision could have been more artistically drafted cannot be a ground to treat any part of a provision as otiose.[15]

**4. Interpretation to be uniform. —** In the matter of administration of taxes such as excise and customs duties, interpretation and practices should be uniform throughout the country. If the views held by the officers in different places in the country results in discrimination, such practice would be unfair and improper and would be violative of Article 14 of the Constitution. In such cases, the view of the officer who is superior of the two should prevail.[16]

**5. Interpretation favourable to the assessee to be adopted.** — Even if two views are possible, the view which is favourable to the assessee must be accepted while construing the provisions of a taxing statute.[17] If a provision of a taxing statute can be reasonably interpreted in two ways that interpretation which is favourable to the assessee has got to be accepted. This is a well accepted view of law.[18] If two interpretations are possible because of looseness in drafting, the interpretation advantageous to the assessee must be adopted.[19] The principle that where two constructions are possible, the one which is favourable to the citizen should be adopted, is not applicable when the provision is clear and suffers from no ambiguity.[20]

However, a discordant note was struck by the Supreme Court in the undernoted case.[21] The court pointed out that there was support of judicial opinion to the view that exemption from taxation has a tendency to increase the burden on the other unexempted class of tax-payers and should be construed against the subject in case of ambiguity.

It is a generally accepted principle of interpretation that in the matter of taxation laws, if a provision is wanting in clarity and no meaning is reasonably clear, that meaning which is favourable to the subject should be taken as its meaning.[22]

**6. Interpretation not to restrict the scope.** — Interpretation which would unduly restrict the scope of the beneficial provision and result in taking away with one hand what is given with the other is to be avoided.[23] Interpretation of exemption notification must be rational. It must not result in denial of benefit thereof.[24]

**7. Acts in *pari materia*.** — Acts are regarded to be in *pari materia* when they deal with the same person or thing or class; it is not enough that they deal with a similar subject-matter.[25]

**8. Case law of different statute.** — Cases on the construction of one statute are rarely of value in construing another statute, for each case turns on the language with which it is concerned and statutes are not often expressed in the same language.[26] The definition of "manufacture" in the Factories Act or the Excise Act should not be blindly applied while interpreting the expression "manufacturing purposes" in section 106 of the Transfer of Property Act, 1882.[27] It is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so when such statute or statutory instrument is not dealing with any cognate subject[28] or when the two Acts are not in *pari materia*.[29]

**9. Double Taxation permissible.** — There can be double taxation if the legislature has distinctly enacted it. It is only when there are general words of taxation and they have to be interpreted, they cannot be so interpreted as to tax the subject twice over the same tax.[30] It is a fundamental rule of the law of taxation that, unless otherwise expressly provided, *income*

*cannot be taxed again*.[31] There is no general principle that there can be no "double taxation" in the levy of excise duty but the court may lean in favour of a construction which will avoid double taxation.[32]

**10. Absurd results to be avoided.** — This is based on the Latin maxim *ut res magis valeat quam pareat*. The construction which would reduce the legislation to a futility should be avoided; an alternative that will introduce uncertainty, friction or confusion into the working of the system should be rejected.[33] An interpretation which leads to unworkable results and brings about absurdity cannot be accepted.[34]

If a strict and literal construction of the statute leads to an absurd result not intended to be subserved by the object of the legislation ascertained from the scheme of the legislation, then if another construction is possible apart from the strict literal construction, then that construction should be preferred to the strict literal construction. Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the legislature, the Court might modify the language used by the legislature so as to achieve the intention of the legislature and produce a rational result.[35]

**11. Machinery provisions—strict rule inapplicable.** — The rule of strict construction applies only to a taxing provision and has no application to all provisions in a taxing statute. It does not, for example, apply to a provision not creating a charge[36] for the tax but laying down the machinery for its calculation or procedure for its collection. The provisions in a taxing statute dealing with machinery for assessment have to be construed by the ordinary rules of construction, that is to say, in accordance with the clear intention of the legislature which is to make a charge levied effective.[37] In interpreting the (machinery) provision, the rule is that construction should be preferred which makes the machinery workable "*ut res valeat potius quam pareat*".[38] A machinery section should be so construed as to effectuate the charging sections.[39]

**12. Machinery/charging sections — relation between.** — The charging section and the computation provisions/machinery provisions together constitute an integrated code. When there is a case to which the computation provision cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Other-wise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it.[40] A machinery section should be so construed as to effectuate the charging section.[41]

**13. Retrospective operation-validity.** — Amendment to tax laws are frequently made with retrospective effect, particularly when the aim is to nullify a decision of the Supreme Court. As a general rule, restrospective laws have not been struck down. A competent legislature can always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating factors noticed in the declaratory judgement are removed or cured. Such a validating law can also be made retrospective.

In testing whether a retrospective imposition of a tax operates so harshly as to violate fundamental rights under Article 19(1)(g) the factors considered relevant include:—

(a) The context in which retroactivity was contemplated such as whether the law is one of validation of taxing statute struck down by courts for certain defects;

(b) The period of such retroactivity; and

(c) The degree and extent of any unforeseen or unforeseeable financial burden imposed for the past period etc.

The retrospectivity of the amending provisions (of sec. 2(f) which was held not to incur any infirmity under Article 19(1)(g) by the Supreme Court in *Empire Industries* case[42] was confirmed by the Bench of five judges.[43]

**14. Retrospective validation.** — Retrospective validation is permissible if tax already imposed is declared invalid owing to defect in legislation. It is not permissible if retrospectivity has the effect of imposing a tax not already sought to be imposed but is in effect fresh levy.[44] Apart from retrospective operation, Parliament frequently resorts to the Validation Act. If a provision is struck down as *ultra vires*, Validation Act is passed to ensure that the tax amount collected is not liable to be refunded. A number of cases have dealt with the scope of retrospective validation.

When a legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition is that the legislature must possess the power to impose the tax, for if it does not, the action must ever remain ineffective and illegal. Granted legislative competence it is not sufficient to declare merely that the decision of the Court shall not be binding for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decision must always be binding unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.[45]

**15. Deeming provisions.** — When a person is 'deemed to be' something the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were.[46] The deeming provision is intended to enlarge the meaning of a particular word or to include matters which otherwise may or may not fall within the main provisions.[47]

It is a well settled rule of interpretation that in construing the scope of a legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate.[48] A note on deeming provisions can never be complete without reference to this outstanding passage from *East End Dwellings Co. Ltd.* vs. *Finsbury Borough Council*[49]

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

**16. Interpretation in favour of constitutionality.** — It is settled law that where two constructions of a legislative provision are possible, one consistent with the constitutionality of the measure impugned and the other offending the same, the court will lean towards the former.[50]

The rule of construction that if the statutory provision is susceptible or admits two reasonably possible views then the one which would promote its constitutionality should be preferred on the ground that the legislature is presumed not to have intended an excess of its own jurisdiction, is subject to the further rule that it applies only where two views are reasonably possible on the statutory language. If the words of the statute, on a proper construction, can be read only in a particular way, then it cannot be read in another way by a court anxious to avoid its unconstitutionality.[51]

**17. Interpretation of notifications.** — Under section 20 of the General Clauses Act, 1897, expressions used in a rule or notification shall have the same respective meanings as in the Act, unless there is anything repugnant in the subject or context.

The Supreme Court has laid down three important principles relating to the interpretation of notifications: (i) the exemption notification should be interpreted in

harmony with the heading number; it cannot be read in isolation or *dehors* the heading number or *vice versa*; (ii) reference to a product in the heading number will also include parts thereof if the context so requires; and (iii) exemption cannot be denied merely because drafting of the notification is poor or because certain words are used in the notification which are not mentioned in the heading number.[52]

**18. Interpretation of exemption notification.** — An exemption notification has to be construed keeping its objective in view. Unless there is anything contrary in the Act, Rules or notifications, if two views are possible, the view which advances the objective of the notification must be accepted.[53] In *Union of India* vs. *Wood Papers Ltd.*,[54] the Supreme Court laid down a new "two-stage" rule of interpreting notifications. The court observed that "truly speaking", liberal and strict constructions of an exemption provision are to be invoked at different stages in interpreting it. When the question is whether a subject falls in the notification (sic) or in the exemption clause, then it being in the nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction. It is submitted that the decision of the Supreme Court is incorrect. If a subject falls in the notification or in the exemption clause, the first "stage" is satisfied and there would be no need to go to the second stage at all. It is difficult to ascertain the logic or reasoning for laying down the two-stage rule for interpreting exemption notifications/provisions.

## 2. INTERPRETATION OF TARIFF HEADING/PRINCIPLES RELATING TO CLASSIFICATION

The important principles that apply to classification of goods have been set out below:

i) The most common and oft-repeated principle of classification is that the goods should be classified according to their popular meaning or as they are understood in their commercial sense and not as per the scientific or technical meaning. *Indo International Industries vs. CST 1981 ELT 325, 329 (SC); Dunlop India Ltd. vs. Union of India, 1983 ELT 1566 (SC).* However, where the entry itself is in technical language or there is a scientific definition, such scientific definition will prevail over the commercial parlance test.

(ii) ISI specifications are important in classification cases, particularly when there is no direct evidence as to how a particular product is dealt within the market or where the commercial parlance test will not be applicable. *CCE vs. Krishna Carbon Paper Co. 1988 (37) ELT 480 (SC).*

(iii) **Burden of proof:** It is for the revenue to establish that the goods fall under a particular tariff item and it is not for the assessee to establish the negative. *Sandoz India Ltd. vs. Union of India 1980 ELT 696, 700, 701 (Bom); UOI vs. Sahney Steel & Press Works Ltd.* 1992 (58) ELT 38 (Bom); *Hindustan Ferodo Ltd. vs. CCE* 1997 (89) ELT 16, 19 (SC).

(iv) **End-use not conclusive:** The end-use for which a product can be used is not relevant to decide a classification *Dunlop India Ltd. vs. Union of India* 1983 ELT 1566, 1579. However, it is submitted that the end-use may not be a conclusive test but will definitely be relevant in understanding how a product is used in the market.

(v) **Expert evidence:** In excise and customs cases, the evidence of technical experts, scientists is of great importance in understanding classification of a product. It must be presented at the first stage itself during adjudication.

(vi) **Rules of interpretation:** The Central Excise Act itself contains rules of interpretation which are based on harmonized system of nomenclature.

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1. *Nectar Beverages Pvt. Ltd. vs. UOI, 1994 (70) ELT 172 (Kar).*
2. *Halsbury's Laws of England, 3rd Edition, pp. 416-17 quoted with approval in ITO vs. Devinatha Nadar, AIR 1968 SC 623, 628; SCE vs. R.K. Chemical Industries P. Ltd., 1987 (30) ELT 641A (Cal).*
3. *CIT vs. Elphinstone Spinning & Weaving Mills Co. Ltd., AIR 1960 SC 1016; CIT vs. Shazada Nand and Sons (1966) 60 ITR 392 (SC); Shree Sajjan Mills Ltd. vs. CIT, 156 ITR 585, 603 (SC).*
4. *CIT vs. Ajax Products Ltd., AIR 1965 SC 1358; Doypack Systems P. Ltd. vs. Union of India, 1988 (36) ELT 201 (SC). See also CIT vs. Hasmath Unissa Begum, 176 ITR 98 (SC); CIT vs. Sundaram Iyengar and Sons (P) Ltd., 101 ITR 764 (SC).*
5. *Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commissioner, 1991 (55) ELT 437 (SC).*
6. *CED vs. Alladi Kuppuswamy (1977) 108 ITR 439 (SC).*
7. *ITO vs. Devinatha Nadar, AIR 1968 SC 623, 629.*
8. *A.V.S. Fernandez vs. State of Kerala, AIR 1957 SC 657; Gursahai Saigal vs. CIT (1963), 48 ITR 1 (SC); CIT vs. M & G Stores, AIR 1968 SC 200.*
9. *Cape Brandy Syndicate vs. IRC, (1921) 1 KB 64, 71; C.S.T. vs. Modi Sugar Mill, AIR 1961 SC 1047; CIT vs. Maharashtra Sugar Mills Ltd., AIR 1971 SC 2434; State vs. Jullunder Veg. Syndicate, AIR 1966 SC 1295; Janapada Sabha vs. C.P. Syndicate, (1971) 1 SCC 509.*
10. *J.K. Steel Ltd. vs. Union of India, AIR 1970 SC 1173, 1177; Jodha Mal Kuthiala vs. CIT, 82 ITR 570 (SC).*
11. *Duncan Agro Industries Ltd. vs. Union of India, 1989 (39) ELT 211, 224 (Del).*
12. *Grasim Industries Ltd. vs. CC, 2002 (141) ELT 593 (SC).*
13. *CCE vs. Parle Exports (P) Ltd., 1988 (38) ELT 741, 749 (SC).*
14. *Advani Oerlikon Ltd. vs. ACCE, 1993 (63) ELT 427, 439 (Mad).*
15. *CWT vs. Kripashankar Worah, AIR 1971 SC 2463, 2466.*
16. *Fitwell Fastners (India) Pvt. Ltd. vs. CC, 1993 (68) ELT 50 (Cal).*
17. *CIT vs. Kulu Valley Transport Co. P. Ltd., (1970) 77 ITR 518, 530 (SC); STP Ltd. vs. CCE, 1998 (97) ELT 16 (SC).*
18. *CIT vs. Naga Hills Tea Co. Ltd., 89 ITR 236, 240; CED vs. Kanakasabai, (1973) 89 ITR 251 (SC); Board of Revenue vs. Sidnath, AIR 1965 SC 1092; C.A. Abraham vs. ITO, (1961) 41 ITR 425 (SC); CIT vs. Karamchand Premchand (1960) 40 ITR 106, 118 (SC); Express Mills vs. Municipal Committee, AIR 1958 SC 341; Union of India vs. Raj Continental Exports P. Ltd., (1991) 31 ECC 369 (Mad).*
19. *Bharat Cottage Industries vs. Union of India, 1992 (59) ELT 30, 34 (Bom).*
20. *Continental Exporters vs. Assistant Collector of Customs, 1995 (77) ELT 801 (SC).*
21. *Mangalore Chemicals & Fertilizers Ltd. vs. Deputy Commissioner, 1991 (55) ELT 437 (SC).*
22. *Sikkakollu Subba Rao & Co vs. State of Andhra Pradesh, 1999 (110) ELT 447 (AP).*
23. *Union of India vs. Suksha International & Nutan Gems, 1989 (39) ELT 503, 507 (SC).*
24. *Shriram Vinyl & Chemical Industries vs. CC, 2001 (129) ELT 278 (SC).*
25. *Maxwell on Interpretation of Statutes, 12th Edition, p. 66.*
26. *Ahmedabad Mfg & Calico Ptg Co. Ltd. vs. S.G. Mehta, AIR 1963 SC 1431, 1443; Mohanlal vs. Kondilal, AIR 1979 SC 1132.*
27. *P.C. Cheriyan vs. Mst. Barfi Devi, 1979 ELT J 593, J 596 (SC); Venkateswara Stainless Steel and Wire Industries vs. Union of India, 1986 (26) ELT 201 (Mad).*
28. *MSCO Pvt. Ltd. vs. Union of India, 1985 (19) ELT 15, 18 (SC).*
29. *Bharat Hansraj Gandhi vs. Addl. CCE, 1991 (55) ELT 462 (Kant).*
30. *Jain Brothers vs. Union of India, 77 ITR 107, 112 (SC).*
31. *Laxmipat Singhania vs. CIT, 72 ITR 291 (294) (SC).*
32. *Premier Tyres Ltd. vs. CCE, 1987 (28) ELT 58, 60 (SC).*
33. *Maxwell, op CIT, p. 45.*
34. *Alembic Glass Industries Ltd. vs. UOI, 1992 (59) ELT 207, 216 (Guj).*
35. *CIT vs. J.H. Gotla (1985), 156 ITR 323 (SC).*
36. *See Bharat Debi vs. ITO, 53 ITR 100 (SC).*
37. *Gursahai Saigal vs. CIT, AIR 1963 SC 1062, 1064, 1065.*
38. *CIT vs. Mahaliram Ramjidas, AIR 1940 PC 124, 127; India United Mills Ltd. vs. CEPT, 27 ITR 20 (SC); Gursahai Saigal vs. CIT (1963), 48 ITR 1 (SC).*
39. *India United Mills Ltd. vs. CEPT, AIR 1955 SC 79, 82.*
40. *CIT vs. B.C. Srinivasa Setty (1981), 128 ITR 294, 299 (SC).*
41. *India United Mills Ltd. vs. CEPT, AIR 1955 SC 79, 82.*
42. *1985 (20) ELT 179 (SC).*
43. *Ujagar Prints vs. Union of India, 1988 (38) ELT 535, 552 (SC).*

44. *Lohia Machines Ltd. vs. Union of India, 152 ITR 308 (SC).*
45. *Shri Prithvi Cotton Mills Ltd vs. Broach Borough Municipality, 2000 (123) ELT 3 (SC).*
46. *CIT vs. Bombay Trust Corporation, AIR 1930 PC 54, 55.*
47. *Doy Pack Systems (Pvt.) Ltd. vs. Union of India, 1988 (36) ELT 201 (SC).*
48. *CIT vs. Teja Singh (1959) 35 ITR 408, 413 (SC).*
49. *(1952) AC 109—per Lord Asquith. Quoted with approval in M.K. Venkatachalam vs. Bombay Dyeing Mfg. Co. Ltd., 34 ITR 143 (SC); State of Bombay vs. Pandurang Vinayak, AIR 1953 SC 244.*
50. *State of M.P. vs. Chotabhai Jethabhai Patel, AIR 1972 SC 971, 975 (SC).*
51. *CWT vs. Hash Matunissa Begam, 1989 (40) ELT 239, 245, 246 (SC).*
52. *Jain Engineering Co. vs. CC, 1987 (32) ELT 3 (SC); see also Newsprint & Papers Ltd. vs. Appraiser Madras Customs, (1988) 33 ELT 22 (Mad).*
53. *Belapur Sugar & Allied Industries Ltd. vs. CCE, 1999 (108) ELT 9 (SC).*
54. *1990 (28) ECC 182, 186 (SC).*

# BINDING PRECEDENTS ON DIRECT TAXES

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## 1. INTRODUCTION

**1.1.** Any authority under the direct tax laws who is entrusted with the task of implementing and enforcing the law is entitled to interpret the relevant provision involved. However, there is administrative and judicial hierarchy under the tax laws. Therefore, any interpretation placed upon a provision by a higher authority will be binding on the lower authority and his freedom to interpret is thus restricted. Thus an interpretation placed by a higher authority becomes a precedent for the lower authority, until it is reversed or modified by a still higher authority. The precedent is thus binding on the lower authorities.

**1.2.** The word 'precedent' means a legal decision or form of proceedings serving as an authoritative rule or pattern in future for similar or analogous cases. It is absolutely necessary for maintaining judicial discipline and rule of law that the precedents are taken as binding by the lower authorities.

In *Mamleshwar vs. Kanahaiyalal* AIR 1975 SC 907 the Supreme Court observed at p. 907 "Certainty of law, consistency of rulings and comity of courts — all flowering from the same principle — converge to the conclusion that a decision once rendered must later bind like cases".

The importance of judicial discipline was stressed by the Supreme Court in the context of binding nature of precedents in *State of U.P. vs. Synthetics & Chemicals Ltd.* (1991) 4 SCC 139 and *Bharat Petroleum Corporation Ltd. vs. Mumbai Shramik Sangh* (2001) 249 ITR 669 (SC).

## 2. DOCTRINE OF STARE DECIS

**2.1.** This doctrine means to "abide by the former precedents" Blackstone elucidates the doctrine thus:

"For it is an established rule to abide by former precedents where the same points come again in litigation: as well as to keep the scale of justice even and steady and not liable to waver with every new judges opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, now become a permanent rule which is not in the breast of any subsequent judge to alter or vary from, according to his private sentiment ". Reference may be made to the decision in *Pierce, Leslie & Co. vs. CIT (1993) 216 ITR 176 ( Mad)* .

**2.2.** In *CIT vs. B. R Construction* (1993) 202 ITR 222 the Full Bench of the Andhra Pradesh High Court held that the ratio decidendi of a judgement is a binding precedent. It also pointed out that precedent ceases to be a precedent (i) if it is reversed or overruled by a higher court; (ii) when it is affirmed or reversed on a different ground; (iii) when it is inconsistent with the earlier decisions of the same rank; (iv) when it is sub silentio and (v) when it is rendered per incurrium .

**2.3.** The Gujarat HC. had earlier explained the principles in the case of *Arvind Board & Paper Products Ltd. vs. CIT (1982) 137 ITR 635* in the following words.

"In Income tax matters which are governed by an All India Statute, when there is a decision of a High Court interpreting a statutory provision, it would be a wise judicial policy and practice not to take a different view, barring of course certain exceptions like where the decision is sub-silentio per incurrium, obiter dicta or based on a concession or takes a view which is impossible to arrive at or there is another view in the field or there is a subsequent amendment of the statute or reversal or implied overruling of the decision by a High Court or same such or similar infirmity is manifestly perceivable in the decision." This principle is recently followed in *CIT vs. SAE Welfare Trust (2004) 192 CTR 70 (Del)*

**2.4.** The doctrine of binding precedents, however cannot be stretched to perpetuate a mistake or injustice, as explained by the Supreme Court in *Union of India vs. Raghubir Singh* (1989) 178 ITR 548, which important decision in dealt with later in this article.

## 3. CONSTITUTION OF INDIA

**3.1** Long before S.212 of G.I. Act, 35 was enacted, the doctrine of precedents, substantially as it prevailed in England was recognized and applied in British India and the judgements of the higher Courts — Court of Appeal Privy Council were binding on all Courts in British India. However, the legal authority of precedents and the "rules" governing precedents raise difficulties which are thus described in Salmond's Juris Prudence. "..... since precedent cannot logically lift itself by its bootstraps the limiting rules are not strictly rules at all, but are mere statements of practice".

**3.2** In fact, the House of Lords had announced that the House of Lords would no longer be absolutely bound by its own decisions. It would appear that S. 212 of GI Act, 35 & Art 141 of the Constitution of India were enacted to give settled practice to the force of a rule of land. Art 141 reads as under:

"The law declared by the Supreme Court shall be binding on all courts within the territory of India.

**3.3** However, it must be pointed out that the Supreme Court while interpreting Art 141 examined the scope of the words "all courts in India" and held that they do not include the Supreme Court itself. See *Bengal Immunity Co. vs. State of Bihar (1955) 2 SCR 603.* But the Supreme Court also will deviate from its earlier decisions only in exceptional cases. Such exceptions were laid down by the Supreme Court in *Union of India vs. Raghubir Singh* (1989) 178 ITR 548 (SC) in the following words.

The pronouncement of law by a Division Bench of the Supreme Court is binding on a Division Bench of the same or a smaller number of judges and in order that such decision be binding, it is not necessary that it should be a decision rendered by the full Court or a Constitution Bench of the Supreme Court.

The Supreme Court is not bound by its own previous decision. Like all principles evolved by man for the regulation of the social order the doctrine of binding precedent is circumscribed in its governance by perceptible limitations — limitations arising by reference to the need for, readjustment in a changing society, a readjustment of legal norms demanded in a changed social context. The court would, however, do well to ensure that although the new norm chosen in response to the changed social climate represents a departure from the previously ruling norm it must, nevertheless, carry within it the same principle of certainty, clarity and stability.

The Supreme Court of India should not differ from its decision merely because a contrary view appeared preferable. But if the previous decision is plainly erroneous, there is a duty of the court to say so and not perpetuate the mistake. A revision of its earlier decision

would be justified if there were compelling and substantial reasons to do so. The earlier decision may be reviewed, for instance, (i) where an earlier relevant statutory provision had not been brought to the notice of the court, or (ii) if a vital point was not considered.

Whether the court should review depends on several relevant considerations, such as :

a) What was the nature of the infirmity or error on the earlier occasion (i) did some patent aspects of the question involved remain unnoticed , or (ii) was the attention of the court not drawn to any relevant and material statutory provision or (ii) was any previous decision of the court bearing on the point not noticed?

b) Is the court hearing the plea for review unanimous that there is such an error in the earlier view ?

c) Has the earlier decision been followed on subsequent occasions either by the Supreme Court or by the High Courts ?

d) What would be the impact of the error on the general administration of law or on the public good?

e) Would the reversal of the earlier decision lead to public inconvenience, hardship or mischief ?

It will benefit the reader a great deal to read the judgement in *Young vs. Bristol Aeroplane Co. Ltd. (1944)1 BK) 718.*

## 4. RATIO DECIDENDI TO THE PRECEDENT

**4.1** It is stated that it is not the judgement as such but its ratio that constitutes a binding precedent . In *Shamrao vs. Pondicherry* ( 67) ASC 1480 Shelat J. said that: "it is trite to say that a decision is binding not because of its conclusion but in regard to its ratio and the principles laid down therein."

**4.2** However there is a different view expressed by *Lord Deinedin in Great western Rly Co. vs. Owners of S.S. Mostyn (1928) A.C. 57,* where he observed

"..... when any tribunal is bound by the judgment of another Court, either superior or co-ordinate, it is of course bound by the judgment itself. And if from the opinion delivered it is clear— as is the case in most instances — what the ratio decidendi was which led to the judgment then that ratio decidendi is also binding. But if it is not clear then, I do not think it is part of the tribunals' duty to spell out with great difficulty a ratio decidenti in order to be bound by it. It appears that the Supreme Court has also concurred with this view in *State of Maharashtra vs. Madhavrao* (68) A.S.C. 1395. The distinction is fine but it exists.

**4.3** In ascertaining the ratio decidendi of a judgement dissenting judgment are to be excluded. As Solmond has put it. "A dissenting judgment valuable and important though it may be, cannot count as a part of the ratio, for it played no part in the Courts reaching their conclusion." Art 145 (5) of the constitution expressly permits dissenting judgments as it speaks of concurrence of the majority of judges.

The law is not clear as to what should be considered as ratio decidendi when judges deliver separate but concurring judgments. It must be remembered that a decision is only an authority for what it actually decides and not for what flows from it.

**4.4** Though it may amount to a little deviation. I'm tempted to refer to *Tribhuvandas vs. Ratilal* 70 Bom L. R. 73 in which the Supreme Court dealt with a very unusual situation created by Raju J when he refused to be bound by the judgment of a single judge or of a division Bench of the High Court of which he was a judge on the ground that to be so bound

would amount to violating the judges oath and also S. 165 of the Evidence Act. He further held that a judgment delivered by a full bench on a reference made by a single judge or a division bench could be ignored, since such judgment would "not be a judgment at all" and "has no existence in law" because such a reference was tantamount to usurping the jurisdiction of the Chief Justice. The Supreme Court said:

"The observations made by the learned judge subvert the accepted notions about the force of precedents in our system of judicial administration. Precedents which enunciate rules of law form the foundation of administration of justice under our system. It has been held time and again that a single judge of a High Court is ordinarily bound to accept as correct judgments of Courts of Co-ordinate jurisdiction and of Division Benches and of the full Benches of his Court. The reason of the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law.

**4.5** In *CIT vs. Balkrishna Malhotra 81 ITR 759* the Supreme Court held that if a decision has held the field for long and citizens as well as tax department have acted upon it, the Court will not disturb the law so laid down even if it comes to the conclusion that earlier decision was wrong.

Readers may refer to *SDS Srivastava vs. Union of India (74) ASC 338.*

**4.6** In *Ambika Prasad Mishra vs. State of UP* AIR 1980 SC 1762 the Supreme Court held that

"Every new discovery or argumentative novelty cannot undo or compel reconsideration of binding precedent.... A decision does not lose its authority merely because it was badly argued, inadequately considered or fallaciously reasoned."

In *Union of India vs. Kamalakshi Finance Corporation Ltd. (1991) 53 ELT 433,* the Hon'ble Supreme Court held as under.

"Judicial propriety demands that the order of the tribunal should not only be respected but it should be followed by a lower authority. If the authority subordinate to the Tribunal is allowed to pick up holes, gaps or some infirmities or is of the view that different line of thinking is possible then there will be judicial chaos and there will not be any finality to litigation.

'This process if permitted will lead to unnecessary harassment to the tax-payers which is not envisaged by the statute nor permitted by law . The CIT(A) is duty bound to follow the decision of the Tribunal. It is well settled that the decision of the higher authorities is binding on a lower authority in judicial hierarchy. Therefore the decision of the Tribunal is binding on the Revenue Authority which they should scrupulously follow."

**4.7** The Bombay HC quoted the following observations of Earl of Halsbury in the case of Qumin V Leathem ( 1901) AC 495 (HL) in *Blue Star Ltd. vs. CIT (1996) 217 ITR 514 520.*

"Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

**4.8** The Bombay HC summed up the issue by observing in *ICICI vs. D.D. Ruparelia* (2000) 99 Com. cases 181 @ p. 185 that to be the ratio decidendi amongst others, the minimum requirements are

1. That the matter was directly in issue (2) that the issue needs to have been decided and (3) that the matter has been decided by giving reasons.

## 5. CONFLICTING DECISION OF SUPREME COURT OR HIGH COURT — WHICH ONE IS A BINDING PRECEDENT?

5.1 The Courts have attempted to lay down certain principles, when faced with conflicting decisions of the higher or same Court.

A. The Supreme Court itself held in *Union of India vs. KS Subramanium AIR 1976 S.C. 2433* that the proper course for a High Court in a case where there are conflicting decisions of larger Benches of the Supreme Court and smaller benches of the Supreme Court, is to try to find out and follow the opinions expressed by larger Benches in preference to those expressed by smaller Benches of the Supreme Court. The practice has now crystallized into a rule of law declared by the Supreme Court. However High Court is at liberty to say but with cogent reasons that the views expressed by the larger bench are not applicable to the facts of a given case.

B. However a question arises where the smaller Bench has taken note of a large Bench decision, but still gave a decision apparently in conflict with the decision of the larger Bench. The Calcutta HC seems to have taken a view that the above ratio may not be applicable to such a situation. See *Century Spinning Mfg. Co. Ltd. vs. State of West Bengal (1989) 73 STC 277.*

C. In *Nandanam Construction vs. Asst. Commissioner (1983) Tax L. R. 2816,* the A. P. High Court has taken the view that in the case of conflicting decisions of the Supreme Court rendered by two Benches of equal strength the subsequent or later decision should he followed. The Madras HC has also taken a similar view in *CIT vs. Nagi Reddi (1983) 144 ITR 62.*

However the Punjab HC struck a different chord in *Indo Swiss Tune Ltd. vs. Umrao* AIR 1981 Punj 213. It opined that in such a situation the HC can follow the judgment which appears to it as laying down the law more elaborately and accurately, The mere incidence of time is a consideration which appears as hardly relevant.

It is submitted, with respect, that the above decision virtually confers powers on the High Court to decide whether Supreme Court was right or wary in a particular decision. The A.P. High Court and Madras HC decision appear to lay down the correct law, having regard to the rationale behind the doctrine of binding nature of precedents. See also 238 ITR 113 (Del.).

**5.2** Readers are aware that in the case of *CIT vs. Sudarshan Chemical Industries Ltd. (2000) 245 ITR 769* the Bombay HC held that in the context of s. 80HHC, sales tax and excise duty cannot form part of 'turnover'. The dept has now started refusing to follow the above decision on the ground that it does not take into account an earlier decision of Bombay HC in *Hindustan Petroleum Corporation vs. CIT (Bom) 143 ITR 318* wherein apparently conflicting view is taken and both the decisions are by Benches with equal strength.

It is submitted with respect that the decision in Sudarshan is not only later in point of time but is based on more than one ground, while the earlier decision is laconic and without considering all aspects of the issue.

## 6. HIGH COURT DECISIONS AS BINDING PRECEDENTS

**6.1.** All the discussion above relating to the decisions of the Apex Court will equally apply to the decisions of the High Court.

In *Siemens India Ltd. vs. ITO* (1983) 143 ITR 120 (Bom), the Bombay HC held that merely because an appeal has been filed or a special leave application is pending against the HC decision, it does not denude the decision of its binding effect and until set aside that

decision is binding on all upon whom it operates as a binding precedent unless the operation of that judgment is stayed by the Supreme Court. The Bombay HC also said that not to follow the decision of the jurisdictional High Court would be almost committing contempt of the Court. See also 156 ITR 11 (Bom)

**6.2.** However it appears that under direct tax laws, it may be permissible for the Assessing Officer, not to follow even the decision of the jurisdictional High Court, if the Department is contesting the issue in the Supreme Court. But in such a case, he cannot recover the tax which must be kept in abeyance.

**6.3.** In this connection, provisions of S. 158A are relevant.

**6.4.** In *Eknath Mukkawar vs. State of Maharashtra* AIR 1977 SC 1177, the Supreme Court held that it is open to the subsequent Division bench to differ from the decision of the earlier division bench. But in that case the only judicial alternative is to prefer to a larger bench and not to dispose of the matter by taking a contrary view.

## 7. DOCTRINE OF RES JUDICATA

**7.1.** It is always said that the doctrine of res judicata does not apply to tax proceedings as under the direct tax laws, it is only a half truth.

As observed by the Supreme Court in the case of *South India Trust Association vs. Telgu Church Council (1996) 2 SCC 520* that the rule of res judicata is founded on considerations of Public Policy. It is in the interest of public at large that finality should attach to the binding decisions pronounced by Courts of competent jurisdiction and it is also in the public interest that individuals should not be vexed over with the same kind of litigation.

The doctrine finds its roots in S. 111 of the Civil Procedure Code.

**7.2.** However Courts have cautioned that the doctrine of Res judicata should not be stretched too far under the Direct tax laws. A Tribunal should be extremely slow to depart from its earlier view. The Bombay HC first laid down this principle in *HA Shah vs. CIT (1956) 30 ITR 618 (Bom).*

The Madras HC put the principle in *CIT vs. L. G. Ramamurthy 110 ITR 453* thus: "But what is relevant is not the personality of officers presiding over the Tribunal but the Tribunal as an Institution. If it is to be conceded that simply because of the change in the personnel who manned the Tribunal, it is open to them to come to a conclusion totally contradictory to the conclusion which had been reached by earlier officers manning the Tribunal on the same set of facts it will not only shake the confidence of the public in judicial procedure as such, but it will totally destroy such confidence.... that will be destructive of the institutional integrity itself.

## 8. DISMISSAL OF SPECIAL LEAVE BY SUPREME COURT

**8.1.** It is more or less well settled that mere dismissal of special leave petition does not necessarily mean that High Court decision is approved on merits so as to constitute a judicial procedent. Recently, in *Smt. Tej Kumari vs. CIT* (2001) 247 ITR 210 the Full Bench of the Patna HC observed that when a special leave petition is summarily rejected or dismissed under Art 136 of the constitution such dismissal does not lay down any law. But the same is not the case when a civil appeal is dismissed by the Supreme Court holding that the appeal has no merit. It is submitted with respect that when the S.C. upheld in the P & H High Court decision in the case of Prithipal Singh as reported in (1990) 183 ITR 69 the Supreme Court must be taken to have approved all aspects of law on which the High Court ruled. Contrary interpretation placed by some benches of the Tribunal are wrong. Even the Hon'ble Bombay

H.C. has missed this point in *CIT vs. Chemiquip Ltd (2004) 265 ITR 265* which was decided ex parte and all aspects were not brought to their notice.

**8.2.** In *V. M. Salgaokar vs. CIT (2000) 243 ITR 383,* the Supreme Court held that when an appeal is dismissed by the Supreme Court by a non speaking order, the order of the High Court or Tribunal from which the appeal arose merges with that of the Supreme Court.

**8.3.** When the Supreme Court dismisses special leave petition with reasons, it might be taken as the affirmation of the High Courts views on merits of the case. There is no reason to dilute the binding nature of precedents in such cases.

**8.4.** Bombay HC has given a very healthy decision in *Godavaribai Saraf vs. CIT (1978) 113 ITR 589 (Guj)* holding that where there is only one High Court decision on an issue, the Tribunal is bound to follow such decision even if it is not of a jurisdictional Court as Tribunal is an all India body. It remains to be seen how the principle of binding precedents is applied, when the National Tax Tribunals will replace the High courts.

## 9. DECISIONS OF APPELLATE TRIBUNAL

**9.1.** It is already pointed out above that the Supreme Court in Kamalakshi Finance Corpn's case AIR 1992 SC 711, has categorically laid down that the doctrine of binding precedents is equally applicable to Tribunals orders also as Tribunal is higher authority in so far as A.O. & CIT (A) are concerned in the judicial hierarchy. Also refer to *Khalid Automobiles vs. Union of India* (1995) SCC Suppl. 653. In *ITAT vs. V.K. Aggarwal (1999) 235 ITR 175 (SC),* the Supreme Court has considered ITAT as a 'Court' for the purpose of contempt of Court Act, 1971.

**9.2.** It is also a healthy practice that one Bench of the tribunal should follow an earlier decision of another Bench, unless there is material change either in facts or law. This was so held by the Bombay H.C. in *CIT vs. Goodlass Nerolac Paints Ltd. (1991) 188 ITR 1.* It must be remembered that there is only one Tribunal under the constitution and different Benches are constituted only for the sake of convenience of the litigating public.

The legal position has been well summed up by the Bombay HC in *CIT vs. Thane Electric Supply Ltd.* (1994) 206 ITR 727 (Bom).

**9.3.** The Special Bench of the tribunal sitting at Bangalore has taken the views in *Mrs. Arathi Shenoy vs. JCIT (2000) 246 ITR 1 (AT)* that a decision of the Tribunal on a finding of fact is a binding precedent only if there is no reference (or appeal) from that decision. Indeed there can be no reference or appeal against a pure finding of fact except on the ground that it is perverse. Reference may be made to *ACE Investments P. Ltd. vs. CIT 157 CTR 185* where Madras HC considered that a finding of fact recorded by the Tribunal for a particular year as good and cogent evidence, but not binding on tax authorities in subsequent year.

Reconciling such conflicting views is more difficult than attempting to explain electoral alliances!

Reference is specially invited to the judgments in *CIT vs. S. Devraj (1979) 73 ITR 1* & *B. G. Jain vs. IT SC 195 ITR 792 (SC), Union of India vs. Paras Laminates P. Ltd. 186 ITR 722 (SC).*

**9.4.** The following are the observations of the Supreme Court from the decision in *Sl Rooplal & Another vs. L. G. of New Delhi (2000) ISCC 644.*

"At the outset, we must express our serious dissatisfaction in regard to the manner in which a coordinate Bench of the Tribunal has overruled in effect, an earlier judgment of the same tribunal. This is opposed to all principles of judicial discipline..... Precedents which enunciate rules of law from the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to

know for consistency in interpretation of law alone can lead to public confidence in our judicial system.

**9.5.** The decision of the special (large) Bench of the Tribunal must be held to be a binding precedent for division benches otherwise the very purpose of constituting them will get frustrated. This of course is subject to the exception that if there is a High Court decision on the same issue and not noticed by the Special Bench, then the High Court decision will receive preference as was done in Chandulal Venichand's case 38 ITD 138

**9.6.** It will be instructive to study the judgments in *Voest-Alpine Ind. GmBH vs. ITO (2000) 246 ITR 745 (Cal) Bank of Baroda vs. CIT (2002) 256 ITR 385 (Bom)* and also the decisions reported in 154 ITR 172, 168 ITR 387 & 257 ITR to gain deeper insight (or to confuse the reader)

## 10. LAST WORD

Lord MacMillian has said that precedents should be stepping stones and not hatting places.

But one should not be obsessed by precedents but should be able to see the facts and issues involved in a case clearly without the sun glasses of precedents. Those who are fans of Perry Mason's novels (as I am) will recall that his law clerk Jackson was so obsessed with precedents that he deliberately married a widow!

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# PRINCIPLES OF INTERPRETATION OF OTHER LAWS APPLICABLE TO DIRECT TAX LAWS

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and
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The Supreme Court in *Institute of Chartered Accountants of India vs. M/s. Price Waterhouse (A.I.R. 1998 S.C. 90),* while lamenting the scant attention paid by draftsman to the language of statutes, referred to the British jingle "I am the Parliamentary draftsman. I compose the country's laws. And of half of the litigation, I am undoubtedly the cause". Reference was also made to *Kirby vs. Leather (1965) 2 All ER 441,* where the Court observed that the provision of the (UK) Limitation Act, 1939 was so obscure "that the draftsman must have been of unsound mind". Construction of statutes and interpretation of laws should obviously cover all areas affecting the rights of the citizens.

"A statute is an edict of Legislature" observed the Apex Court and ruled that the elementary principle of interpreting or construing a statute is to gather the *mens or sententia legis* of the Legislature. The following observation of the Supreme Court in this context is very revealing.

**"Interpretation postulates the search for the true meaning of the words used in the statute as a medium of expression to communicate a particular thought. The task is not easy as the "language" is often misunderstood even in ordinary conversation or correspondence. The tragedy is that although in the matter of correspondence or conversation the person who has spoken the words or used the language can be approached for clarification, the Legislature cannot be approached as the Legislature, after enacting a law or Act, becomes functus officio so far as that particular Act is concerned and it cannot itself interpret it. No doubt, the Legislature retains the power to amend or repeal the law so made and can also declare its meaning, but that can be done only by making another law or statute after undertaking the whole process of law-making."**

While observing that the Supreme Court in interpreting the constitution enjoys a freedom which is not available in interpreting other statutes, the Court referred to the observation of Lord Diplock of the House of Lord to the following effect:

**"It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if Judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the Court before whom the matter comes consider to be injurious to public interest."**

**Salmond defines "interpretation" as "a process by which the Court seeks the meaning of Legislature through the medium of authoritative forms in which it expresses".**

When does the need to interpret arise?

Judicial authorities are consistent that where the language of the statute is plain and unambiguous and admits only one interpretation "there does not arise a need for interpretation".

Gray in his "The Nature and Sources of the Law" defines interpretation as "the process by which a Judge constructs from the words of a Statute Book a meaning which he either believes to be that of the Legislature or which he proposed to attribute to it".

Interpretation as widely accepted, is the process by which the Courts determine the meaning of a provision for applying it to a situation before them.

Very often "Interpretation" is used as analogous to "Construction", but judicial precedents have recognised the distinction between the two. "Interpretation" is the art of finding out the true sense of any form or words, the sense which they are intended to convey, while "Construction" is the drawing of the conclusions, respecting objects that lie beyond the direct expression of the text, from elements known from and given in the text. "Construction" constitutes the conclusions which are in the spirit though not within the letter of the law (Cooley "Constitutional Limitations").

The above concept of Interpretation as distinct from Construction has been recognized by the Supreme Court in a number of decisions.

Corpus Juris Secundum distinguishes between "Interpretation" and "Construction" of statutes as follows:

"Construction," as a process for determining the meaning of statutes, has been defined as the drawing of conclusions with respect to subjects which lie beyond the direct expression of the text from elements known from, and given in the text, while "interpretation," strictly speaking, is limited to exploration of the written text itself." It has been said that with respect to statutes construction sometimes is to be exercised as well as interpretation.

The object and the rules of Interpretation being what they are it is only natural that the rules of interpretation should not be static but dynamic. Rules of interpretation are not the rules of law and have to evolve constantly to ensure that they lie in sync with the march of the society. It is in this context that the Supreme Court in *Kehar Singh vs. State (A.I.R. 1988 Supreme Court 1883)* gave a go-by to the golden rule by which statutes were to be interpreted according to the grammatical and ordinary sense of the word. The following observation of the Supreme Court is very revealing in this context:

"During the last several years, the 'golden rule' has been given a go-by. We now look for the 'intention' of the legislature or the 'purpose' of the statute. First, we examine the words of the statute. If the words are precise and cover the situation in hand, we do not go further. We expound those words in the natural and ordinary sense of the words. But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute. We will not view the provisions as abstract principles separated from the motive force behind. We will consider the provisions in the circumstances to which they owe their origin. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences. "

In *Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. (A.I.R. 2003 SC 511),* the Supreme Court reiterated the rules relating to the interpretation of statutes and held that

recourse to construction or interpretation of the statute arises only when there is an ambiguity, obscurity, or inconsistency therein or otherwise. The basic principle of construction of statutes is that it should be read as a whole, then chapter by chapter, section by section and word by word. True meaning of a provision of law has to be determined on the basis of the clear language with due regard to the scheme of the law. No words shall be added, altered or modified unless it becomes necessary to do so to prevent the provision becoming unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute.

It is a presumption of interpretation of statute that the legislature inserted every word and expression in the statute for a definite purpose, and while interpreting a statute no word can be rejected as being inapposite or surplusage *(Mithilesh Singh vs. Union of India (AIR 2003 SC 1145).*

**Where the language of the statute is clear and unambiguous nothing can be read into it by implication and the intention of the legislature has to be gathered from the language used. *(Dayal Singh vs. Union of India) (AIR 2003 SC 1140).***

LEGISLATIVE INTENTION: "Object of interpreting a statute is to ascertain the intention of the Legislature enacting it. *(Kartar Singh vs. State of Punjab) JT (1994) (2 SC 423).* According to Salmond, the duty of the judicature is to act upon the true intention of the Legislature – *Mens or sententia legis.* Where the statute is equivocal and open to more than one interpretation, the court has to adopt that which in its view represents the true intention of the Legislature also referred to as the "legal meaning" of the provision. This is so, since the role of the courts is only to expound and interpret and not to legislate. In ascertaining the intention of the Legislature courts will have to appreciate the background in which a particular legislation is enacted. In the modern welfare state legislation is actuated by a policy intended to curb a social evil or achieve a social benefit. This is based on experience, past and present, and generally decided by words intended to cover similar problems arising in the future. In the words of the House of Lords "Those who seek to replace the common law by a statutory code always have to choose between certainty and flexibility". However, it does not fall within the realm of human agencies to exhaustively cover all situations and consequently controversial questions of construction arise. (1969) 3 All. E.R. 39).

**"Intention of legislature" covers two aspects viz. "Meaning" and "Purpose & Object". The construction of a statute thus combines both literal and purposive approaches. This requires ascertaining the true or legal meaning of an enactment in the context of a desirable purpose or object of the statute. As observed by the Supreme Court, the purposive approach aims at finding out the mischief against which the statute is directed** and the remedy *(State vs. Kailashchand Mahajan (AIR 1992 S.C. 1227* See also *C.C. Goutham vs. Union of India (1993) 199 ITR 530).* The Privy Council in a decision in *Crawford vs. Spooner (4 MIA 179)* held that if the legislature intended nearly the opposite to what it said, it is not for the Judges to invent something which they do not want within the words of the text. The Courts cannot labour to find out "the supposed intention" or "the underlying policy".

The rule of purposive construction known as "the rule in Heyden's case" and also the "mischief rule" requires four aspects to be taken into account while construing a constitute. They are:

i) The law before the making of the statute;

ii) The mischief or defect for which the law did not provide;

iii) The remedy provided under the Act; and

iv) The reasons for the remedy.

Taking these four aspects into account, the Court has to adopt a construction which suppresses the mischief and advances the remedy *(Bengal Immunity Co. Ltd. vs. State) (AIR 1955 S.C. 661)* See also *K.P. Varghese vs. I.T.O. (131 ITR 597).*

**STATUTE TO BE READ AS A WHOLE**

In *Poppatlal Shah vs. State (AIR 1953 S.C. 274),* the Supreme Court emphasised the need to read the statute as a whole in the proper context. This was referred to as a "settled rule" and reiterated time and again. In *R.S. Raghunath vs. State of Karnataka (AIR 1992 S.C.81),* the Supreme Court quoted its earlier observation with approval as follows:

**"The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs."**

In the words of the Apex Court that interpretation is best which makes "the textual interpretation match the contextual".

**It is more than a settled position of law that the Courts should adopt the interpretation which makes the statute workable, and reject a view which would render it unworkable and a futility. In *Municipal Council vs. Narayanan (AIR 1975 2193),*** the Supreme Court explained the maxim "*utres magisvalet quam pevat*" to mean that the Court should adopt a construction which sustains the legislative competence and lean in favour of its validity. In the words of Justice Farewell "unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning, and not to declare them void for uncertainty". *(Tinsukhia Electric Supply Co. Ltd. vs. State (AIR 1990 S.C. 123).*

This principle can be best summarised in the words of Justice Holmes, when he said "it is not an adequate discharge of duty for Courts to say, we see what you are driving at, but you have not said it, therefore we shall go on as before".

**This principle has been effectively set out by the Supreme Court in *ITO vs. Damodarbhat (1969) 71 ITR 806 (SC)* where the Court rejected the contention which sought to nullify the provisions of section 297(2)(g) of the I.T. Act, 1961.**

**BENEFICIAL CONSTRUCTION**

A beneficial legislation should receive liberal interpretation which would advance the purpose and object of the enactment. *(Bajaj Tempo Ltd. vs. CIT) (189 ITR).* In *Oil and Natural Gas Corporation Ltd. vs. Sawpipes Ltd. (AIR 2003 S.C. 2629),* the Supreme Court while interpreting the phrase "Public Policy of India" in Section 34 of the Arbitration and Conciliation Act, held that a wider meaning should be given to that expression to ensure that some of the provisions of the Act do not become nugatory. This is particularly so, since the expression connotes matters which concern public good and public interest.

**In a case arising under the Motor Vehicles Act, the Court reiterated that a beneficial legislation should be liberally construed so as to provide effective relief, untrammelled by technicalities *(New India Assurance Co. Ltd. vs. C. Padma) [(2003) 7 SCC 713].***

**GRAMMATICAL CONSTRUCTION**

The rule of grammatical construction was applied by the Supreme Court in a case arising under the Service Laws, in *Union of India vs. Rajeev Kumar (AIR 2003 6 SCC 516),*

where the Court held that since the provision was plain and unambiguous it has to be given a grammatical construction and nothing can be read into it or deleted there from.

**HARMONIOUS CONSTRUCTION**

The rule of harmonious construction is the thumb rule to interpretation of any statute. An interpretation which makes the enactment a consistent whole should be the aim of the Courts and a construction which avoids inconsistency or repugnancy between the various sections or parts of the statute should be adopted. The Courts should avoid "a head on clash", in the words of the Apex Court, between the different parts of an enactment and conflict between the various provisions should be sought to be harmonised. The normal presumption should be consistency and it should not be assumed that what is given with one hand by the legislature is sought to be taken away by the other. The rule of harmonious construction has been tersely explained by the Supreme Court thus, "when there are, in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted, that if possible, effect should be given to both". A construction which makes one portion of the enactment a dead letter should be avoided since harmonisation is not equivalent to destruction.

**It is a settled rule that an interpretation which results in hardship, injustice, inconvenience or anomaly should be avoided and that which supports the sense of justice should be adopted. The Court leans in favour of an interpretation which conforms to justice and fair play and prevents injustice *(Union of India vs. B.S. Aggarwal) (AIR 1998 S.C. 1537).***

**LIBERAL VS. LITERAL CONSTRUCTION**

The normal rule of construction of statutes is the literal rule or strict construction. An interpretation based on the wordings of the statute cannot be avoided for the mere reason that it would result in hardship or harsh consequences. It is only if there is ambiguity in the words of the statute that the Court can exercise its power of interpretation. The Court can only iron out the creases, but cannot change the texture of the fabric of a statute based on consequences of its decision *(Nazeeruddin vs. Sitaram Agarwal AIR 2003 SC 1543).* Generally, the rule of strict construction is adopted in taxing statutes. The House of Lords in the case of Top Ten Promotions (1969)3 All E.R 39) observed "In a Taxing Act one has to look merely at what is clearly said; there is no room for any intent; One can only look fairly at the language used". In *Maclay vs. Dixon (1944) 1 All E.R 22) Scott L.J.* observed "the only duty of citizens to Parliament is to obey its Act: To beg the question by such a phrase as "evading the Act" is to indulge in confusion of thought." The normal rule of interpretation is that "if the law does not forbid, it allows".

The rule of strict construction was applied by the Supreme Court in interpreting certain provisions of the *Monopoly and Restrictive Trade Practices Act (Goyal vs. Reliance Industries Ltd., (2003) 113 Comp. cases 1).* In *State of Maharashtra vs. Billimoria (2003) 7 SCC 336)* the Supreme Court while considering certain provisions of the Urban Land (Ceiling and Regulation) Act, held that an expropriatory legislation should be strictly construed. However, in invoking certain exclusionary clauses, the Court adopted a liberal construction; thus, accepting the position that different portions of the same statute can be interpreted differently based on the texture, content and object thereof.

A rule of strict construction is not of universal application. While statutes like the taxing statutes have generally to be interpreted strictly, wherever provisions are remedial or beneficent in nature they should receive a liberal construction. Remedial legislations are generally beneficient or social justice oriented. A remedial statute may contain penal provisions to prevent infringement. While remedial statute has to be liberally construed, the penal provisions should receive strict construction. The House of Lords in London and *North*

*Eastern Railway Company vs. Berriman (1946) 1 All E.R 255)* while interpreting such a statute, observed "Wherever Legislature prescribes a duty and penalty for breach of it, it must be assumed that the duty is prescribed in the interest of the community or some part of it and the penalty is prescribed as a sanction for its performance". The Supreme Court in *Tolaram vs. State of Bombay (AIR 1954 SC 496)* quoted with approval the observation of Lord Macmillan, "Where penalties for infringement are imposed it is not legitimate to stretch the language of a Rule, however beneficient its intention, beyond the fair and ordinary meaning of its language". In the Berriman case (ibid.,) different notes were struck by the House of Lords. After two decades, the House of Lords while considering a case under Factories Act, held that there is no need to construe the Act restrictively, "though equally there is no need to expand it beyond its natural meaning". The Supreme Court in Appabalu's case (AIR 1993 SC 1126) while considering the Civil Rights Act, held that the Statute has to be construed in the light of the objective and with a view to implement the mandate of the Constitution. A perusal of the various decisions of the Supreme Court would show that the interpretation is guided by the objective of the Act rather than the mere consequences. The Court aims at promoting the beneficient objective of the Act while being aware that the breach thereof leads to penal consequences and consequently strict interpretation in relation to such penal provisions. In the Indian Medical Association case (AIR 1996 SC 550) the Supreme Court took the view that any repugnancy has to be resolved in favour of the consumer to achieve the objective of the Act.

**SUBSIDIARY RULES**

In dealing with rules of interpretation it must be remembered that there are various subsidiary rules of interpretation, some of which are dealt with below:

(i) *CASUS OMISSUS*

Normally the Court cannot supply any assumed omission in the statute except in case of necessity, within the four corners of the statute. *(Union of India –vs. Rajiv Kumar (AIR 2003 SC 2917)*

(ii) *CONJUNCTION DISJUNCTION*

The word "or" is generally used disjunctively while "and" is used conjunctively. In certain situations however, these words may be interchanged. In the words of Lord Halsbury these words cannot be interchanged unless the clear intent of the statute requires that to be done. The Supreme Court considered this issue in the leading case of *Chamarbaugwala (AIR 1957 S.C. 699)* with a view to give effect to the clear intention of the Legislature as evidenced from the statute as a whole.

(iii) *RULE OF EJUSDEM GENERIS*

The Supreme Court in the case of *Kavalappara vs. State (AIR 1960 SC 1080)* explained the principle of Ejusdem Generis to mean that general words following a particular class, category or genes should be construed as limited to the same kind as those specified. In the words of the Supreme Court the Rule is intended to reconcile incompatibility between specific and general terms and applies only when specific words falling within a class or genes is followed by a general term. It is also relevant that the legislative intent should not point to a different interpretation.

This rule can be invoked only if there is a distinct genus which comprises more than one species. Where the items specified belong to different classes or categories, the principle of Ejusdem Generis cannot be invoked.

**WORDS OF RANK**

Allied to the rule of Ejusdem Generis is the rule relating to Words of Rank. Where a statute refers to persons or things of a particular specified rank and is followed by general words, such general words cannot cover persons and things of higher rank.

**REDDENDO SINGULA SINGULIS**

This is also a rule allied to the rule of Ejusdem Generis. The rule applies where general words of description follow a list of particular things. In such a case, the general words are to be construed distributively to things to which such general words can be applied. An illustration of the above rule is the expression "if one shall draw or load a sword or gun". Applying the above rule to interpret the above statement, the word "draw" should refer to "sword", while "load" would refer to "gun". The Supreme Court applied the above rule while interpreting the proviso to Article 304 of the Constitution in *Koteswar Vittal Kamath vs. K. Rangappa Baliga & Co. (AIR 1969 SC 504).*

**DEEMING PROVISION**

Deeming provisions or legal fictions abound in many statutes. While giving effect to legal fictions, all facts and circumstances incidental thereto and inevitable corollaries thereof have to be assumed.

**READING DOWN**

The rule of Reading Down is adopted by Courts to iron out creases and smoothen the crudities in a statute to make it workable. The Court exercises a limited power under this Rule, if the statute as such cannot be enforced and would lead to unworkable results. In such a situation the Court reads down the provision for making it workable, keeping in view the scheme and object of the Act [Goutham's case (supra); *Calcutta Gujarathi Education Society vs. Calcutta Municipal Corporation (2003) 10 SCC 533].*

**EXPRESSION UNIUS**

Under this Rule, where a particular thing is specifically expressed, it does not necessarily mean that all other circumstances are excluded. The normal rule of interpretation is that the mere expression of one term does not necessarily mean that all other situations cannot co-exist. The above Rule was applied by the *Supreme Court in Union of India vs. Shiv Dayal & Sons (AIR 2003 SC 1877).*

**GENERALIA SPECIALIBUS**

This Rule is invoked where there are two conflicting provisions of law in operation in the same field. Where a statute or rule specifically operates in a field, general rule would not apply to the circumstances and situations covered by the special statute. *(D.R. Yadav vs. R.K. Singh) [(2003) 7 SCC 110].*

Some of the important Rules as well as Subsidiary Rules of Interpretation have been referred to herein before. To conclude, the object of Interpretation of Statutes is to arrive at the true intent of the law maker and the best interpretation is that which focuses the spirit of law.

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# INTERPRETATION OF PENAL PROVISIONS UNDER DIRECT TAXES

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## 1. RULES FOR INTERPRETING TAX LEGISLATION

At times it is argued that a provision creating a tax exemption should be interpreted by looking at the spirit and purpose of the legislation. In this connection it is worth looking briefly at the development of the rules for interpreting tax legislation and formulating certain principles. Recently the Constitution Bench of the Apex Court, in the case of *State of W.Bengal vs. Kesoram Industries Ltd. (2004) (266 ITR 721)* has held as follows.

"The judicial opinion of binding authority flowing from several pronouncements of this court has settled these principles : (i) in interpreting a taxing statute, equitable considerations are entirely out of place. Taxing statutes cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency; (ii) before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject. There is nothing unjust in the tax-payer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly, (Justice G. P. Singh, ibid, pages 638-639)."

There is no longer any doubt that the interpretation of tax legislation should be subject to the ordinary rules of construction. At page 87 of his text *Construction of Statutes* (2nd ed. 1983), Driedger fittingly summarizes the basic principles: "..... *the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*". The first consideration should therefore be to determine the purpose of the legislation, whether as a whole or as expressed in a particular provision. However, in the resolution of ambiguities, in the past, resort was often made to the maxims that an ambiguity in a taxing provision is resolved in the tax-payer's favour and that an ambiguity in an exempting provision is resolved in the Crown's favour. Now an ambiguity is usually resolved openly by reference to legislative intent. However the ambiguities in the penal provisions under the taxing statute must be resolved in favour of the tax-payer. Where the taxing statute is not explicit, reasonable uncertainty or factual ambiguity resulting from lack of explicitness in the statute should be resolved in favour of the tax-payer. If the interpretation of a taxation statute is unclear, and one reasonable interpretation leads to a deduction to the credit of a tax-payer and the other leaves the tax-payer with no relief from clearly *bona fide* expenditures in the course of his business activities, the general rules of interpretation of taxing statutes would direct the tribunal to the former interpretation.

If the tax-payer receives the benefit of the doubt, such a "doubt" must nevertheless be "reasonable". A taxation statute should be "reasonably clear". This criterion is not satisfied if the usual rules of interpretation have not already been applied in an attempt to clarify the problem. The meaning of the enactment must first be ascertained, and only where this proves impossible can that which is more favourable to the tax-payer be chosen.

People often have difficulty with interpreting legislation, particularly tax legislation. When applied to the facts of a particular case, the words of a statute may be ambiguous or, while apparently clear, may lead to a result that seems to be unjust, absurd, or out of line with other

parts of the Act. In these circumstances courts turn for help to principles of statutory interpretation that have developed over many decades. For lawyers and officials, therefore, the term 'statutory interpretation' carries a great deal of freight. It refers to whole volumes of principles, rules, and maxims that courts call in aid to help them to interpret difficult passages in statutes.

## 2. INTERPRETATION OF PENAL AND REMEDIAL STATUTES

Courts adopt a number of approaches to statutory interpretation. One approach involves categorising the statute in question, and employing principles that are thought to be appropriate for that category of legislation. In the present context, the categories of 'remedial' and 'penal' are relevant. Remedial legislation is designed to repair some defect that has become apparent in the existing law. Penal legislation, which includes criminal statutes, exacts penalties for breaking rules.

Historically, courts have adopted opposing approaches to these two categories. Since *Heydon's* case [*(1584) 3 Co. Rep. 7*], whenever a court has categorised legislation as remedial it has tried to work out the purpose of the legislation, and in interpreting the statute it has endeavoured to promote that purpose. For example, when a provision is ambiguous, the court will interpret it in the manner that best promotes what the court sees as the overall purpose of the Act.

In contrast, when courts categorise statutes as penal they are apt to interpret them restrictively, in order to narrow their scope. The reason is that by imposing penalties penal statutes interfere with the liberty of the subject or take the subject's money or property by fines or forfeitures. Courts take the view that penalties should be imposed only when it is very clear that such was Parliament's intention. Importantly in the present context, courts historically categorised tax statutes as penal, or analogous to penal, because they take money compulsorily from the citizen.

## 3. CONSTRUCTION OF TAXING STATUTES AND EVASION OF STATUTES

That the terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. (see *International Harvester Co. vs. Kentucky, 234 U.S. 216, 221 , Collins vs. Kentucky, 234 U.S. 634, 638 ,).* Similarly the dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

If the provision is reasonably capable of two alternative meanings, the courts will prefer the meaning more preferable to the subject. In *Mangin vs.* IRC 1971 AC 739 the Privy Council approvingly quoted from Rowlatt J in *Cape Brandy Syndicate vs. IRC.* In what is possibly the most cited explanation of the restrictive approach to interpreting tax statutes in English jurisprudence, Rowlatt J said:

*"One has merely to look at what was clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

This passage is quoted with approval repeatedly by the Apex Court lastly being in the case of *State of W.Bengal vs. Kesoram Industries Ltd (supra).* Although the principles of statutory interpretation are often called 'rules' the courts treat them more as guidelines whose importance varies relative to one another depending on the facts and nature of the case. One commentator went as far as to say, 'A court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it'.

It is firmly regarded that penal statutes — including civil and criminal tax penalties — are to be strictly construed. This means that if it is not clear whether the language of a penal provision applies to the tax-payer's conduct, then the statute will be interpreted narrowly in favour of the tax-payer/defendant. The policy behind such a rule of construction is that people should have fair warning that conduct is punishable. In this regard, courts have repeatedly recognized that where a statute imposes a tax which is in effect a penalty, the statute should be strictly construed and should not be extended to cover cases which do not fall within its letter. Moreover, courts have acknowledged that any ambiguities with respect to such provisions should be construed in favour of the tax-payer.

## 4. ELEMENT OF MENS REA (GUILTY MIND)

A penalty provision in a taxing Act as distinguished from a provision creating an offence may not attract the rule of presumption of *mens rea*. The same rule applies to offences against the Revenue and economic offences. The words 'shall presume' used in a Taxing Act to show infringement of some provision which subjects the assessee to a penalty are construed to convey a rebuttable presumption. At the same time provision to impose a penalty does not necessarily convey that penalty must be imposed in all cases. As held in *State of Madhya Pradesh vs. Bharat Heavy Electricals (AIR 1997 SC 3285),* a high rate of penalty may be construed to be the maximum, not applicable to all cases.

A penalty provision in a taxing Act may not be equated to a criminal statute requiring impliedly the element of *mens rea* and unless there is something in the language of the Act indicating the need to establish *mens rea*, it is generally sufficient to prove that a default in complying with the provisions of the Act for which the penalty is provided has occurred. The class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty, and instances of which are found under the Revenue statute or Taxing statutes, is one of the classes where the legislature normally enacts absolute prohibition. Such offences in respect of which *mens rea* is not required to be established, are usually of a comparatively minor character and sentences prescribed for them are not of a severe type. Thus penalty imposable under an Act for the breach of civil obligation, such as payment of taxes, does not attract the rule that *mens rea* must be established before a penalty could be imposed, and as such, a penalty can be imposed even without there being any proof of *mens rea*.

Recently, however the Hon'ble the Supreme Court had an occasion to deal with the aspect of *mens rea*, wherein the Hon'ble Court held that even after the amendment w.e.f. 1-4-1976 with the omission of the word "deliberately" from the language of sec. 271(1) (c) of the Act, it has still to be proved that the concealing of particulars of income or furnishing of inaccurate particulars of income was a deliberate act on the part of the assessee and the same has resulted into tax avoidance on the part of the assessee. The Hon'ble Supreme Court in the case of *K.C. Builders And Anr. vs. Assistant Commissioner of Income Tax. (2004) 265 ITR 562 (SC)* has held as follows.

"One of the amendments made to the abovementioned provisions is the omission of the word "deliberately" from the expression "deliberately furnished inaccurate particulars of such income". It is implicit in the word "concealed" that there has been a deliberate act on the part of the assessee. The meaning of the word "concealment" as found in Shorter Oxford English Dictionary, 3rd Edition, Volume I, is as follows :-

"In law, the intentional suppression of truth or fact known, to the injury or prejudice of another."

*The word "concealment" inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under section 271(1)(iii) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income. Where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, there remains no basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be cancelled as in the instant case.*

## 5. INTERPRETATION OF PENAL STATUTES – WHETHER STRICT OR LIBERAL

Penal provisions enacted to meet tax evasion are subject to the rule of strict construction and it is for the Revenue to prove that the conditions laid down for the imposition of penalty are satisfied. It must also be remembered that in applying a statute designed for detection of fraud, for example, one providing for search and seizure of tax-payer's property two competing public interests are involved: that offences involving tax frauds should be detected and punished and that the right of the individual to the protection of law from unjustified interference with his use and enjoyment of his private property should be upheld. If the statutory words are ambiguous or obscure, a construction should be placed on them that is least restrictive of the individual's rights. But the judge should not be over zealous in searching ambiguities or obscurities in words which are plain, simply because he is out of sympathy with the policy which the Act appears to give effect (*Inland Revenue Commissioner vs. Rossminster Ltd.* (1980) 1 All ER 80).

Generally speaking, a statute enacting an offence or imposing penalty is strictly construed. But this rule, is nowadays, of limited application, and usually serves in the selection of one when two or more constructions are reasonably open. The rule exhibits a preference for the liberty of the subject and in a case of ambiguity enables the court to resolve the doubt in favour of the subject and against the Legislature which has failed to express itself clearly. The rule was originally evolved to mitigate the rigour of monstrous sentences for trivial offences and although that necessity and that strictness have now almost vanished, the difference in the approach made to a penal statute as against any other statute still persists. This aspect is best expressed by the following observations of the Apex Court in the case of *CIT vs. Vegetable Products Ltd. (88 ITR 192).*

"There is no doubt that the acceptance of one or the other interpretation sought to be placed on section 271(1)(a)(i) by the parties would lead to some inconvenient result, but the duty of the court is to read the section, understand its language and give effect to the same. If the language is plain, the fact that the consequence of giving effect to it may lead to some absurd result is not a factor to be taken into account in interpreting a provision. It is for the legislature to step in and remove the absurdity. On the other hand, if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognised by this court in several of its decisions."

The Gujarat High Court in the case of *National Textiles vs. CIT (2001) (249 ITR 125)(Guj)* has held that when there are more than one view possible on the same set of facts, no penalty under sec.271(1)(c) of the Act can be levied. The Court observed thus:

"In order to justify the levy of penalty, two factors must co-exist, (i) there must be some material or circumstances leading to the reasonable conclusion that the amount does represent the assessee's income. It is not enough for the purpose of penalty that the amount has been assessed as income, and (ii) the circumstances must show that there was animus; i.e., conscious concealment or act of furnishing of inaccurate particulars on the part of the assessee. The explanation has no bearing on factor No. 1 but it has bearing only on factor No. 2. The explanation does not make the assessment order conclusive evidence that the amount assessed was in fact the income of the assessee. No penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If an assessee gives an explanation which is unproved but not disproved; i.e., it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, the explanation cannot help the Department because there will be no material to show that the amount in question was the income of the assessee.

The fact the enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. In *Joint Commercial Tax Officer, Madras vs. YMA, Madras (AIR 1970 SC 1212),* Shah J. observed that "In a criminal trial or quasi criminal proceeding, the court is entitled to consider the substance of the transaction and determine the liability of the offender. But in taxing statute, the strict legal position as disclosed by the form and not the substance of the transaction is determinative of its taxability. However, G. P. Singh in his book "Principles of Statutory Interpretation" disagrees with Shah J. and explains that even in construing and applying criminal statutes any reasoning based on the substance of the transaction is discarded.

## 6. OPERATION OF THE STATUTE – WHETHER PROSPECTIVE OR RETROSPECTIVE

Fiscal legislation imposing liability is generally governed by the normal presumption that it is not retrospective and it is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication. The above rule applies to charging section and other substantive provisions of a taxing Act which are generally retrospective and apply even to pending proceedings. A taxing Act cannot, however, be called retrospective if it taxes an event which is continuing and not complete when the Act comes into force. A default, for example, which is a continuing default and not a default once for all, can be dealt with under the provisions of the new Act, if it continues when the new Act comes into force, although it commenced when the old Act was in force. A default in filing return of income is a continuing default till the return is filed, such a default, though it commenced when the Income-tax Act, 1922 was in force, can yet be dealt with under the provisions of Income-tax Act, 1961 if it continued after the commencement of the new Act.

Penal statutes which create offences or which have the effect of increasing penalties for existing offences will only be prospective by reason of the constitutional restriction imposed by Article 20 of the Constitution of India. Therefore, if an Act creates a new offence, it will bring into its fold only those offenders who commit all ingredients of the offence after the Act comes into operation. However, if any legislation downgrades the harshness of the sentence for the same offence, the benefit of the new legislation can be extended to the person committing the offence prior to the new legislation, who is still to be finally sentensed. This is based on the basic principle of natural justice that no one can be penalized on the ground of a conduct which was not penal on the day it was committed. This rule of construction against retroactivity of penal laws is not restricted to criminal offences punished with imprisonment, but also applies to laws which provide for other penal consequences such as fines and penalties.

Recently this issue has been addressed by the Special Bench of the ITAT, Ahmedabad in the case of *Apsara Processors Private Limited* (ITA No. 284/04, unreported as yet) where the Bench was examining the issue as to whether the assessee can be subjected to any penalty for

concealment of income, even where after making addition/ disallowances, the returned income which is "loss" continues to be assessed as "loss". The Revenue relied upon the amendment of section 271(1)(c) of the Income-tax Act by the Finance Act, 2002 whereby *Explanation 4* is amended to specifically levy penalty in such a situation. The Bench rejected the argument as to retrospectivity of the *Explanation 4* by following the Supreme Court judgement in the case of *Pyarelal Sharma vs. MD, Jammu & Kashmir Industries Ltd (AIR 1989 SC 1854)* where the Court had held that "*It is basic principles of natural justice that no one can be penalized on the ground of a conduct which was not penal on the day it was committed.*"

## 7. BURDEN OF PROOF

However it should at once be noted that there is a risk of confusion between the rule that a taxing provision is to be strictly construed and the burden of proof resting upon the parties in an action between the government and a tax-payer. According to the general rule which provides that the burden of proof lies with the plaintiff, in any proceeding it is for the party claiming the benefit of a legislative provision to show that he is entitled to rely on it. The burden of proof thus rests with the tax department in the case of a provision imposing a tax obligation and [unless shifted to the assessee by a deeming fiction in law] in the matter of levy of penalty, and with the tax-payer in the case of a provision creating a tax exemption. In any event, the rule of strict construction relates only to the clarity of the wording of the tax legislation: regardless of who bears the burden of proof, that person will have to persuade the court that the tax-payer is clearly covered by the wording of the legislative provision which it is sought to apply.

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# PROSECUTION UNDER DIRECT TAXES RULES OF INTERPRETATION

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Economic offences in spite of broader attitude and liberal approach on the part of the Government have come to stay since the tendency of the people and particularly that of the young entrepreneurs is to become rich overnight. Abuse of the process of law and finding loopholes in the already archaic system of law and legislation prevalent have made 'white collared' criminals a class by themselves. The tax laws in India though are changing with every Financial Year leave enough room for such abuse of law and evasion of taxes and these economic offenders have been on the rise and will continue being, since the whip of the law is not so strong yet to cover all situations. In the post liberalization era cross border transactions are on the rise and this has made the 'withholding of tax' provisions more stringent and non-compliance of the same also attracts heavy penalties. The Indian Income-tax Act, 1961 (The Act) being a very important piece of legislation too attempts to cover such situations where the defaults of the assessees are brought to the books. Prosecution under the Act thus has become a very important and live subject and requires more attention in the present times.

Under the Act some of the offences and/ or irregularities on the part of the assessees are made punishable. The offences and prosecution prescribed under the Act vary between being deterrent in nature to being penal and punitive. It is therefore imperative to understand and analyze the provisions of Act wherein prosecution has been prescribed. The crucial point which one has to bear in mind while dealing with these provisions is the interpretation of these provisions lest an honest tax-payer may be reprimanded on account of the wrong interpretation of these penal/ punitive provisions.

The following are some of the important provisions of the Act wherein prosecution proceedings can be initiated. The relevant chapter under the Act is Chapter XXII and the said chapter starts with section 275A to section 280 of the Act.

The important provisions are listed below:

i) Wherein the search proceedings have taken place u/s 132 and the order has been passed under sub section 3 of section 132 by a competent officer directing the person not to remove a particular thing or article and if there is a contravention of such an order it will be an offence u/s 275 A of the Act. Similarly, if any person refuses an authorized officer necessary facility to inspect the books of account or other documents as required under clause ii-b of sub section 132 of the Act and fails to afford such facility it will amount to an offence u/s 275B of the Act. Any person who fraudulently removes, conceals, transfers or delivers to any person any property or any interest therein with an intention to prevent such property or interest therein and to thwart any attempt of execution of recovery proceedings shall also face prosecution proceedings u/s 275A of the Act. Similarly, under other provisions even if a liquidator of a company fails to act in a particular manner it may invite prosecution proceedings. U/S 276BB of the Act if a person after deducting tax at source fails to pay the same to the Government treasury it will invite prosecution proceedings. According to the earlier provisions not deducting tax at source was an offence under section 276B of the Act. Wilful attempt to evade taxes under the Act and or failure to furnish tax returns as required under

the Law and or failure to produce accounts and documents and or making false statement in verification and or helping any person or abetting any person for false returns are being treated as offences under the Act and prosecution proceedings can be commenced. A plethora of case laws have been developed over the years to cover the situations wherein prosecution proceedings can be initiated against the assessee under the various provisions of the Act.

Considering the above said provisions one will appreciate that there are enough powers at the disposal of the Income Tax Authorities to start prosecution proceedings against the erring assessees. The important aspects to be considered before and during the course of launching prosecution with the help of well recognized principles of interpretation of statutes are as under:–

## 1. STRICT INTERPRETATION OF THE PROVISIONS

One of the important aspects to be considered is the complaint to be filed under the above-referred provisions. The complaint filed under the Act is independent of the assessment order. In fact the Madras High Court has held in the case of *ITO vs. D. Manoharlal Kothari 236 ITR 357 (Mad)* that the Criminal Court has to arrive at the conclusion independently from the evidence and materials placed before the Tribunal or any other Court. The findings in assessment proceedings are not enough because the burden of proof of the offence is on the department and no accused can be convicted unless and until the offence has been proved beyond reasonable doubts. In number of cases, Supreme Court as well as High Court has taken the view that on mere suspicion prosecution proceedings cannot be launched. Complainant must disclose nature of offence as well as the participation in such offence by the accused as stated above. Thus the cardinal principle of criminal jurisprudence that penal statutes have to be construed strictly is enunciated in the case of *D. Manoharlal Kothari (supra).* Such a strict interpretation can sometimes work against the defaulting assessee. While filing the complaint, the complainant has to disclose the nature of offence and the involvement of the accused while committing the said offence. The complaint must also set out some positive averments of violations of the provisions of law and if any triable offence has been made out. For the purpose of this limited proposition one can rely on the judgment of the Delhi High Court in the case of *Vinod Paper Mills vs. A.P. Singh 256 ITR 350 (Del).* Even in penalty proceedings the Supreme Court in the leading case of *Hindustan Steels reported in 83 ITR 26* has stated that penalty proceedings are of quasi-judicial nature and the principle of preponderance of probability will always work in favour of the assessee.

Prosecution needs higher proofs and for that the offence has to be proved beyond reasonable doubts.

## 2. MENS REA

i) The next most important ingredient, which is required to be, satisfied in prosecution proceedings, is in respect of the guilty mind of the accused, which in legal parlance is called ‘mens rea.’ ‘Mens Rea’ connotes that an accused was fully aware of the offence he was committing and that there was a criminal intent on his part to commit such an offence. The complainant has to prove that such a guilty mind was present at the time of the offence by the accused. Thus the onus is on the prosecution to lead evidence and show that such a guilty mind exists. However in section 278E of the Act the presumption is against the assessee and the court presumes that the accused has a ‘culpable mental state’ at the time of committing the offence as alleged. “The culpable mental state” of the accused has been defined in the Act as the ‘intention, ‘motive’ or ‘knowledge’ of a fact or belief by the accused. The onus in such a situation thus shifts on the accused and he has to prove beyond reasonable doubt that he had no such mental state. This proposition that the accused has to prove beyond reasonable doubt that a culpable mental state did not exist has been propounded in the judgment of the Delhi High Court in *V.P. Punj vs. Asst Commissioner of Income Tax & Anr reported in 253 ITR 369.* In this case the accused could not prove beyond reasonable doubt that a culpable mental state did not exist on his part at the time of committing the offence and hence the

order framing the charge was not quashed. In the case of *Prakashnath Khanna & Anr vs. CIT & Anr. reported in 266 ITR 1* the Supreme Court has once again reiterated that the statutory presumption prescribed in section 278E of the Act is to be applied in prosecution proceedings and the only defence available to the assessee is to plead the absence of such mental state as prescribed in the statutory presumption.

In our discussion on mens rea it is pertinent to make note of the new section being section 277A which has been introduced in the Act with effect from 1-10-2004 and has created considerable furor and commotion particularly amongst the fraternity of Chartered Accountants and Tax Consultants. The above section prescribes the punishment to any person who induces or abets any other person to evade any tax, interest or penalty by making or causing to be made any entry or statement which is false and which such person knows to be false or does not believe to be true. The explanation that has been added to the said section states that for such proceedings it is not necessary that there has to be an actual evasion of any tax, interest or penalty chargeable or imposable under the Act. The interpretation of the section is likely to create many difficulties. It appears that the tenor and Explanation of the section is contradictory. The main ingredient of the section is to evade tax and that too coupled with a wilful intent. Hence ultimately the issue of guilty mind of such person will have to be proved who has passed an entry into such books of account and such a guilty mind should be for the purpose of evading tax.

However it appears on the basis of plain reading of the section as it stands now that in the years to come the section may not stand to judicial scrutiny of the court of law with the purpose for which it has been introduced. In fact there are other provisions, which could have taken care of such situations.

## 3. PROSECUTION OF COMPANY

The other important issue to be considered in prosecution proceedings, which has come up for discussion before the Hon'ble Supreme Court in the recent times, is that whether a company can be prosecuted against for non-compliance of the provisions of the Act, which invite prosecution. In the case of *Assistant Commissioner II Bangalore vs. Valiappa Textiles Ltd. and Anr. reported in ITR 263 Page 550.*, the issue was that "can a company be proceeded against u/sections 276C, 277, 278 and 278B of the Act?" The Supreme Court came to the conclusion that though the definition 'person' does include company, yet the punishment prescribed for violation of the above offences is imprisonment and not fine. Hence the Court cannot impose a fine in lieu of imprisonment and therefore the company cannot be proceeded against for the violation of these provisions. The Apex Court further observed that ' the Court cannot read the recommendations of the law Commission as justifying an interpretation of the section in tune with them, even where the words of the section are plain and unambiguous.

In such a situation when the company cannot be proceeded against the provisions of the Act as given in section 278B make it clear that the person who at the time the offence was committed, was in charge of, and was responsible to, the company for conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However the complainant has to make out a case that the person against whom the complaint has been filed was actually in charge of the affairs of the company and was responsible for the conduct of the day-to-day business of the company at the time of committing offence complained of. If the complainant fails to make out such a strong case then the accused cannot be prosecuted. The Bombay High Court in the case of *Homi Phiroze Ranina & Ors. vs. State of Maharashtra & Ors. (2003) 263 ITR 636 (Bom)* quashed the complaints filed against the Directors for non-compliance of sections 194C, 276B & 278B of the Act as the Commissioner could not prime-facie make out the case that the Directors were in charge of the affairs of the company and responsible for the conduct of day-to-day affairs of the company and were

under any liability and obligation as principal officers of the company as required under section 278B of the Act.

However if the complainant is able to make out a prima – facie case against the principal officers then the only defence available to these officers is carved out in the proviso to section 278B of the Act. The Principal officer has to prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

## 4. RULE OF CASSUS OMISSUS

In the case of *Prakash Nath Khanna vs. Commissioner of Income Tax and Anr. reported in 266 ITR 1* involving prosecution proceedings an important rule of construction of statutes was discussed known as the "principle of casus omissus". The Court took the view that no cannon of construction permits the court to supply a lacunae in a statute whether the omission is intentional or inadvertent. The duty of the Court is to decide what the law is and apply it and not to make it. In criminal jurisprudence the penal statute is to be construed strictly and no court can supply the words if there is omission. In the said case the offence was of failure to file return in due time as required u/ss. 139(1) and (2) of the Act. The Court held that "due time" as referred to in section 276CC refers to due time in relation to sub–sections (1) and (2) of section 139 and not sub–section (4). It cannot be said that the legislature without any purpose or intent specified only sub–sections (1) and (2) and the conspicuous omission of sub–section (4) has no meaning or purpose behind it. Sub–section (4) of section 139 cannot control the operation of sub-section (1) wherein a fixed period for furnishing the return is stipulated. The principle of "cassus omissus" was applied in this case as there was no doubt or ambiguity in the provisions of section 276CC. The Court held that the interpretation sought to be put on section 276CC to the effect that if a return is filed under sub-section (4) of section 139 it means that the requirements of sub section (1) of section 139 cannot be accepted for more reasons than one.

The same principle has also been applied by the Supreme Court in the case of *Asstt. Comm. Assessment II & Ors. vs. Velliappa Textiles Ltd. & Anr. reported in (2003) 263 ITR 550.*

## 5. EFFECT OF REPEAL & OMISSION OF A PROVISION IN THE ACT

The other important Judgment, which has a significant bearing on the rules of interpretation in prosecution proceedings, was recently decided by the Apex Court in the case of *General Finance Co. and Another vs. Asstt. Commissioner of IT reported in 257 ITR 338*. The Supreme Court had an occasion to decide the issue of omission of a particular provision from the Act. The Court discussed the difference between the omission of a particular provision from the Act and repealment of the same. Prior to 1-4-1989 not deducting tax at source as required under the Act either from the salary or interest was an offence. The said provision was omitted as on from 1-4-1989. Similarly, accepting deposits of cash above Rs. 10,000/- was an offence u/s 269SS of the IT Act [***This was the issue in the case of General Finance (supra)]***. The said provision was also omitted as on from 1-4-1989 and is no more an offence. In the said case the Apex Court took the view that saving the right to initiate proceedings under Sec. 6 of General Clauses Act for liabilities incurred during the currency of the Act applied only to a repeal and did not apply to mere omission. Once the provision is omitted prosecution could not be proceeded with or cannot be initiated. The similar view has been taken by Madhya Pradesh High Court in following cases : *Khushal Kishore Biyani vs. Union of India 256 ITR 679, Narendrakumar Khandelwal & Ors. vs. Union of India & Ors. 259 ITR 593*

## 6. SANCTION

Section 279 of the Act clearly prescribes that any proceeding to be initiated against the assessee for non-compliance of the provision of sections 275A, 275B, 276, 276A, 276 B, 276BB, 276C, 276CC, 276D, 277 and 278 cannot be launched without previous sanction of

the Commissioner or Commissioner (Appeals) or the appropriate authority. However it has to be kept in mind that this sanction cannot be a blanket sanction for all prosecution proceedings and such a discretionary power vested in the authorities cannot be exercised arbitrarily. While interpreting the section there has to be an application of mind by the sanctioning authority. The sanction accorded must not smack of abuse of the vast discretionary power conferred by this section. The Supreme Court has taken the view in the case of *Velliappa Textiles Ltd & Anr. (supra)* regarding sanction is that it is a purely administrative act and affording opportunity of hearing the accused is not contemplated at that stage. No opportunity of hearing is required to be given before affording sanction to initiate prosecution proceedings. However, though no opportunity is to be given to the accused for hearing, a sanction cannot be given without application of mind on the part of the sanctioning authority to initiate prosecution. It is not a mechanical act. It has been held in the case of *S.G. Kale vs. Union of India reported in 256 ITR 148 (Raj)* that application of mind is necessary before according sanction. The Court further held that sanction cannot be granted automatically on being satisfied about the breach but satisfaction has also to be on the question whether on the material disclosed a case for sanctioning prosecution or withholding such sanction has been made out. Sanctioning is not a mere mechanical act and in the present case the Court held that the sanction accorded by the authority was on complete non-application of mind.

It is thus seen that prosecution proceedings are case specific which have to be looked at from various angles and the interpretation of statutes and application of the various ingredients of the section depend on the facts and circumstances of each case. Though penal statutes have to be construed strictly the totality of the entire case has to be kept in mind while applying such strict provisions. Every small violation cannot be accorded the status of punishable offence. In the final reckoning thus the point to be noted is that even though prosecution proceedings have been introduced in the Act, have they really served the purpose of being a deterrent for erring assessees and have they been able to keep fraudulent tax evasion under check.

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# PEARLS OF WISDOM – A STUDY OF LEGAL MAXIMS

**M. K. CHATURVEDI**
*Vice President*

Maxim can be defined as an established principle or proposition. A tenet of law universally admitted as being just and consonant with reasons. Lord Coke said: — "Maxims are a sure foundation or ground of art and a conclusion of reason, so sure and uncontrolled that they ought not to be questioned". Maxims in law are said to be somewhat like axioms in geometry. They are the principles and authorities, and part of the general customs or common law of the land. These are sort of legal capsules, useful in dispensing justice.

Maxims have been divided, as to their origin, into three classes: — Roman, Roman modified, and indigenous. They are mostly derived from civil law, either literally or by adaptation, and most of those which are not found in the Roman sources are the invention of medieval jurists. The earliest work on maxims appears to have been that of Bacon (1630) followed by Noy (1641), Wingate (1658), Heath (Pleading, 1694), Francis (1723), Grounds and Rudiments of Law and Equity (Anonymous, 1751, of which Francis was the author), Branch (1753), Logtt (1776, in his Reports). Broom (1845), Trayner (1872, 1883), Cotteral (1881, 1894), and Wharton's Dictionary (1848, 1892), Lawson (1883), Bells Dictionary (Scotch, 1890), Petoubet (New York, 1880), Barton, Stimson, Morgan, Taylor, Hening, Halkerston, Jackson (Law Latin), and Hughes.

The tenets of law canonized in maxim are the precepts, ideals and techniques of law referring a general truth drawn from experience. In the olden days great majority of questions apropos the rights, remedies and liabilities to private individuals were determined with reference to maxims. The lasting importance of maxims is well expressed by Lord Cameron in an article on "Maxims," in Green's Encyclopaedia of the Law of Scotland (Vol. 9, para 1201) where he says:— "In legal discussions reference is constantly being made to certain principles of common sense and justice, which are necessarily the same in the legal systems of all nations. Many of these fundamental principles and rules, founded on experience and reason, have found expression in the legal maxims, most of which are derived directly or indirectly from the Roman law. Nowhere is the faculty of clear and terse statement of legal principles more conspicuously exhibited than in the texts of the civil law. Accordingly, while the legal systems of modern civilized nations differ greatly in their technical rules and forms, all of them recognise the value of the simple and apposite statements of fundamental principles embodied in the maxims of Roman jurisprudence."

But all the maxims did not have a respectable origin. Lord Denning in his book "The Family Story" has described his fascination for the use of maxims. He was very fond of a particular maxim: "FIAT JUASTITIA RUAT COELUM" (Justice should be done though the heaven falls). But when he investigated its origin, he discarded the "RUAT COELUM" part of the maxim. According to Lord Denning, if justice is done, the heaven should not fall. They should rejoice.

The story as to this maxim as referred by Lord Denning was told by SENECA (dialogues, III, 18). Piso sentenced a soldier to death for the murder of Gaius. He ordered a Centurion (Commander) to execute the sentence. When the soldier was about to be executed, Gaius came forward himself alive and well. The Centurion reported it to Piso. He sentenced

all three to death. The soldier because he had already been sentenced, the Centurion for disobeying orders and Gaius for being the cause of the death of two innocent men. Piso excused it by plea, "FIAT JUASTITIA RUAT COELUM" — let justice be done, though the heaven should fall. Here command of sovereign was equated with justice. But the dictum is not used in this sense. It is always used by the Courts for furthering the cause of justice.

The principles enunciated in the maxims should be applied with due care, as there are exceptions to the rule and qualification for applicability of dictum. Maxims are the condensed good sense of notions. These pearls of wisdom are the harbinger of justice. Good many concepts prevalent in legal world owe their origin from the maxims. The concept of natural justice is based on the principles laid down in "AUDI ALTERAM PARTEM" and "NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA"

"AUDI ALTERAM PARTEM" (No man shall be condemned unheard).

*Audi alteram partem literally* means 'hear the other party". This maxim is based on the principle of natural justice. It means that a person deciding on issue should hear both sides and give each an opportunity of hearing what is being alleged against him. It has long been an accepted rule that no one is to be condemned, punished or deprived of property in any judicial or quasi-judicial proceeding unless he has had an opportunity of being heard.

Any person against whom an action is proposed to be taken or whose right or interest is being affected, should be given a reasonable opportunity to defend himself. A decision taken without affording both the parties an opportunity to be heard violates the principles of natural justice. An award made in violation of the above said rule may be set aside. On laying of charges, an opportunity to answer it must be given to an individual alleged to have committed an offence. Sufficient notice also should be given to the person against whom the charge is laid. This rule has a universal acceptance and is founded upon the plainest principle of justice.

Thus nobody should be condemned unheard is the basic rule of natural justice. *Audi alteram* (Hear the other side) embraces the whole notion of fair procedure or due process. The principles of natural justice are not embodied rules and they have been applied by courts in the context of *writs of certiorari* and prohibition. The breach of natural justice has been recognised as one of the grounds for granting writs. The court will extend the application of the maxims, if the decision of the administrative authority *affects the* legal rights of the affected party. This rule has two important pillars: (a) Notice of the case to be met, and (b) Opportunity to explain. It is not necessary that the notice should be given in a formal manner. Even oral notice or notice with technical irregularities or with defective wording is sufficient notice if it furnishes an opportunity to the individual *concerned* to present his case. The person concerned against whom action is proposed to be taken should be given reasonable opportunity to explain and defend himself.

"NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA" (No man can be judge in his own cause).

It is a fundamental rule in the administration of justice, that a person cannot be judge in a cause wherein he is interested. In the reign of James I, it was solemnly adjudged that the king cannot take any cause, whether civil or criminal, out of any of his Courts, and give judgment upon it himself; but it must be determined and adjudged in some Court of justice according to the law and custom of England; and the judges informed the king that no king, after the Conquest, assumed to himself to give any judgment in any case whatsoever which concerned the administration of justice within his realm; but these were solely determined in the Courts of justice.

Where a judge is interested in the result of a cause, he cannot, either personally or by deputy, sit in judgment upon it. Lord Campbell said that this maxim be held sacred. It is not to be confined to a cause in which judge is a party, but applies to a cause in which judge had interest. Any direct pecuniary or other interest, in the subject matter of enquiry will disqualify a judge, if it be sufficiently substantial to create reasonable suspicion of bias.

There is another maxim concerning natural justice: “QUI ALIQUID STATUERIT PARTE INAUDITA ALTERA AEQUUM LICET DIXERIT, HAUD AEQUUM FECERIT”, which means: He who determines any matter without hearing both sides, though he may have decided right, has not done justice. In other words, as it is now expressed ‘Justice should not only be done but should manifestly be seen to be done’.

Maxims are also useful in finding out the ‘MENS LEGIS” (Intention of the Legislature), in construing the meaning of a statute. Some such maxims are discussed here as under:—

“EJUSDEM GENERIS” (Of the same class or kind)

The maxim serves to restrict the meaning of a general word to things or matters of the same genus as the preceding particular words. In this connection, the following passage from Salmond on jurisprudence (12th Edition, Page 135) is worth quoting: — “This however, is only an application of a common sense rule of language; if a man tells his wife to go out and buy butter, milk, eggs and anything else she needs, he will not normally be understood to include in the term ‘anything else she needs’ a new hat or an item of furniture”. This lucid illustration explains the meaning of the said maxim.

“NOSCITUR A SOCIIS” (The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it).

A man may be known by the company he keeps, and a word is known by the accompanying words. Words derive colour from the surrounding words. The coupling of words together shows that they are to be understood in the same sense. Where the meaning of a particular word is doubtful, it may be ascertained by looking at adjoining words. In the construction of statutes, the rule *noscitur a sociis* is frequently applied, the meaning of a word, and, consequently, the *mens legis* is ascertained with reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter. The meaning of law can be collected by comparing one part with another and by viewing all the parts together as one whole, and not one part only by itself.

“UT RES MAGIS VALEAT QUAM PEREAT” (That the language may rather have effect than be destroyed).

The Courts lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must be so construed so as to make it effective and operative on the principle expressed in the dictum. However complicated or mind twisting a provision may be, Court will attempt to give it a meaning. When a statute has some meaning even though it is obscure, or several meanings, even though it is little to choose between them, the Courts have to say what meaning the statute is to bear, rather than reject it as a nullity. The Courts may complain that the enactment is “mind twisting” or an “enigma” yet they do not readily concede that no meaning can be given to it. They strive hard to give meaning and avoid cadaveric consequences. Normally hardship or inconvenience cannot alter the meaning of language implied by the Legislature if such meaning is clear on the face of the statute.

‘NOVA CONSTITUTIO FUTURIS FORMAM IMPONERE DEBET, NON PRAETERITIS” (A new law ought to be prospective, not retrospective, in its operations).

Retrospective legislation is never presumed, and therefore a law will only be applied to cases occurring after its date, unless it appears from the statute itself that it is intended to have retroactive effect. Penal laws are never retrospective; but remedial statutes, which are more liberally interpreted, are sometimes allowed retroactive effect. It manifestly shocks our sense of justice that an act legal at the time when it was done should be made unlawful by a new enactment.

“EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS” (The express mention of one thing implies the exclusion of another).

It is an ordinary rule that if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorised, under other circumstances than those so defined. Where general words are used in a written instrument, it is *sine qua non*, in the first instance, to determine whether those general words are intended to include other matters besides such as are specifically mentioned, or to be referable exclusively to them, in which latter case only can this maxim be applied.

"CONTEMPORANEA EXPOSITIO EST OPTIMA ET FORTISSIMA IN LEGE" (A contemporaneous exposition is regarded in law as the best and strongest).

The view, which was taken at the time an Act of Parliament was enacted, can best be explained by those who were acquainted with the circumstances, which called for the enactment or made it expedient. Great regard in construing a statute to be paid to the construction which the sages of the law who lived about the time or soon after it was made put upon it; because they were best able to judge of the intention of the makers at the time when the law was made. In construing old deeds and writings, care must be taken to expound their words according to the meaning which the words bore at the time when they were used, and not according to what these words have come to mean in later time.

"QUI HAERET IN LITERA HAERET IN CORTICE" (He who considers the letter of an instrument goes but skin deep into its meaning).

The reason and spirit of cases make law, and not the letter of particular precedents. The grammatical construction is not always, in judgment of law, to be followed; and neither false English nor bad Latin makes a deed void when its meaning is apparent. The meaning of particular words, in a statute, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained.

ABSOLUTA SENTENTIA EXPOSITORE NON INDIGET" (Plain words require no explanation).

When the language of the statute is transparently plain, it is wrong to give it colour according to the temper of time. When the language implied by the enactment is clear, there is no question of interpreting the provisions in any manner except by giving them their plain and obvious meaning. Nebulous concept of the legislative intent cannot be used to curtail the explicit provisions in a statute.

The subject of legal maxims has depth of an ocean. To comprehend it within the limit of this paper is like seeing Himalaya in a flash of lightning. I am reminded of the story of the legendary Harvard Law Professor Edward "Bull" Warren. He was so enthusiastic about his subject that he always went on after the bell at the end of the class. His students were continually late to their next class, so they decided to start shuffling their feet to let the Professor know when to stop. The first time they tried it, "Bull" roared: "Quiet! I still have a few more pearls to cast!"

I will consider my efforts amply rewarded if this article *invigorates* the desire among the students to fathom deep in the ocean of knowledge, to find out the priceless pearls of wisdom.

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# PRINCIPLES OF INTERPRETATION OF ISSUES IN DOUBLE TAXATION AVOIDANCE TREATIES

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## 1. INTRODUCTION

The proliferation of Double Taxation Avoidance Agreements entered into by India with several foreign countries has created a new branch of tax law. These Agreements come into play when a resident of one state has income sourced in another state. For the purpose of such Agreements income is regarded as sourced in a state if the payer is based there. A country's appetite for taxation being insatiable, both states would like to tax the income arising from the same transaction. It is here that Double Taxation Avoidance Agreements come into play. The Agreements deal with different types of income and some of them have a residual "catch-all" provision. With reference to different types of income different modes of avoiding/restricting double taxation are evolved. The Agreement may vest jurisdiction to tax a particular type of income in one of the contesting states. The vesting of such right may depend on the fulfilment of the prescribed condition/s. For example, business income is generally taxable in the source state if the enter-prise has a permanent establishment therein. (By source state is meant the state where the income arises or the state the residents of which make payment to the residents of the other contracting state).

Certain income, for example, interest income may be taxable in both states. In respect of such cases the normal rule is that the state of which the concerned person is a resident has the right to tax his income. However, the source state would also have the right to tax the income. Such taxation by the latter may be subject to a maximum permissible rate. A Double Taxation Avoidance Agreement may effectively provide for avoidance of tax or for relief against double taxation by providing for grant of credit by the state of residence of the tax paid in the source state. Tax Avoidance Agreements may be confined to a particular type of income for example, aviation income or may be general and cover several/all types of income.

It is of interest to note that the first Double Taxation Avoidance Agreement was executed 105 years ago (in 1899 between Prussia and the Austro Hungarian empire). Seligman in "Double Taxation and International Fiscal Co-operation" notes that the problem of double taxation first surfaced in the 13th century regarding property taxes levied in France and Italy – where the property was situated in one country but owned by a resident of the other country. The first concrete step for relieving against double taxation, in so far as India is concerned, was taken in 1939 with the coming into force of the Income-tax (Double Taxation Relief) (Indian States) Rules. Since then India has travelled a long distance. Presently, India has entered into over 90 Double Taxation Avoidance Agreements — some of them of limited application but most of them being comprehensive Agreements.

Double Taxation Avoidance Agreements are treaties between two sovereign states. (Such Agreements can also be between two countries which are not "sovereign" states in the full legal sense). Being Agreements between two contracting states it was found that it would be useful to have a Model Agreement which could be the basis for discussion between two states contemplating to conclude a Double Tax Avoidance Agreement. The League of Nations first commenced work in this behalf in 1921 and produced in 1928 the first Model Bilateral Convention. These were followed by the Model Convention of Mexico (1943) and the London Model Convention (1946). The Council of the Organisation for European Economic Co-

operation, which later became the Organisation for Economic Co-operation and Development (OECD) set up a fiscal committee in 1956 to formulate a Model Convention. The first draft Double Taxation Convention on income and capital was framed in 1963. This ultimately gave birth to the 1977 OECD Model Convention and Commentaries. On the basis of the recommendation of the Committee on Fiscal Affairs, OECD published the 1992 Model Convention in a loose leaf format to facilitate updating. The present Model Convention and Commentaries are updated as of January 2003.

The OECD Model Convention though primarily meant for use by the OECD countries is often referred to and the Commentaries applied in interpreting Agreements between non-OECD countries also. In addition to the OECD Model, there is the UN Model Convention. Its origin lies in a resolution passed by the Economic and Social Council of the U.N. in August 1967 and was published in 1980 in the form of Model Double Taxation Convention between developed and developing countries. The UN Model is generally considered to be more favourable from the point of view of the developing countries as it places greater emphasis on the right of the source state to tax a transaction having international ramifications. Predictably the United States wanted to have its own Model Convention and published in 1976 the US Model Treaty. In 1996, the US Model was revised. It is accompanied by a most exhaustive technical explanation commenting on the various articles in the Model Convention. Unlike the OECD Commentaries which have to take into consideration the views of various states the US Technical Explanation highlights the US point of view and to that extent is more emphatic and clear compared to the OECD Commentaries which are necessarily based on a compromise. Whenever the United States enters into a Double Taxation Avoidance Agreement it also releases a detailed write-up explaining the US view concerning each of the articles in the Agreement entitled “The Treasury Department Technical Explanation”. The thoroughness of the US approach in the matter is shown by the fact that the technical explanation in respect of the Indo-US Double Taxation Avoidance Agreement covers about 50 pages. The US also publishes the Report of the Senate Foreign Relations Committee on each Treaty negotiated by the US. Thus, far more “official” literature is available in respect of agreements concluded by the US than by us.

As noted above, the OECD Model Convention of 1963 was substituted by a fresh Model in 1977. However, the wording of the Commentaries is an on-going process and there may be changes therein without a change in the provision of the Convention. There would of course also be cases where there is a change in the provisions of the Convention which may also result in a change in the Commentaries. The view of the Committee on fiscal affairs is that the revised commentaries should be taken into account even where there is no change in the wording of the Convention. Of course, where there is a change in the wording of the Convention it is only the revised commentary which has to be taken into account. Having said this it must be emphasised that these are only the views and opinions of the committee and are in no way binding on the judicial authority called upon to interpret the actual Agreement concluded by the two contracting states.

## 2. AGREEMENT VS. ACT

The first and the basic issue which arises in the interpretation of a Double Taxation Avoidance Agreement is what is the position where there is a conflict between the provisions of the statute (the Income-tax Act — hereinafter referred to as the Act) and the provisions of the applicable Double Taxation Avoidance Agreement. It is to be remembered that an assessee cannot be worse off by virtue of any provision in the treaty — as the purpose of a treaty is to confer a benefit and not to levy a charge.

Section 90(2) of the Act makes it clear that where an agreement for granting relief of tax or for avoidance of double taxation has been entered into, then, in relation to the assessee to whom such agreement applies, the provisions of the Act to the extent that they are more beneficial as compared to the provisions of the Double Taxation Avoidance Agreement would have to be applied. It follows that where the provisions of the applicable Agreement are more

favourable, compared to the provisions in the Act, the provisions of the Agreement will prevail. Section 90(2) is a statutory recognition of the rule laid down by the Andhra Pradesh High Court in *CIT vs. Visakhapatnam Port Trust* 144 ITR 146 which view has now been accepted by the Supreme Court in *Union of India vs. Azadi Bachao Andolan* 263 ITR 706. Indeed the Central Board of Direct Taxes itself had earlier accepted this position in Circular No. 333 dt. April 2, 1982 reproduced in 137 ITR 1 (st.). The Finance (No. 2) Act, 1991, which inserted sub-section (2) in section 90 with retrospective effect from 1-4-1972, also inserted clause (iii) in section 2(37A) to provide that where tax is deductible at source from payments made to a non-resident the payer could apply the rate as prescribed in the Act or the Finance Act or the rate applicable under the relevant Agreement whichever was lower.

The general principle as enunciated above raises several issues. Whilst it is true that the Agreement would override the Act, would it be open to an assessee depending on the provisions in force in different assessment years and the prevailing factual position in each year to opt for being governed by the Act in one year and the applicable Agreement in the other? The view of the writer is that such option is available. The more intricate problem is whether an assessee can choose for the same assessment year to be governed by the provisions of the Act in so far as assessment of a particular type of income is concerned, say, business income, but by the provisions of the Agreement in so far as another type of income is concerned, say, capital gain. In my view this would be permissible as one would, in the language of section 90(2), apply the Act to the extent that the provisions thereof are more beneficial to the assessee. The next issue is whether in respect of the same type of income derived by the assessee from two different states can he opt for being governed by the provisions of the Agreement in so far as state A is concerned but by the provisions of the Act in so far as state B is concerned. For example, an Indian company may have branches (permanent establishments) in state A and state B. The branch in state A makes a profit and the Indian company elects to be governed by the Agreement and takes the stand that the profit is assessable only in country s where there is a permanent establishment, in line with the view taken by the High Courts and the Supreme Court as referred to hereinafter. The permanent establishment in country B makes a loss and the Indian company desires to set off such business loss against its Indian business income as permissible under section 70 of the Act and does not want to be governed by the provisions of the treaty whereunder the income (which term would include loss) is assessable, as noted above, only in state B. Though the matter cannot be said to be free from all doubt, in the writer's opinion it would be permissible to choose the more beneficial provision "Treatywise."

A further refinement, which the more blunt would call hair splitting by a bald person, is whether an assessee can claim that the computation of his income should be under say, the Act but the rate of tax should be as per the treaty. According to the writer this is not permissible because a lower rate is often prescribed where, as per the applicable provisions of the Treaty, expenditure is not allowed in computing the particular type of income. One cannot therefore take advantage of computation under, say, the Act where it allows deduction of expenditure and then turn to the treaty to apply the lower rate.

As noted above section 90(2) places a Double Taxation Avoidance Agreement at a level higher than the provisions of the Act in that an assessee governed by a treaty can opt for being governed by the provisions of the treaty rather than the Act. As observed by the Supreme Court in Chettiar's case (267 ITR 654) referred to hereafter), section 90 and the Agreements executed pursuant to the power conferred thereunder were provisos or exceptions to the charge of tax levied by sections 4 and 5. In other words, the Agreements become part of the Indian law.

The issue which arises is whether Parliament can enact legislation subsequent to the signing of a treaty which would override the provisions of a treaty and if so whether such legislation has to be in any particular form. Depending on the provision in a country's Constitution as to the status of domestic law vis-a-vis provisions in a treaty the conclusion may be different whether a post treaty domestic law can override a provision in an earlier

treaty. The French and Dutch Constitutions do not, it appears, permit the overriding of a treaty provision by a subsequent legislation. The position is different in the United States of America and in the United Kingdom. Though Article 51 of our Constitution provides as a directive principle that the state shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another the position appears to be that there is no fetter on the power of the Indian Parliament to legislate in a manner which may conflict with or override the provisions of an earlier treaty just as Parliament can over turn or amend an earlier enacted law. An example of such treaty override is provided by the insertion of the Explanation to section 90 of the Act (by the Finance Act, 2001) and subsequently amending the Explanation by the Finance Act (No. 2) Act, 2004.

To understand the context in which the Explanation was added a few facts may be noted. Some Double Taxation Avoidance Agreements provide that tax on a permanent establishment of an enterprise of one of the states in the other state shall not be less favourably levied in such other state than the taxation levied on enterprises of that other state carrying on the same activities. In India a higher rate of tax is charged on non-domestic companies compared to domestic companies similarly engaged, with the result that the permanent establishment of an enterprise of a contracting state suffers tax at a higher rate. In some cases it was judically held that such discrimination was not permissible. The Explanation to section 90 now declares that "the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company." In other words, the Explanation has ruled that rate discrimination is not to be regarded as a less favourable charge of tax obviously for the purposes of Agreements for Avoidance of Double Taxation as only in the case of persons governed by such Agreement would the issue of less favourable rate of tax arise. In so far as tax matters are concerned it has not yet been tested in India whether Parliament can override a provision in an earlier concluded treaty. It is, of course, debatable as to who can have the matter tested as the treaty is between two states. Is it the state which must take up the issue or should it be decided under the mutual agreement procedure or can the affected person challenge the amendment even if the concerned state has not protested? The writer is of the view, which he must confess is not the generally accepted one, that as Double Taxation Avoidance Agreements are agreements between two contracting parties it is not proper for one of the contracting parties unilaterally to change the provisions of the bilateral Agreement. A state cannot, unlike Alice in Wonderland say that words will have the meaning which it chooses to confer on them! It may be noted that by the Finance Act, 2003 sub-section (3) has been incorporated in section 90 which entitles the Central Government by notification to provide that any term in the Agreement which is not defined therein or in the Act shall have the meaning given thereto in the notification so long as such meaning is not inconsistent with the provisions of the Act or the Agreement.

I now consider the position where there is a conflict in the definition of certain terms in the Act and a Double Taxation Avoidance Agreement. The definition of a term (say royalty) plays an important role in appropriately classifying an item of income. Typically Article 3(1) of the Agreements concluded by India contains general definitions. In addition, certain terms are defined in the applicable article. For example, the terms dividends, interest and royalties, normally dealt with, respectively in Articles 10, 11 and 12 of an Agreement, define these terms for the purposes of those articles. There can be no dispute that if there is a conflict between a definition in the Act as existing when a Treaty comes into force and a definition in the Treaty the latter will prevail. The issues which arise are 1) if there is a definition in the Act at the time the treaty comes into force but there is no definition of that term in the treaty will the definition in the Act apply and 2) if there is no definition of the term in the treaty or in the Act when the treaty was concluded but subsequently a definition is introduced in the Act would that definition be applied also for the purposes of interpreting the treaty?

In so far as 1) above is concerned, the position seems to be clear that in the absence of a definition in the treaty the definition in the Act as existing at the time the treaty is made

will be applicable unless the context requires otherwise. The position is not completely clear as to what is to happen where a definition is inserted in the Act or an existing definition in the Act is changed subsequent to the coming into force of the Treaty. Article 3(2) of the OECD Model Convention provides "As regards the application of the Convention at any time by a contracting state, any term not defined therein shall, unless the context otherwise requires, have meaning that it has at that time under the law of that state for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that state prevailing over a meaning given to that term under other laws of that state." It is, therefore, made clear that the definition "at any time" in the local tax law would have to be applied in the absence of a definition in the Convention. If, therefore, a term is defined in the Convention a subsequent change of meaning in the local law will not be applicable but where the term is not defined, then, the meaning under the local tax law as in existence from time to time will have to be applied. This is made clear by the use of the phrases "at any time" and "at that time." These words are absent in the UN and US Model Conventions. Also, in most of the Treaties entered into by India, the relevant provision does not refer to "at any time" or "at that time." Nevertheless the general view appears to be that ..a subsequent definition in the local tax law will have to be applied in interpreting that term in the Agreement. To the writer this appears strange because an Agreement may have been negotiated on the basis of the meaning of the term as commonly understood. As per the generally held view a unilateral change in the definition may impact on the scope and interpretation of the Agreement. It may also be noted that the OECD Model Convention requires one to have regard to the definition of a term in the Agreement in any local law but preference is to be given to the meaning, if any, under the local tax law. However, as per the US and UN Models as well as the Agreements generally entered into by India it is only the meaning in the local tax law (and not any other local law) which has to be taken into account. The general view mentioned above may lead to the anomalous situation that the two countries may change the meaning of the term under their local laws subsequent to the execution of the Agreement and, therefore, a particular term may be interpreted differently by the Courts of the two states resulting in such income being classified differently by the two states, say, royalty income by one state and only a business income by the other. There is a view that when there is a possibility of such a conflict the definition of the source state would be applicable. In *Siemens A.G. vs. ITO* (1987) 22 ITD 87 (SB) the Special Bench of the Tribunal accepted the static and not the ambulatory rule and, accordingly, did not interpret the term "royalty" in the then existing ( 1959) Indo-German Double Taxation Agreement on the basis of the meaning given to the term from 1976 in section 9 of the Act.

I next consider whether the definition in the local law which one has to have regard to as per article 3(2) referred to above is a reference to the "general" definition in the local tax law or a definition restricted to particular provisions. For example, the definition of royalty in section 9 of the Act is for the purposes of certain sections and is not a "general" definition listed in section 2. The issue appears to be a virgin one. The writer is of the view that a definition for particular provisions in the Act would not strictly apply to other provisions in the Act and it would be strange to interpret provisions in a Double Taxation Avoidance Agreement in the light of a definition of limited application in the Act.

Earlier a reference has been made to a state's power to override a treaty provision. Whether in fact the treaty has been overridden would depend on the interpretation to be placed on the language used in the provision said to override the treaty. The Court would strain every nerve to give full meaning to the treaty unless it is clear that the legislation in question has indeed overriden the treaty provision. Insofar as the issue of treaty override is concerned, a very useful discussion is found in Chapter 33 of Tax Treaty Interpretation" by Michael Edwardes-Ker and also in Double Taxation Conventions and International Tax Law (Second Edition) by Philip Baker (pages 48 - 54).

## 3. TREATY SHOPPING

The natural consequence of supremacy of favourable provisions in a tax treaty is the desire to implement a transaction "through a country which has a favourable treaty provision. Insofar as India is concerned, the most glaring Convention in this behalf is the Agreement between India and Mauritius. The Conventions with Cyprus and the Netherlands also have certain advantages compared to other Agreements. Assuming there is a favourable provision in the Indo-Mauritian treaty compared to, say, the Indo-US Treaty it would be the natural desire of the concerned party to structure the transaction so as to be able to claim the benefit of the Indo-Mauritian Double Taxation Avoidance Agreement. For example, a company may be incorporated in Mauritius so that it can take advantage of the Indo-Mauritian Double Taxation Avoidance Agreement even though the persons interested in the company may be foreign entities based elsewhere. This is generally called "treaty shopping"; i.e., to shop for the most favourable treaty. States frown upon treaty shopping as the general wisdom is that it is a misuse of a treaty provision and is contrary to the intendment of the treaty negotiating partners. A substantial portion of foreign investments into India take the Mauritian route because as per the Indo-Mauritian Double Taxation Avoidance Agreement capital gains are to be assessed as per the law of the state of residence of the party. As under the Mauritian law tax is not levied on capital gains it means that capital gains made by Mauritian entity on transfer of shares in an Indian company go unassessed. One may also indulge in treaty shopping if the law of one of the states taxes the income in question at a lower rate compared to the state of residence of the concerned person.

One of the first cases where the issue of "treaty shopping" came up for judicial consideration in India was before the Authority for Advance Ruling in Ruling No. 9 of 1995 *220 ITR* 377. Clause (iii) of the proviso to section 245R ( 2) disables the Authority from pronouncing upon a transaction which is designed *prima facie* for the avoidance of income-tax, which is, of course, what treaty shopping is all about. In that case a company in the United Kingdom had invested in India via the Mauritian route. The Authority was of the view that this was to obtain the advantage of non-taxation in India of capital gains arising to a resident of Mauritius under the Indo-Mauritian Double Taxation Avoidance Agreement, which advantage was not available under the Indo-UK Double Taxation Avoidance Agreement. Subsequently, in Advance Ruling No. 10 of 1996 (224 ITR 473) the Authority sanctioned the Mauritian route where investors from several countries were to come together and it was necessary to base the investing company in a particular location and Mauritius was chosen as such location even though in making the choice the tax advantage was one of the considerations.

The Supreme Court has exhaustively dealt with this issue in *Union of India vs. Azadi Bachao Andolan* 263 ITR 706 at pages 746 - 753. The Supreme Court appears to have blessed' treaty shopping as according to it "If it was intended that a national of a third state should be precluded from the benefits of the DTAC, then a suitable term of limitation to that effect should have been incorporated therein." According to the Supreme Court it was for Parliament to take appropriate action in the matter and in the absence of a prohibition one could not deny the benefits of a treaty on the basis of the belief that treaty shopping was not permissible. An anti treaty shopping provision is normally inserted in a Double Taxation Avoidance Agreement by a limitation on benefits clause (see, for example article 24 of the Indo-US Double Taxation Avoidance Agreement which permits a non-individual person to avail of treaty benefits only if more than 50% beneficial interest therein is owned by individual residents of a contracting state).

## 4. WHO CAN TAX INCOME

An issue which often arises in implementing a Double Taxation Avoidance Agreement concerns determination of the question as to which country is entitled to tax a particular income. According to the writer the function of a Double Taxation Avoidance Agreement is to determine the jurisdiction of the contracting parties to tax a particular income. It confers jurisdiction on one of the states or on both the states to tax a particular

type of income. Classically an article may provide that a particular income may be taxed in the source country or it may provide for a particular income to be taxed by the country of residence at the normal rates and also in the country of source but generally not at a rate in excess of a specified figure. Thus, for example, in dealing with income from immovable property (generally article 6) it is stated that the same "may be taxed in the contracting state in which such property is situated." The issue which arises is whether the country of residence of the owner of the property can also tax the income in which event the concerned person would have to claim credit in the country of residence for the tax paid in the country where the property is situated. In-so-far as taxation of business profits (generally article 7) is concerned, the position is that the profits of an enterprise of a contracting state shall be taxable only in the state of residence unless the enterprise carries on business in the other contracting state (source state) through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other contracting state but only so much of them as is attributable to that establishment. Though the two articles are not identically worded, the Madras and Karnataka High Courts have taken the view (see *CIT vs. V.R.S.R.M. Firm& Others* 208 ITR 400 and *CIT vs. R.M.Muthaiah* (1993) 202 ITR 508) that when it is provided that tax may be charged in a particular state in respect of the specified income it is implied that tax will not be charged by the other state. Conventional wisdom seems to be to the contrary. However, the Supreme Court has in the Azadi Bachao Andolan case 263 ITR 706, 723-4, approved of not only the decision in Muthaiah's case (which dealt with both immovable property and business income) but also the reasoning of the High Court.

In *CIT vs. Kulandagan Chettiar and Other Appeals* (2004) 267 ITR 654 (SC) the Supreme Court decided appeals arising from several decisions of different High Courts (including of the Madras and Karnataka High Courts referred to above) wherein it was held that if the concerned assessee was resident in India and had a permanent establishment or owned immovable property in Malaysia it was Malaysia alone which had the right to tax such business or immovable property income. In a judgement which is not the most clearly expressed the Supreme Court appears to have taken the view that the concerned assessees were to be regarded as residents in Malaysia with no permanent establishment in India and, therefore, not chargeable to Indian tax. The Supreme Court, therefore, did not specifically approve nor in any way disapprove of the view of the High Courts that where it was provided that the source state "may" tax the specified income, without stating that the state of residence may also tax such income, it was the former alone which could tax such income. However, as noted above in the Azadi Bachao Andolan case (which the Supreme Court does refer to in the Chettiar case) the Supreme Court specifically stated that it approved of not only the conclusion but the reasoning for reaching such conclusion.

That the decisions of the Madras and Karnataka High Courts, as approved by the Supreme Court in (2003) 263 ITR 706, lay down the correct proposition is shown by the fact that wherever an Agreement contemplates taxation by both states it is specifically so provided. For example, generally both states are empowered to tax income by way of dividend, interest and royalty (normally articles 10, 11 and 12). The right of taxation is conferred on the state of residence but it is specifically provided that such income may "also" be taxed in the state of source. It may be noted that the OECD in its model convention has framed two alternative articles (23A/23B) for granting benefit by the exemption/credit method.

## 5. DOUBLE NON-TAXATION

As noted above it is this writer's view that the logical consequence of the view that where it is stated that a particular income "may be" taxed in the source state (e.g., income from immovable property and business income as referred to above) is that the state of residence is not entitled to tax the same. Consequently, there may be double non-taxation if that particular income is not subjected to tax in the state wherein it "may be" taxed; i.e., in

the source state, because that state does not tax such income or provides an incentive/exemption in respect thereof. Thus, for example, if a resident of India owns immovable property in country X in which country income from immovable property "may be" taxed as per the Agreement but the laws of that state for some reason do not provide for taxation of the income from such immovable property, then, such income would go completely untaxed as the state in which the jurisdiction to tax that income has been conferred chooses not to tax the same.

A view which seems to be gaining ground internationally is that a Double Taxation Avoidance Agreement ought not to be interpreted so as to give rise to double non-taxation, its purpose being only to avoid double taxation. The philosophy underlying this view is that there is always an inherent right in the state of residence to tax the income of the resident and even if, in the above example, country X does not tax income from immovable property, the state of residence would be entitled to tax the same. The writer being a contrarian does not subscribe to this view. An avoidance agreement is to be interpreted on its own terms and if what is regarded as a correct interpretation results in double non-taxation so be it. The cynic would support this view by saying that one must never look a gift horse in the mouth! The Supreme Court has apparently affirmed the view that a possible double non-taxation is irrelevant. In the Azadi Bachao Andolan case (2003) (263 ITR 706) the claim of the Mauritian investors was that as per the article 13 of the Indo- Mauritius Double Taxation Avoidance Agreement, capital gains arising to them was taxable only in Mauritius. The Court noted that the capital gain was not assessable as per Mauritian law but nevertheless upheld the view of the Mauritian investors.

The decision of the Madras High Court in *CIT vs. Laxmi Textile Exporters Ltd. (2000) 245 ITR 521 (Mad)* is instructive in this behalf. In that case the Sri Lankan Tax Authorities held that the assessee, who was a resident of India, carried on business in Sri Lanka through a permanent establishment which income was however exempted from tax by the Sri Lankan Government. The High Court held that this would not give a right to India as the state of residence to tax the income arising to the resident from its permanent establishment in Sri Lanka. The case also laid down that the determination by the Sri Lankan authorities that the Indian resident assessee had a permanent establishment in Sri Lanka was binding on the Indian Tax Authorities; i.e., the view of the source state was determinative of the issue whether the assessee had permanent establishment abroad.

## 6. ENTITLEMENT TO CLAIM BENEFIT OF A TREATY

The normal rule is that the provisions of a Double Taxation Avoidance Agreement apply to persons who are residents of one or both of the contracting states (article 1). Thus, "to enter" the portals of the treaty a person must show that he is a resident of at least one of the states. Generally, a person is regarded as a resident of a contracting state if he is liable to taxation therein by reason of certain prescribed tests, for example, domicile, residence, place of management etc. Thus, for a person to be a resident of state A he must show that he is liable to tax in that state by virtue of any off the prescribed criteria. The interpretation of the phrase "liable to tax" has given rise to controversy. There are four possible cases which may arise: 1) the concerned state does not have a law for levying tax on income 2) the concerned state may have a law levying tax on income, which may not apply to a particular class of persons say, individuals and firms but only to corporate entities 3) the state may have a law imposing tax but the tax is leviable only if extended to the particular person or transaction by a Government notification or 4) the state has a law imposing tax in respect of the concerned persons but a particular type of income is not taxed; e.g., capital gains or technical service fees.

Insofar as 1) above is concerned, one cannot say that the person is liable to tax in that state and, therefore would not be regarded as a resident of that state entitled to claim benefit of the Double Taxation Avoidance Agreement. The same result may flow in case 2) insofar as

the law envisages taxation of only a class of assessees, say, corporate assessees and there is no law under which non-corporate assessees could be subjected to tax.

Case 3) however, is one where the law does provide for taxation of a particular person but it has been, as it were, held in abeyance pending issue of a notification. In such a case the person should be regarded as a resident of that state entitled to claim protection under the treaty. The 4th case is undoubtedly one where the person is liable to be assessed but the state has decided not to levy tax on a particular type of income. In the Azadi Bachao Andolan case the Supreme Court was concerned with case 4) and held that even so the concerned entity was a resident of Mauritius.

Peculiar problems arise in the case of partnerships where the partnership as such is not liable to tax (as in India from the assessment year 1993-94) but the partners are directly taxable in respect of the income from the firm (as, for example, in the United Kingdom). In such a case whether the partnership is to be regarded as entitled to claim the treaty benefit is a matter of debate.

## 7. "LIFE" OF A TREATY

Section 90 of the Act empowers the Central Government to enter into Double Taxation Avoidance Agreements and by notification in the Official Gazette to make provision for implementing the same. Such Agreements, therefore, become part of the Act itself. As already noted above in *CIT vs. Kulangadan Chettiar (2004) 267 ITR 654 (SC)* the Supreme Court held that such an Agreement acts as an exception to or modification of sections 4 and 5 of the Act. Entry 14 in List I of Schedule VII to the Constitution vests power exclusively in the Union to enter into treaties. The upshot of the decision of the Supreme Court in *Meganbhai vs. Union of India AIR 1969 SC 783* is that a tax treaty becomes law without any further legislation having to be enacted (see also *Union of India vs. Azadi Bachao Andolan (2003) 263 ITR 706 at 721).*

Once a Double Taxation Avoidance Agreement is entered into it would continue to be in force in all its terms unless the covenanting states subsequently execute a protocol to amend the terms of the Agreement or one of the states gives notice of termination to the other state which can normally be done only after the expiry of any minimum prescribed period for the operation of the Treaty. The negotiation of a fresh treaty would also sound the death-knell of the old Agreement.

Agreements entered into by India provide for the date of entry into force of the Agreement. The contracting states have to notify each other of the completion of the procedures required by the respective laws of the state for the bringing into force of the Convention. The Convention normally comes into force after a specified period of time from the receipt of the letter communicating compliance with the prescribed procedures in this behalf referred to above. In India the provisions of the Convention generally apply in respect of income arising in any fiscal year beginning on or after the first of April following the calendar year in which the Agreement comes into force. The same is the position with regard to the coming into force of a protocol amending the Agreement.

A problem arises where residents of the two contracting states have entered into a private contract when a particular Double Taxation Avoidance Agreement was in force and subsequently there is an amending protocol or a new Agreement which affects the assessee adversely. Is it at all open to an assessee to urge that the provisions of the Convention as existing when the private contract was entered into should govern the taxation in respect of income under the said private contract and not the terms of the new Agreement or the amending protocol? The general view is that it is the provisions of the Convention as on the first day of the relevant assessment year which would have to be taken into account and not the provisions of the Convention as in force when the parties entered into the private contract. The rule is the same as when interpreting an amendment to the Act — the Act (as amended) existing on 1st April, of the assessment year will apply (see *CIT vs. Isthmian*

*Steamship Lines (1951) 20 ITR 572)*. The Calcutta High Court in *Timken India Ltd. vs. CIT* (2002) 256 ITR 460 (Kar) has also taken a similar view, namely, that one has to consider the terms of any Convention in existence for the assessment year in which the income is chargeable to tax.

In *CIT vs. Tata Iron & Steel Company Ltd. 66 TTJ 463; (2000) 248 ITR 190 (Bom)* the Mumbai Bench of the Income-tax Appellate Tribunal in disposing of the Department's application under section 254( 2) of the Act to rectify its earlier order reported in 62 TTJ 17 held that the subsequently entered into protocol did not affect taxability under an earlier entered private contract. With respect the writer submits that this is not the right view. In 248 ITR 190 the High Court at Bombay (in dismissing the Revenue's appeal against the Tribunal's conclusion in 66 TTJ 463 that its earlier decision in 62 TTJ 17 did not disclose a rectifiable mistake) has only held that the Tribunal's earlier decision did not reveal any mistake apparent from the record and the Court did not uphold the correctness of the view taken by the Tribunal on the merits in either 66 TTJ 463 or 62 TTJ 17.

A peculiar problem which would arise is where there is an amendment of an Agreement by a protocol which is applied retrospectively. In *Tata Iron & Steel Co. Ltd. vs. Dy. Commissioner of Income-tax* 62 ITJ 17 (already mentioned above) the Mumbai Bench of the Income-tax Appellate Tribunal has taken the view (whilst considering the protocol which amended the Indo-German Double Taxation Avoidance Agreement of 1959 in respect of income assessable from the assessment year 1984-85 by notification dated 26th August, 1985) that the amended protocol would not govern the assessment for the assessment year 1985-86. The issue whether an amendment can have retrospective effect so as to make the amended Agreement applicable to a year earlier to the year in which the notification was issued is not yet conclusively adjudicated upon by a Court.

## 8. AIDS IN CONSTRUING TAX TREATIES

Having considered problems concerning interpretation to be placed on particular provisions in Double Taxation Avoidance Agreements I may now refer to certain general rules' which are applied in interpreting Double Taxation Avoidance Agreements. One view is that rules of interpretation which are applied in interpreting laws in general and taxation laws in particular would equally apply to the interpretation of treaties. These rules are to be covered by distinguished writers who have contributed to the present publication and I need not delve into the same. However, in applying general rules for interpreting statutes one should bear in mind that in *Union of India vs. Azadi Bachao Andolan* 263 ITR 706 at 751 the Supreme Court of India held that principles to be adopted in interpreting treaties are not the same as those employed in the interpretation of "statutory legislation." The Court quoted with approval Francis Bennion's statement in "statutory interpretation" namely, "The drafting of treaties is notoriously sloppy usually for very good reason. To get agreement, politic uncertainty is called for... The interpretation of a treaty imported into Municipal law ( is)... unconstrained by technical rules... or... legal precedent but conducted on broad principles of general acceptation'... the words 'are to be given their general meaning, general to lawyer and layman alike... the meaning of the diplomat rather than the lawyer." The Court also approved of the observations of David R. Davies in "Principles of International Double Taxation Relief" to the effect that the main function of a Double Taxation Avoidance Agreement is to aid commercial relations between treaty partners and as being essentially a bargain between two treaty countries as to the division of tax revenues between them in respect of income falling to be taxed in both jurisdictions. The final Agreement often represents a number of compromises. The Supreme Court rightly observed that in interpreting double taxation treaties it has to be borne in mind that treaties negotiated are entered into at a political level and have several considerations as their bases.

I now refer to certain rules of interpretation which specifically relate to the interpretation of Double Taxation Avoidance Agreement. In May 1969 some countries concluded the Vienna Convention on the law of treaties. Though India is not a party to the

Convention the Convention really codifies existing customary law for interpretation of treaties in general. To that extent the rules laid down in the Convention for interpretation of treaties would be equally applicable in interpreting Double Taxation Avoidance Agreements entered into by India. A very instructive analysis of the terms of the Convention is found in Martin Dixon's Textbook on International Law (first Indian Reprint) at pages 59-80. Part III of the Convention enumerates the rules of interpretation to be applied. Article 26 provides that a treaty is binding upon the parties and must be performed by them in good faith. Article 27 forbids a contracting state from invoking the provisions of its internal law as justification for failure to perform a treaty obligation unless a rule of internal law of fundamental importance has been violated in concluding the treaty. Article 31 provides that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. What are the relevant circumstances in determining such context are also set out. Article 32 provides that in interpreting the terms of a treaty the preparatory work and the circumstances of its conclusion should be taken into account if the application of the context rule creates ambiguity. This is called the 'travaux preparatoires' rule. Article 33 is of particular importance. It provides that when a treaty is authenticated in two or more languages the text in each of the languages is equally authoritative unless the parties have inserted a provision that a particular text shall prevail. A version of the treaty in a language other than the one or ones in which the text was authenticated is not to be considered unless the parties have agreed that it shall be regarded as the authentic text. Further, the terms of the treaty are presumed to have the same meaning in each authentic test. Article 33.4 lays down the rule that where a particular text is not to prevail but a comparison of the authentic texts discloses a difference of meaning which cannot be resolved the meaning which best reconciles the texts, having regard to the object and purpose of the treaty shall be adopted. For example, the Indo-Uzbekistan Double Taxation Avoidance Agreement records that it has been executed in Hindi, Uzbek and English languages and "all the texts being equally authentic." It is however, provided that "in case of divergence between any of the texts, the English text shall be the operative one."

In interpreting Double Taxation Avoidance Agreement what are the other aids which the Court can draw upon? As noted above the Commentaries to the Models are generally regarded as very relevant in interpreting a Double Taxation Avoidance Agreement which uses the identical language as in the applicable Model Convention. The reason for this is that the Commentaries express the understanding of the wording in the Agreement and if one of the contracting parties does not agree with the same it should put in a caveat in this behalf. If it adopts the language of the Convention, then, the interpretation placed thereon should be regarded as accepted by it. *CIT vs. Visakhapatnam Port Trust (1983) 144 ITR 146* is one of the first judgements in India wherein the general principles applicable in the case of Double Taxation Avoidance Agreement were exhaustively considered. Reference is made therein to the OECD Commentaries and the view is expressed that in interpreting a Double Taxation Avoidance Agreement the Court must have regard to the decisions and rulings of Courts in foreign countries. Similarly, in *CIT vs. Vijay Ship Breaking Corp. (2003) 261 ITR 113* the Gujarat High Court has placed reliance on the OECD Commentary. This has also been done by the Supreme Court in the all pervasive Azadi Bachao Andolan case (263 ITR 706). Undoubtedly, the commentaries cannot be treated as binding but in the event of any doubt in the meaning of the words used in an article one would have regard to the view taken in the Commentary.

In interpreting any law or any tax law as also in interpreting Double Taxation Avoidance

Agreements, the question arises whether one can consider the views of authors of books or interpret the law, as it were, by analogy. Insofar as the former is concerned the strict rule, is that the opinion of a living author cannot be considered. This is on the basis that he may change his views and that it is not his final view. This strict rule is rightly not followed as

after all a Court only considers the view expressed and it is open to the Court to agree or disagree with the same.

One of the aids in construing the meaning of words used in a treaty is to refer to another treaty and on the wording thereof to urge that the treaty under consideration not being so worded should be interpreted differently or being similarly worded should be interpreted as per any clarification issued for the purpose of that other treaty or any decision interpreting the language of that treaty. One may call this the interpretation by analogy rule. For example, in *CIT vs. Vijay Ship Breaking Corp. 261 ITR 113* the interest article in the Indo-UK Treaty was sought to be interpreted by reference to the Indo-Indonesian Treaty. In the latter treaty the term "debt claims" was defined as including interest on deferred payment of sale consideration. It was urged that as in the Indo-UK Treaty the inclusive part in the Indo-Indonesian Treaty was absent, "debt claims" as per the former Treaty did not include deferred payment interest. The Gujarat High Court held that the elaboration in the Indo-Indonesian Treaty was clarificatory. On the other hand, in *Raymond Ltd. vs. Dy. Commissioner of Income-tax* 86 ITD 791 the Tribunal had to consider the provision defining "fees for technical services" in the Indo-UK Treaty as payments which make available technical knowledge, experience etc. In interpreting this term the Tribunal had regard to the explanation of this term in the Memorandum of Understanding appended to the Indo-USA Double Taxation Avoidance Agreement which was executed prior to the Indo-UK Agreement and the clarification in the Memorandum was regarded as acceptable to India and, therefore, applicable in interpreting language in the Indo-UK Treaty which was identical to the Indo-US Treaty. The Tribunal also relied on the fact that in the subsequently executed Indo-Singapore Treaty itself the phrase in question was explained as knowledge etc., "which enables the person acquiring the services to apply the technology contained therein." The writer feels that when one is arguing by "comparison of language" insofar as two Acts are concerned, one could urge that the purpose and function of the two Acts are different and one cannot argue by comparison particularly when an argument is based on the comparison of language in a foreign statute. However, rule of interpretation by analogy would have force when India is a party to both the concerned Agreements and one is seeking to rely on the Memorandum of Understanding in one of the Agreements or the express language in the other Agreement. If India accepts a particular interpretation, why should it not be applied when interpreting another identically worded Treaty to which India is a party? The argument may not have much force when one is seeking to compare two treaties but India is a party to only one of them.

It goes without saying that a protocol attached to a treaty would have equal force as the treaty (see the decision of the Income-tax Appellate Tribunal in *Dy. Commissioner of Income-tax vs. ITC Ltd. 82 ITD 239).* The Memorandum of Understanding as noted is also relevant and was relied upon by the Authority for Advance Ruling in P No. 28 of 1999 242 ITR 208 at 225. If at all the protocol may be at a slightly higher level of acceptance for interpretation than a Memorandum of Understanding.

## 9. CONCLUSION

In the ultimate analysis the ability to arrive at the correct interpretation of a legal provision, which could also mean the interpretation which the Court will ultimately place thereon, is the real art of a lawyer. It depends on his ability to read what is stated, to read between the lines and to read "through" the provision, things which one can do if he has a wide exposure to life as such. These are qualities which R. J. Kolah, in whose memory and honour this publication is being released, possessed in abundance.

The publishers of this issue have undoubtedly undertaken a Herculian task in trying to place within its covers rules of interpretation which would apply in different circumstances and in interpreting different legislations, rules and Agreements etc. Let there be no misinterpretation of my appreciation for their efforts if I end on a somewhat cynical note.

I believe that the rules of interpretation are in a way elastic enough for a judge to be able to support the view which he thinks will further the cause of justice by citing an appropriate rule of interpretation. If a judge wants to go strictly by the written word he would cite the rule enunciated by Rowlatt J. in *Cape Brandy Syndicate vs. IR 1921 (1) KB 64*, approved by the Supreme Court in *CIT vs. Ajax Products Ltd. 55 ITR 741, 747*, which requires that in a tax law one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look at the language used. In *Jiwandas vs. CIT 4 ITC 40* it was stated that one cannot extend the scope of a statute by analogy or place upon it what is called a beneficent or equitable construction in order to prevent a real or supposed anomaly.

There is, on the other hand, the directly opposite rule of construction whereunder a judge is exhorted to supplement the written word so as to give force and life to the intention of the legislature though he must not alter the material of which the fabric is woven but he should iron out the creases. By invoking these principles the Supreme Court of India in *CIT vs. Bhattachargee (1979) 118 ITR 461* held that in section 245M of the Act the term "assessee" would encompass the department as well! This was done undoubtedly to avoid a result which would have been unjust to the Revenue. In *CIT vs. J. H. Gotla (1985) 156 ITR 323 (SC)* the boot was, as it were, on the other foot. A literal interpretation would have resulted in a patent injustice to the assessee. In the process the Court observed that where the plain literal interpretation of a statutory provision produces a manifestly unjust result, which could never have been intended by the legislature, the Court might modify the language used by the legislature so as to achieve its intention. To this approach a strict constructionist judge would say that it is not for the Court to make good the lacuna in the legislation.

This contrasting approach is very tellingly illustrated by two decisions of the High Court at Bombay — the gap between the two decisions being just five years. In *Elphinstone Spinning and Weaving Mills Co. Ltd. vs. CIT (1955) 28 ITR 811 (Bom)* the Court observed that where the language was clear and not capable of any other construction, then, however illogical the position, however, absurd the result, however much the construction put may defeat the object of the Legislature, the statute must be construed according to the plain language used by the Legislature. On the other hand in *CIT vs. Kishoresinh Kalyansinh Solanki (1960) 39 ITR 522 (Bom)* the same Court observed that the rule of literal interpretation cannot be adhered to if it leads to manifest absurdity.

The pity is that what is "manifest" to one judge is often obscure to another. Therein lies the strength and weakness of rules of interpretation and provide bread, butter and large helpings of jam to the legal fraternity!

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# IMPORTANT CONSTITUTIONAL CASES ON TAX LAWS

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For over 50 years, battles between the tax-payer and the State continue to be fought in the Supreme Court and the High Courts. This article seeks to examine cases on tax laws which have arisen in the context of the Constitution of India. The article is structured under the following headings:

1. Important constitutional provisions;
2. Vires of tax laws;
3. Specific principles applicable to tax laws;
4. Difference between tax and fee;
5. Tax laws and the commerce clause; and
6. Conclusion

## 1. IMPORTANT CONSTITUTIONAL PROVISIONS

Article 366(28) defines "taxation" to include the imposition of any tax or impost whether general or local or special and "tax" shall be construed accordingly. Perhaps that the best definition of the word "tax" has been given by Chief Justice Latham of the Australian High Court in *Mathews vs. Chicory Marketing Board 60 CLR 263-276:* "A tax is a compulsory exaction of money by a public authority for public purposes enforceable by law and is not payment 'for services rendered' . Part XII deals with finance, property, contracts and suits and consists of Articles 264 to 291. It consists of various provisions dealing with imposition of tax, distribution of tax between the Union and the States, the levy of surcharge, tax on professions, trades and callings. It also grants exemption from Union taxation.

The most important article is Article 265 which reads thus: "Taxes not to be imposed save by authority of law. — No tax shall be levied or collected except by authority of law."

This simple article has been the foundation for several writs challenging various provisions of taxing statutes, rules and notifications. The Article does not lay down any guidelines or parameters within which tax has to be levied. All that is necessary is that the imposition, levy and collection of tax must be authorised by law. The three basic requirements of a valid tax statute are as follows:–

(i) the law should be within the legislative competence of the legislature being covered by the legislative entries in the Seventh Schedule of the Constitution;

(ii) the law should not be prohibited by any particular provision of the Constitution such as for example Articles 276(2), 286 etc.;

*(iii) the law or the relevant portion thereof should not be invalid under Article 13 for repugnancy to those freedoms which are guaranteed by Part III of the Constitution which are relevant to the subject matter of the law. [Chhotabhai Jethabhai Patel and Co. vs. Union of India AIR 1962 SC 1006, 1020; State of Rajasthan vs. Sajanlal Panjawat AIR 1975 SC 706, 725-726; State of Punjab vs. Naranjan Dass Doomra Rice & General Mills AIR 1998 SC 537; see also Raja Jagannath Baksh Singh vs. State of Uttar Pradesh AIR 1962 SC 1563.].*

The other important article is Article 286 which places restriction on imposition of sales tax on certain types of transactions. It has also been amended substantially by the

Constitution (6th Amendment) Act, 1956 (which enabled the imposition of inter-State sales tax) and by the Constitution (46th Amendment) Act, 1982 (which enabled the imposition of sales tax on works contract, leasing, sale of foodstuff and so on). Article 289 states that the property and income of a State Government shall be exempt from Union taxation. But this does not mean that State Government undertakings are exempt from income tax or excise duty. If the State carries on any trade or business, it is open to Parliament to impose appropriate tax on such activity just as in the case of an ordinary citizen. Articles 301 to 304, contained in Part-XIII, deal with the important provisions relating to inter-State trade and commerce. In a country with a federal structure, it is vitally important that there should be free flow of goods from one State to the other. Article 304 prohibits any State Government from imposing discriminatory tax on goods imported from other States. For example, the State of Maharashtra cannot impose a higher tax on cars which are imported into the Maharashtra as compared to the tax levied on cars manufactured or produced within Maharashtra.

The three Legislative Lists in Schedule VII set out the fields of legislation that are available to the Union, the States and to both (the Concurrent List). The power of the Union to levy tax is enumerated in Entries 82 to 92B. Entry 92C has been inserted by the Constitution (88th Amendment) Act, 2003 (for levy of "Tax on Services") but has not been notified till date. Entry 96 enables imposition of fees [except court fees]. Entry 97 is the famous residuary entry which reads:–

"Any other matter not enumerated in List–II or List–III including any tax not mentioned in either of those Lists".

Three entries – Entry 82 [Income Tax], Entry 83 [Customs Duty] and Entry 84 [Excise Duty] – permit the levy of three Central taxes that generate almost the entire tax revenue of the Union. In List–II, the fields of taxation start with Entry 46 [Agriculture Income Tax] and continue till Entry 63. Entry 66 also refer to levy of fees but excludes court fees. Amongst the important State taxes are agriculture income tax, sales tax, motor vehicles tax and luxury tax.

List III is the Concurrent List. Significantly, it contains no entry permitting levy of tax. However, it refers to stamp duty or fees collected by means of judicial stamps.

## 2. VIRES OF TAX LAWS

The vires of any tax law can be challenged in the same manner as any other statute. On an overall examination of the case laws, any taxing statute can be challenged only on two grounds:-

(i) lack of legislative competence,

(ii) violation of fundamental rights.

A law which is completely arbitrary will be struck down as being violative of Article 14 – *Raja Jagannath Baksh Singh vs. State of U.P. AIR 1962 SC 1563.*

## 3. SPECIFIC PRINCIPLES APPLICABLE TO TAX LAWS

(i) ***Tax laws and fundamental rights:*** In most cases, a taxing statute is challenged either on the ground that it violates the right to equality under Article 14 or it is violative of the fundamental rights to carry on business under Article 19. But a larger discretion is permitted in matters of classification. *Sri Srinivasa Theatre vs. Government of Tamil Nadu AIR 1992 SC 999; K. Sham Bhat vs. Agricultural ITO AIR 1963 SC 591.*

(ii) The levy, quantum of tax applicable, conditions and manner of recovery are all matters within the competence of the legislature. Unless the taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy, the Court would not be justified in striking down the impugned statute as unconstitutional. *Rai Ramkrishna vs. State of Bihar* AIR 1963 SC 1667.

(iii) A law will not be struck down merely because other entities or objects could have been taxed but have not been taxed by the legislature. *Venugopala Ravi Varma Rajah vs. Union of India* AIR 1969 SC 1094.

(iv) The taxing statute must satisfy the test of reasonable classification – this implies that all those who are similarly situated must be included. It is also necessary to look beyond the classification and the purposes of the law. *Federation of Hotel and Restaurant Association vs. Union of India* AIR 1990 SC 1637.

(v) The Supreme Court has also laid down the test of *palpable arbitrariness*. It is not possible to lay down any precise formula or test or precise scientific principles of exclusion or inclusion that can be applied. The test can only be one of *palpable arbitrariness* applied in the context of felt needs of the times and societal exigencies informed by experience. *[Federation of Hotel and Restaurant Association vs. Union of India AIR 1990 SC 1637]*

(vi) In a taxing statute, mathematical precision is not possible; nor is completely logical or symmetrical classification. The legislature can choose objects of taxation and impose different rates of duty or grant exemption for different classes of commodities in different ways and methods. It is only necessary that such difference of classification is rational. *[Venugopala Ravi Verma Rajah vs. Union of India AIR 1969 SC 1094, 1098; Hoechst Pharmaceuticals Ltd. vs. State of Bihar AIR 1983 SC 1019].* Thus, it is not necessary for the Government to tax everything in order to be able to tax something. The Supreme Court has upheld, for example, levy of duty only on virginia tobacco and not on country tobacco; the levy of sales tax only on hides and not on other commodities. *[V.M. Syed Mohammad & Co. vs. State of Andhra Pradesh AIR 1954 SC 314; E.I. Tobacco Co. Ltd. vs. State of A.P. AIR 1962 SC 1733; see also Vrajlal Manilal & Co. vs. State of M.P. 1986 Supp. SCC 201].*

(vii) ***Absence of classification:*** Ironically, the failure to make a classification may itself lead to inequality. Thus, when a flat rate of tax of Rs. 2/- per acre was levied on all lands in Kerala, it was struck down as violative of Article 14. The flat rate of tax failed to take into account the income earning potential of the land which was taxed; fertile farm land suffered the same rate of tax as dry and wasteland. *[K.T. Moopil Nair vs. State of Kerala AIR 1961 SC 552].* Similarly, a flat rate of tax based on the area of a building without any reference to the nature of the building, locality, type of structure, rents received and other relevant circumstances was violative of Article 14. [*State of Kerala vs. Haji K. Haji K. Kutty Naha AIR 1969 SC 378;* see also *New Manek Chowk Spinning & Weaving Mills Co. Ltd. vs. Municipal Corporation, Ahmedabad AIR 1967 SC 1801].*

(viii) A high rate of tax will not be violative of the fundamental right to carry on business under Article 19(1)(g) unless the assessee can show that the increase resulted in destroying his right to carry on business. [*Express Hotels P. Ltd. vs. State of Gujarat* AIR 1989 SC 1949; *Federation of Hotels and Restaurant Association of India vs. Union of India AIR 1990 SC 1637]*

(ix) ***Tax laws – Levy, assessment and recovery:*** The power to make a law with respect to tax includes the power to provide for all incidental and ancillary matters relating to levy, assessment, collection and recovery of tax. *[Meenakshi vs. State of Karnataka AIR 1983 SC 1283; Khazan Chand vs. State of Jammu & Kashmir AIR 1984 SC 762; Hiralal Ratanlal vs. Sales Tax Officer AIR 1973 SC 1034]*

(x) Article 265 makes a distinction between levy and collection. The term “levy” is wider than “assessment”, the latter generally applies to procedure adopted in fixing the liability to pay a particular tax. “Levy” includes imposition of tax as well as the assessment. Power to levy tax includes all subsidiary powers. *[Khyerbhari Tea Co. Ltd. vs. State of Assam AIR 1964 SC 925]*

(xi) ***Taxation not by subordinate legislation:*** As a general rule, the tax laws must be passed by the legislature. Imposition of tax by executive notification or bye laws is not permissible unless there has been a very specific power delegated to the executive to do so. *[Bimalchandra Banerjee vs. State of Madhya Pradesh AIR 1971 SC 517, 520; Ahmedabad Urban Development Authority vs. Sharadkumar Jayantikumar Pasawalla AIR 1992 SC 2038; Narinder Chand Hem Raj vs. Lt. Governor, Himachal Pradesh AIR 1971 SC 2399, 2401]*

At the same time Parliament/State Legislature can delegate the power to fix the rate of tax and provide for the procedure for the collection of the same.

## 4. DIFFERENCE BETWEEN TAX AND FEE

An interesting area of controversy is the distinction between "tax" and "fee". In the classic decision of *Commissioner, HRE vs. L.Swamiyar AIR 1954 SC 282,* Mukherjee J pointed out that while tax is a part of the common burden, a fee is a payment for a special benefit or privilege. Sometimes, the special benefit is secondary to the primary motive of regulation as in the case of fees for registration of documents or grant of marriage licence. In fees, there is "*quid pro quo*" although this is not always mandatory.

Unfortunately, the decisions are not very clear on this issue. In one case, it was held that fees collected for the use of municipal market need not be shown to have been spent for the function of the market users. *[Krishi Utpadan Samiti vs. Ashok Kumar Dinesh Chandra (1996) 10 SCC 100; Municipal Corporation of Delhi vs. Mohd. Yasin AIR 1983 SC 617; Corporation of Calicut vs. Thachambalath Sadasivan AIR 1985 SC 756; Ved Prakash Agarwal vs. Commissioner, Gorakhpur Division (1997) 11 SCC 331].* There has to be some reasonable nexus between the collection of fee and running of services. Indeed in the *L.T. Swamiyar's* case, it has been pointed out that if the amount is paid for a particular work or service and not merged in the public revenue, it will be a fee and not a tax.

## 5. TAX LAWS AND THE COMMERCE CLAUSE

As stated above, Article 304 prohibits the imposition of discriminatory tax. If a taxing statute imposes a higher rate of tax on goods imported from other States, it would be violative of Article 304. At the same time, minor variation in tax will not be a ground to strike down a particular levy. The court will look into the effect of a local law. For example, sales tax levied on hides and skins imported from other States was held to be discriminatory and unconstitutional. *[A.T.B. Mehtab Majid & Co. vs. State of Madras AIR 1963 SC 928, 931].* Similarly, exemption granted only to local manufacturers of edible oil for a ten year period was held to be discriminatory and violative of Articles 301 and 304. [*Shree Mahavir Oil Mills vs. State of Jammu & Kashmir* (1996) 11 SCC 39, 54]

## 6. CONCLUSION

An examination of the case laws over the last fifty-four years shows that the courts have been reluctant in striking down tax laws as being unconstitutional. As repeatedly held, the courts usually lean in favour of the constitutionality of tax laws. In rare cases, where the law is struck down, Parliament retrospectively amends the law. Despite several Committee reports and Budget speech assurances, tax laws have not been simplified. Absurd amendments continue unabated and so do irrational show cause notices in Central Excise and Customs. The Constitution will continue to be the last bulwark against executive and legislative arbitrariness.

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# INTERPRETATION OF DEEDS, DOCUMENTS AND WILLS

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## 1. INTRODUCTION

Deeds, agreements and other documents were found necessary in civilized societies in order to specify the rights and obligations of each one of the parties in respec signed to regulate inter personal relationship under general laws. But with the increasing complexities of the Direct Tax Laws, taxes are imposed on an income when it is earned or at the end of the period when such income changes into wealth or even at a point when a part of such wealth is given to another person and ultimately at the point of time when such property passes on the death of the property holder. Hence every deed defining the title to property or an agreement regulating contractual relationship between two persons comes up for the consideration of the income-tax authorities. As such, complications of taxation laws can at time affect adversely the parties, deeds, conveyances, agreements and other documents if the language of such writings is not checked carefully with tax provision laid down by law.

It has been judicially observed that it is legitimate for an assessee so to arrange his affairs as to avoid legally levy of tax or to reduce the tax burden as much as possible. A proper fiscal administration, therefore, permits legal avoidance of tax but comes down fiercely against every attempt at evasion. To successfully avoid the extra burden of tax the need for accurate knowledge of the up-to-date provisions of the taxation laws as well as that of the basic general laws of our country and their implications and true meaning as expounded by the Supreme Court and various High Courts of India cannot be overstressed. Without such knowledge the draftsman is likely to commit errors while drafting deed, writings, conveyances etc. The drafting of deeds is very much relevant for the purposes of leviability of Gift Tax. Similarly it was also relevant for leviability of Estate Duty before its repeal.

## 2. INTERPRETATION OF DEEDS, DOCUMENTS & WILLS

A. A deed may be defined as a formal writing of a non-testamentary character which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title or interest.

B. There is no need to make use of any particular form in the delivery of a deed. It is well settled; that the mere retention of a deed after its execution by the maker of the deed does not of itself impair the validity of the deed or prevent its operating at once. A policy, “signed, sealed and delivered” is complete and binding as against the party executing it, though in fact, it remains in his possession unless there is some particular act required to be done by the other party to declare his adoption of it; nor is it necessary that the assured should formally accept or take away a policy in order to make the delivery complete. The registration of a deed of sale constitutes sufficient delivery of the deed.

C. When parties have deliberately put their mutual engagements into writing, in language which imports a legal obligation, or, in other words, a complete contract, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstances.

“Because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void. It is clear that nothing was said to mislead them as to the nature of the instrument they were executing. It is doubtful how far they understood the nature of

the deeds, but it is in my opinion clear upon the evidence that they knew that the deeds dealt in some way with their houses. This contention therefore fails".

D. The authorities in support of the proposition are, but unless actual mis-statement of the character of the deed is made the deed is only voidable.

## 3. GOLDEN RULE OF INTERPRETATION OF DEEDS

The golden rule of construction is to ascertain the intention of the parties to the instrument after considering all the words in their ordinary natural sense. *(AIR 1969 SC page 9 at page 11 & 12)*. Sometimes it happens that there is a conflict between what is said in one part of the document and in another part. In such a case an attempt should always be made to read the two parts of the document harmoniously, if possible. In such a case the second part of the document has to be held as void. *(AIR 1963 SC page 890 at page 893 & 894).*

An important rule to be remembered while interpreting rules and statutes is:

"In drafting it is not enough to gain a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible a degree of precision which a person reading in bad faith cannot misunderstand".

Further, in revenue cases, regard must be given to the substance of the transaction than to mere norm. On principle, the two legal position arising from a transaction alone determines the taxability of a receipt arising from a transaction *(Refer 87 ITR page 407).*

## 4. FUNDAMENTAL RULE OF CONSTRUCTION

The fundamental rule is to ascertain the intention from the words used. The surrounding circumstances are to be considered but that is only for the purpose of finding out the intended meaning of the words which have actually been employed *(AIR 1951 SC page 139).* However, while considering a contract it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the party *(AIR 1969 SC page 9).*

## 5. RULE OF CONSTRUCTION OF DOCUMENT IN CASE OF AMBIGUITY

If there is ambiguity in the language employed, the intention may be ascertained from the content of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. The document has to be considered as a whole for interpretation of particular word or direction. *(AIR 1966 SC page 902 and AIR 1979 SC page 533 at page 561).*

It is well settled that legal relationship resulting from a transaction cannot be substituted by I.T. authorities by any of their notions about the substance of transaction. *(66 ITR page 692 SC).*

In the case reported in *73 ITR page 702* in the case of *Juggilal Kamalapath,* it has been held as under:

> "It is true that from the juristic point of view the company is a legal personality, entirely distinct from its members and is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members but in certain exceptional cases the court is entitled to lift the veil or corporate entity and to pay regard to the economic realities behind the legal facade".

In another judgment reported in *82 ITR page 540* the Hon'ble Supreme Court has held as follows:

> *"It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind, a party who relies on a recital in a deed has to establish the truth of these recitals otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. It all that an assessee who wants to evade tax is to have some recitals, made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not*

*the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recital made in the documents".*

## 6. TWO ADMISSABLE CONSTRUCTIONS OF DOCUMENTS

It is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim *ut res magis valeat quam pereat***.**

## 7. CONFLICT BETWEEN EARLIER AND LATER PROBLEM OF DOCUMENT

If it is not possible to give effect all of them, the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa *(AIR 1969 SC page 22).*

## 8. SCOPE OF LEGAL EFFECT OF PROVISO AND EXCEPTION IN INTERPRETING DEEDS

The technical rules of interpretation of provisos and exceptions, with reference to their scope and legal effect, adopted in constructing statutes should not ordinarily be imported in interpreting deeds and documents executed by laymen. In ordinary deeds, a proviso may sometimes be in the nature of an explanation of the main clause or provisions; and one must look not merely at the form of the language but its substance, the governing idea or purpose of the deed, the context and the surrounding circumstances to father the real meaning or intention of the executant".

**Recital meaning of –** Normally, a recital is evidence as against the parties to the instrument and those claiming under then and in an action on the instrument itself the recitals operate as an estoppel though that would not be so on a collateral matter.

*Ram Charan Das vs. Girja Nandini Devi, AIR 1966 SC page 323 at page 327*

**Expression "terms" meaning of -** The expression "terms" used in a document would, according to Webster's New World Dictionary, mean "conditions of a contract, agreement, sale, etc. that limit or define its scope or action involved".

*Ram Charan Das vs. Girja Nandini Devi, AIR 1966 SC page 323 at page 328*

**True legal position in matters of proof of documents – Wills –** The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved one must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of Evidence Act are relevant for this purpose. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, sections 59 and 63 of the Indian Succession Act are also relevant. The question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he put his signature to the will knowing what it contained? Stated broadly, it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would *prima facie* be true to say that the will has to be proved like any other document except as in the special requirements of attestation prescribed by section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

Interpretation of deeds, documents and will is a subject with vast area. I have incorporated in this article only very important aspects of the same.

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# THE INCOME TAX ACT AND THE CONSTITUTION OF INDIA

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## 1. POWER TO TAX

The power to tax is an incident of sovereignty, *(New Delhi Municipal Comm vs. State of Punjab AIR 1997 SC 2847)* and since the Constitution of India is the supreme law of the land, all other laws, including the Income-tax Act, are subordinate to the Constitution and must be read and interpreted in the light of the constitutional provisions. *CIT vs. Harijan Nigam (1997) 226 ITR 696 ( )* In *India Cement Ltd. vs. State of Tamil Nadu, (1991) 188 ITR 690, 699 (SC),* a seven-judge bench of the Supreme Court observed that the Constitution is 'the mechanism under which the laws are to be made and not merely an Act which declares what the law is to be.' One of the most important of the Constitution relating to taxation is Article 265, which provides: 'No tax shall be levied or controlled except by authority of law. 'Therefore, not only the levy but also the collection of a tax must be under the authority of some law. *(Chhotabhai vs. UOI AIR 1952 Nag 139.)* 'Law', in this article, means law enacted by a competent legislature and cannot include an executive order, *(Ghulam Hussain vs. State of Rajasthan AIR 1963 SC 379.)* or a rule without express statutory authority, *(Krishi Utpadan vs. Shree Mahalaxmi 1995 Supp (3) SCC 433)* or a custom. (State *of Kerala vs. Joseph AIR 1958 SC 296)* Thus, any act of the state that seeks to impose a tax without legislative authority will be void.

## 2. LEGISLATIVE ENTRIES IN THE CONSTITUTION

The Constitution of India contemplates a threefold distribution of legislative powers between the Union and the States. The authority to legislate is conferred by Art. 246, *India Cement vs. State of TN (1991) 188 ITR 690 (SC)* which provides for three legislative lists that find place in the Seventh Schedule of the Constitution. These are :

(i) List I or the Union List, which comprises of entries over which the Union has exclusive power of legislation;

(ii) List II or the State List, which comprises of entries over which the State legislatures have exclusive power of legislation;

(iii) List III or the Concurrent List, which gives concurrent powers of legislation to the Union and the States.

If a state law relating to an entry in List III is repugnant to a Union law relating to that entry, the Union law will prevail, and the state law shall, to the extent of such repugnancy, be void. *(Article 254.)* The various entries in the three Lists of the Seventh Schedule are not 'powers' of legislation but 'fields' of legislation or legislative heads designed to define and de-limit the respective areas of legislative competence of the state and the Union legislatures. *(India Cement vs. State of TN 188 ITR 690(SC); Aboobacker vs. UOI (1989) 177 ITR 358; Sat Pal vs. ETC (1990) 185 ITR 375(P & H) ; Tuhi Ram vs. LAC (1993) 199 ITR 490(P & H); Ashoka vs. CIT (1994) 209 ITR 679 (Pat))*

The subject matters of taxation available to Parliament are enumerated in entries 82 to 97 of List I, those available to the state legislature in entries 45 to 68 of List II, and those

available to both in entry 44 of List III. *(All India FTP vs. UOI (2002) 256 ITR 401(Bom.).* The parliament also has residuary powers of taxation under Article 248(2) and entry 97, List I. *(All Ker CAA vs. UOI (2002) 258 ITR 679 (Guj.); Vijayan vs. UOI (1995) 215 ITR 371 (Mad.); Ker State Coir Corpn vs. UOI (1994) 210 ITR 121 (Ker.).* The Income-tax Act, 1961 has been passed under entry 82 of List I, *(Sanctus Drugs vs. UOI (1997) 225 ITR 252 (M.P.))* which is : 'Taxes on income other than agricultural income'.

## 3. CONSTITUTIONAL VALIDITY OF PROVISIONS

In order that the law imposing the tax is regarded as constitutionally valid, it must firstly be examined whether the legislature that passed the law was competent to pass it or not; secondly, since a taxing statute is a law for the purpose of Article 13, its validity can also be challenged on the ground that it contravenes any of the fundamental rights guaranteed by Part III of the Constitution *(Jagannath Baksh Singh vs. State of UP (1962) 46 ITR 169 (SC); Municipal Council, Kota vs. Delhi Cloth (2001) 249 ITR 560 (SC); Vijayan vs. UOI (1995) 215 ITR 371(Mad.))* Yet, unless and until the Supreme Court or a High Court declares any provision to be ultra vires, it must be taken to be constitutionally valid and treated as such.*( CIT vs. Shah Elec. (1994) 207 ITR 350(Guj.))* Further, there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. *(Kunhammed vs. UOI (1989) 176 ITR 481(Ker.); Aboobacker vs. UOI (1989) 177 ITR 358 (Ker.); R Laxmichand vs. UOI (1990) 184 ITR 376(Guj.); Tuhi Ram vs. LAC (1993) 199 ITR 490(P & H); Vijayan vs. UOI (1995) 215 ITR 371(Mad.); All India FTP vs. UOI (1997) 228 ITR 68 (Bom.); All India FTP vs. UOI (1999) 236 ITR 1(Del.); Shashikant Kale vs. UOI (1990) 185 ITR 104 (SC).*

### (a) Competence of the Legislature to Levy Tax

It is the duty of the courts to ascertain to what degree and to what extent the authority to levy tax exist in each legislature and to define the limits of the respective entry, incidental powers. [Federation *of Hotel and Restaurant Assn vs. UOI (1989) 178 ITR 97(SC); Goodyear vs. State of Haryana (1991) 188 ITR 402 (SC): India Cement vs. State of TN (1991) 188 ITR 690 (SC)].* Once a law in 'pith and substance' falls within a legislative entry, incidental encroachment on an entry in another list does not affect its validity. *[Kanchenjunga Properties vs. State of Sikkim (1991) 191 ITR 575(Sik.)]* Further, there is no rule that an enactment must relate to only one entry in the Seventh Schedule; in the case of a Parliamentary enactment, it may relate to more than one entry in List I and to an entry or entries in List III. *[Geep Flashlight vs. UOI (1996) 218 ITR 638(All)].*

It is well settled that the language of the entries should be given the widest scope and the most liberal construction should be put upon the words. *(UOI vs. Sanyasi Rao (1996) 219 ITR 330 (SC); CWT vs. Karan Singh (1993) 200 ITR 614 (SC); India Cement vs. State of TN (1991) 188 ITR 690 (SC); Goodyear vs. State of Haryana (1991) 188 ITR 402 (SC); Express Hotels vs. State of Gujarat (1989) 178 ITR 151 (SC); Elel Hotels vs. UOI (1989) 178 ITR 140 (SC); Kunhammed vs. UOI (1989) 176 ITR 481(Ker.) ; Aboobacker vs. UOI (1989) 177 ITR 358 (Ker.); Sanyasi Rao vs. Govt of AP (1989) 178 ITR 31(AP); Sat Pal vs. ETC (1990) 185 ITR 375(P & H); Sri Venkateswara vs. UOI (1991) 189 ITR 741(Ori.); Tuhi Ram vs. LAC (1993) 199 ITR 490 (P & H); Ashoka vs. CIT (1994) 209 ITR 679 (Pat.))* Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it, and in interpreting an entry it would not be reasonable to import any limitation by comparing or contracting that entry with any other one in the same list. *(Elel Hotels vs. UOI (1989) 178 ITR 140 (SC); Express Hotels vs. State of Gujarat (1989) 178 ITR 151 (SC); Indian Cement vs. State of TN (1991) 188 ITR 690 (SC); Aboobacker vs. UOI (1989) 177 ITR 358(Ker.))* At the same time, it is quite important that the three Lists should be read together harmoniously, *(All India FPT vs. UOI (2002) 256 ITR 401(Bom.))* Any legislation with regard to subjects enumerated in the State List is excluded from the

Parliament's competence; everything else is included in the Parliament's competence. *(All Ker CAA vs. UOI (2002) 258 ITR 679(Ker.); UOI vs. Harbhajan Singh Dhillon (1972) 83 ITR 582 (SC).)* Consistent with the above principles, the word 'income' occurring in entry 82 should be construed liberally and in a very wide manner and the power to legislate will take in all incidental and ancillary matters. (Elel *Hotels vs. UOI (1989) 178 ITR 140 (SC); CIT vs. Karthikeyan (1993) 201 ITR 866 (SC); UOI vs. Sanyasi Rao (1996) 219 ITR 330 (SC); Sat Pal vs. ETC (1996) 185 ITR 375(P & H))* Thus, this entry should be read not only as authorizing the imposition of a tax but also as authorising an enactment to prevent evasion of tax. (UOI *vs. Sanyasi Rao (1996) 219 ITR 330 (SC); Aboobacker vs. UOI (1989) 177 ITR 358 (Ker.); Sat Pal vs. ETC (1990) 185 ITR 375; Ashoka vs. CIT (1994) 209 ITR 679 (Pat.); Attar Singh vs. ITO (1991) 191 ITR 667 (SC)]* or to provide for taxation on a presumptive basis *(UOI vs. Sanyasi Rao (1996) 219 ITR 330 (SC)]* or to provide for a vicarious liability.

In *Federation of Hotel and Restaurant Association of India vs. UOI (1989) 178 ITR 97 (SC).* A Constitution Bench of the Supreme Court has exhaustively considered the question of legislative competence with regard to levy of tax.

**(b) Fundamental Rights**

Article 14 provides that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. In *Jagannath Baksh Singh vs. State of UP (1962) 46 ITR 169 (SC) and Venugopal Varma vs. UOI, (1969) 74 ITR 49 (SC)* the Supreme Court, while laying down the principles to be applied in determining whether a taxing statute violates the fundamental rights, ruled that a taxing statute can be held to contravene Article 14 if it purports to impose on the same class of persons or property similarly situated an incidence of taxation that leads to obvious inequality. *(See the following cases where the general principles and scope of Article 14 have been discussed: Chunnilal vs. UOI (1996) 221 ITR 459 (MP): Geep Flashlight vs. UOI (1996) 218 ITR 638 (All); Pranlal vs. UOI (1995) 212 ITR 362 (Guj.); Seetha Rama vs. State of Karnataka ( ) 199 ITR 588 (Ker.); Shanthi vs. Asst DI (1992) 197 ITR 330 (Mad.); Banashankari vs. State of Karnataka (1992) 194 ITR 650 (Kar.))* The combined effect of these two decisions is to lay down, *inter alia*, the following basic propositions:

(i) it is for the legislature to determine the objects on which tax shall be levied, and the rates thereof;

(ii) the courts will not strike down an Act as denying the equal protection of laws merely, because other objects could have been, but are not, taxed by the legislature; for a state does not have to tax everything in order to tax something;

(iii) the legislature is competent to classify persons or properties into different categories and tax them differently, and if the classification thus made is rational, the taxing statute cannot be challenged merely because different rates of taxation are prescribed for different categories of persons or objects; and

(iv) if any taxing statute is found to contravene Article 14, it would be open to courts to strike it down as denying to the citizens the equality before the law guaranteed by that article.

Article 14 does not insist that all persons must be taxed equally or that the legislative classification must be scientifically perfect or logically complete. *(Kedar Nath vs. State of WB AIR 1953 SC 404; PB Roy vs. UOI 1972 SC 908; Banashakary vs. State of Karnataka (1990) 182 ITR 8.)* It is also well settled by a plethora of judgments that in a taxing statue, the legislature enjoys much greater latitude for selection of subjects of taxation as also for classification and that the legislative dispensations are based on an interaction of diverse economic, social and policy considerations. *(Sarala Birla vs. CWT (1989) 176 ITR 98 (SC); Federation of Hotel and Restaurant Association vs. UOI (1989) 178 ITR 97 (SC); Elel Hotels vs. UOI (1989) 178 ITR 140 (SC); Shashikant Kale vs. UOI (1990) 185 ITR 104 (SC); Bharat vs. CWT (1994) 207 ITR 1 (SC); UOI vs. Sanyasi Rao (1996) 219 ITR 330 (SC); Municipal*

*Council, Kota vs. Delhi Cloth (2001) 249 ITR 560 (SC); Banashankary vs. State of Karnataka (1990) 182 ITR 8 (Kar.); Venkateswara vs. UOI (1991) 189 ITR 741(Ori.); Sri Banashankari vs. State of Karnataka (1992) 194 ITR 650 (Kar.); Sattur's Sushrushalya vs. State of Karnataka (1992) 198 ITR 480 (Kar.); Dollar vs. UOI (1993) 204 ITR 103 (Mad.); Gopalkrishnan vs. CBDT (1994) 206 ITR 183 (Mad.); Syed vs. UOI (1994) 209 ITR 746 (Pat.); Pranlal vs. UOI (1995) 212 ITR 362 (Guj.) (wide discretion in matters of concession or exemption); Vijayan vs. UOI (1995) 215 ITR 371 (Mad.); Modi Engg vs. UOI (1996) 218 ITR 50 (Raj.); All India FTP vs. UOI (1997) 228 ITR 68 (Bom.); All India FTP vs. UOI (1999) 236 ITR 1 (Del.); DCIT vs. Central Concrete (1999) 236 ITR 595 (Cal.); Netley vs. ACAgIT (1999) 238 ITR 876 (Kar.); All India FTP vs. UOI (2002) 256 ITR 401 (Bom.); All Ker CAA vs. UOI (2002) 258 ITR 679 (Ker.))* The economic wisdom of a tax is within the exclusive province of the legislature *Titanium Equipments vs. UOI (1994) 207 ITR 566 (Mad.)* and questioning the legislative policy is beyond the domain of the judiciary. The tests of the vice of discrimination in a taxing law are accordingly, less rigorous. *(Federation of Hotel and Restaurant Assn vs. UOI ( ) 178 ITR 97 (SC); Dollar vs. UOI (1993) 204 ITR 103 (Mad.).* In order, however, to pass the test of permissible classification, two conditions must still be fulfilled:

(i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left over of the group and

(ii) the differentia must have a rational relation to the object sought to be achieved by the statute. (Budhan *vs. State of Bihar AIR 1955 SC 191; Hanif vs. State of Bihar AIR 1958 SC 731; Fed of Hotel and Restaurant Assn vs. UOI (1989) 178 ITR 97(SC); Seetha Rama vs. State of Karnataka (1993) 199 ITR 588 (Ker.); Hitech vs. UOI (1997) 227 ITR 446 (AP); Khandubhai vs. DCIT (1999) 236 ITR 73 (Guj.); B. Noorsingh vs. UOI (2001) 249 ITR 378 (Mad.)*

The classification must not be 'arbitrary, artificial or evasive' but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. (Shanthi *vs. Asst DI (1992) 197 ITR 330 (Mad.); Vijayan vs. UOI ( ) 215 ITR 371 (Mad.); All India FTP vs. UOI (1999) 236 ITR 1 (Del.))*

In examining the allegations of a hostile discrimination, what is looked into is not the phraseology, but the real effect of the provision. *Federation of Hotel and Restaurant Association of India vs. UOI (1989) 178 ITR 97 (SC).* Thus, for instance, a discriminatory exemption provision *(Dutta vs. Lawrence (1968) 68 ITR 272 (SC).)* or a statute conferring an arbitrary power *(CIT vs. Kelvinator (2002) 256 ITR 1 (FB).)* may be held to be ultra vires Article 14, but a mere possibility of abuse of power would not render a provision unconstitutional. (Sant *Lal vs. UOI (1996) 222 ITR 375(P & H))*. The court would also not ordinarily interfere with the choice of the legislature in matters pertaining to the mode and manner of recovery of taxes. *(Sant Lal vs. UOI (1996) 222 ITR 375(P & H))*

Apart from Article 14, challenges to the constitutional validity of taxing statutes have been based on Article 19(1)(g), which provides that all citizens shall have the right to practice any professions, or to carry on any occupation, trade or business. This Article is, however, subject to Article 19(6), which permits the imposition of reasonable restrictions on the exercise of this right 'in the interest of the general public'. Therefore, any such reasonable restriction in the interest of the general public would be saved by cl (6) of Article 19; *(Geep Flashlight vs. UOI (1996) 218 ITR 638 (All); Dollar vs. UOI (1993) 204 ITR 103(Mad.))*, but not a restriction that is unreasonable. *(Venkateswara vs. UOI (1991) 189 ITR 741(Ori.))* In the case of *Federation of Hotel and Restaurant Association of India, (1989) 178 ITR 97 (SC), followed in Hotel Manasarovar vs. UOI (1995) 213 ITR 668 (AP); Express Hotels vs. State of Gujarat (1989) 178 ITR 151 (SC) (mere excessiveness of a tax or that it affects the earnings cannot per se be held to be violative of this Article); Sukhdev vs. UOI (1995) 211 ITR 157(Guj.) (mere hardship to some persons is insufficient for the purpose of invalidating a section under this Article) the* Supreme Court observed :

A taxing statute is not, per se, a restriction of the freedom under Article 19(1)(g). The policy of a tax, in its effectuation, might, of course, bring in some hardship in some individual cases. But that is inevitable.... Every cause, it is said, has its martyrs. Then again, the mere excessiveness of a tax or even the circumstances that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not, per se, and without more, constitute violation of the rights under Article 19(1)(g).

Further, any restraint intended to curb the chances and opportunities to use or create black money should not be regarded as curtailing the freedom of trade or business. (Attar *Singh vs. ITO (1991) 191 ITR 667(SC).)*

Further, the Parliament has the power to levy tax retrospectively, provided it is reasonable and in public interest to do so. In *Ramakrishna vs. State of Bihar (1963) 50 ITR 171 (SC)* the Supreme Court dealt with the question of retrospective operation of a taxing statute violating the fundamental rights.

In *Ujjambhai vs. State of UP (AIR 1962 SC 1621.)* a majority of the Supreme Court held that an order of assessment passed within jurisdiction and under a valid law cannot be regarded as violating the fundamental rights merely because it proceeds upon a misconstruction of the statute; therefore the validity of such an order cannot be challenged in a petition to the Supreme Court under Article 32 of the Constitution, though it may be challenged in a petition to the High Court under Article 226. Moreover, a fundamental right being in the nature of a prohibition to the state, an individual cannot waive it. *(Bashesharnath vs. CIT (1959) 35 ITR 190 (SC).)*

### (c) Doctrine of Reading Down

The theory of 'reading down' is a rule of interpretation resorted to by the courts when a provision, read literally, seems to offend a fundamental right, or falls outside the competence of the particular legislature; reading down a provision is permissible as a part of the judicial process. *(Sanyasi Rao vs. Govt of AP (1989) 178 ITR 31 (SC), affirmed by SC ( ) 219 ITR 330 (SC).)* This doctrine can be resorted to in giving the statute reasonable meaning and making it constitutionally valid. *(Omkar Kanwar vs. UOI (2002) 254 ITR 337 (Guj.); CWT vs. Jindal (1992) 194 ITR 539 (Ker.))* It has the principle effect that, where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the legislative power, the court will construe it in more limited sense so as to keep it within its power. *(Venkateswara vs. UOI (1991) 189 ITR 741 (Ori.))*

## 4. CONSTITUTIONAL REMEDIES AND WRITS

### (a) Articles 32 and 226

An aggrieved party has a right to approach the Supreme Court under Article 32, which itself is a fundamental right, or a High Court under Article 226, for an appropriate writ, direction or order. These are extraordinary and high prerogative remedies. Article 32 can be invoked only in the case of a contravention of a fundamental right, whereas Article 226 can be invoked in case of a violation of a fundamental right or any other legal right. The power of judicial review over legislative action vested in the Supreme Court under Article 32 and in the High Courts under article 226 is an integral and essential feature of the Constitution, constituting a part of its 'basic structure'. (Chandra *Kumar vs. UOI (1997) 228 ITR 725(SC).)*

The five writs referred to in Articles 32 and 226 are :

#### *(i) Mandamus*

Mandamus is a judicial remedy which is in the form of an order from the Supreme Court or High Court to any government, court, public authority or public corporation to do or to forbear doing some specific act which that body is obliged under law to do or refrain from doing, and which is in the nature of a public duty and in certain cases a statutory duty.

#### *(ii) Prohibition*

A writ of prohibition is an order directed to an inferior court or authority forbidding it from continuing with a proceeding on the ground that the proceeding is without or in excess of jurisdiction or contrary to the laws of the land. *(East India Comm vs. Coll AIR 1962 SC 1893, 1903.)*

***(iii) Certiorari***

A writ of certiorari is an order issued to an inferior court or authority exercising judicial or quasi-judicial functions to investigate and decide the legality and the validity of the orders passed by that court or authority. *(Prabodh vs. State of UP AIR 1985 SC167.)* The difference between the writ of prohibition and the writ of certiorari is that while a writ of prohibition is preventive and is used before a decision is made by the inferior court or authority, a writ of certiorari is corrective or remedial and is used after the decision has been made.

***(iv) Quo Warranto***

A writ of quo warranto ('what is your authority) is a judicial remedy against an occupier or usurper of an independent substantive public office, franchise or liberty. It controls appointments to public offices and also protects a citizen from being deprived of a public office to which he may before the Court, in order to let the court know on what ground he has been confined and to set him free if there is no legal jurisdiction for the imprisonment *(State of Bihar vs. Kameshwar AIR 1965 SC 575.)*

**(b) Appeals to the Supreme Court**

Article 132 to 135 of the Constitution deal with the regular appellate powers of the Supreme Court. Article 139A enables the Supreme Court to withdraw or transfer cases from one court to another court.

**(c) Special Leave Petitions**

Article 136 of the Constitution confers extraordinary powers on the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order passed or made by any court or tribunal in India. The jurisdiction conferred by art 136 is divisible into two stages; the first stage is up to the disposal of the prayer for special leave to appeal; the second stage commences if and when the leave to appeal is granted and the petition for special leave to appeal is converted into an appeal. *(Kunhayammed vs. State of Ker (2000) 245 ITR 360 (SC).)* While hearing a special leave petition the Supreme Court does not exercise its appellate jurisdiction; it merely exercises its discretionary jurisdiction to grant or not to grant leave to appeal. (Kunhayammed *v State of Ker (2000) 245 ITR 360 (SC).)* Although the power conferred upon the Supreme Court under this article is not subject to any limitation, the Supreme Court has itself imposed certain limitations upon its powers *(Ramsaran vs. CTO AIR 1962 SC 1326; Chandra Kumar vs. UOI (1997) 228 ITR 725 (SC).) and* it exercise its discretion to allow special leave to appeal sparingly and in exceptional cases only. (Bharat *Bank vs. Employees AIR 1950 SC 188; Pritam Singh vs. State [1950] SCR 452.)*

**(d) *Supervisory Jurisdiction of High Courts***

Article 227 of the Constitution confers upon every High Court the power of superintendence over all the subordinate courts and inferior tribunals functioning in the state, with the object of securing that all such institutions exercise their powers and discharge their duties properly and in accordance with law. *(CWT vs. Guna Shenoy 197 ITR 325 (Ker.))* The nature of this power is judicial as well as administrative. The power conferred by this provision on every High Court is unlimited and unfettered, *(Waryan Singh vs. Amarnath AIR 1954 SC 215; Banerji vs. Mallikarjun AIR 1960 SC 137.)* and has been held to be a part of the basic structure of the Constitution. *(Chandra Kumar vs. UOI (1981) 128 ITR 725 (SC).)* However, in exercising this supervisory power, the High Court does not sit or act as an

appellate authority. *(CWT vs. Guna Shenoy (1992) 197 ITR 325 (Ker.); Titanium Equipments vs. UOI (1994) 207 ITR 566 (Mad.))*.

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# INTERPRETATION OF STATUTE

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The concept of interpretation of a Statute cannot be a static one. Though "Maxwell on Interpretation of Statutes" is a virtual Bible for analysing the concept, even still, courts have departed from the principles laid down therein depending upon the social needs of the community, economic exigencies of time and several other factors.

One of the controversial areas in which courts had to interpret the taxing statute is relating to the retrospective operation of the statute. This can be viewed with the background of various amendments made in sections 115J, 115JA and 115JB of the Income-tax Act, 1961. Let us look at some of the decided cases dealing with interpretation of retrospective nature of an amendment.

a) In *Heydon's Case*, in 1584, it was resolved by the Barons of the Exchequer "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1) What was the common law before the making of the Act (2) What was the mischief and defect for which the common law did not provide, (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and, (4) The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro private commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico".* In 1898, Lindley M.R: said: "In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case* to consider how the law stood when the statute to be construed, was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief." Although Judges are unlikely to propound formally in their judgements the four questions in *Heydon's Case,* consideration of the "mischief" or object of the enactment is common, and will often provide the solution to a problem of interpretation.

b) If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result".

c) The construction of a statute must not so strain the words as to include cases plainly omitted from the natural meaning of the language. Thus an enactment requiring that public houses be closed at certain hours on Sundays was incapable of being construed as extending to Christmas Day; and a rule relating to applications for new trials in cases tried by a jury did not extend to cases tried by an official referee. Nevertheless, even where the usual meaning of the words falls short of the object of the legislature, a more extended meaning may be attributed to them, if they are fairly susceptible of it. Previous editions of this work have referred to this relaxation of strictly literal principles of interpretation as *beneficial construction:* and the modern cases provide many instances of the Judges' reluctance to stand upon the letter of a statute. They will not, of course, supply omissions, but where they are faced with a

choice between a wide meaning which carries out what appears to have been the object of the legislature more fully, and a narrow meaning which carries it out less fully or not at all, they will often choose the former. Beneficial construction is a tendency, rather than a rule.

(Emphasis supplied)

d) In the case of *Thomson vs. Lord Clan Morris*, *Lord Lindley M.R.* stated that in interpreting any statutory enactment regard must be had not only to the words used, but also to the history of the Act and the reasons which lead to its being passed.

e) In the case of *CIT vs. Sundaradevi (1957) (32 ITR 615) (SC)*, it was held by the Apex Court that unless there is an ambiguity, it would not be open to the Court to depart from the normal rule of construction which is that the intention of the legislature should be primarily to gather from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and considered on surrounding circumstances and constitutionally proposed practices.

f) *Lord Denning in Sea Fort Tea Estates, 1949 (2) AER 155 CA* has opined that in some situations, the Court supplement the words of the statute to give the force and life to the intention of the legislature and are compelled to perform some judicial services.

g) In the case of *CIT vs. National Taj Traders (1980) (121 ITR 535)*, it has been held by the Supreme Court that it is permissible for the Courts to modify any of the statutes if the literal construction or its clause leads to manifestly absurd anomalous results which could not have been intended by the legislature.

h) In the case of *CIT vs. Vegetable Products Ltd. (1973) (88 ITR) 192 Y. Mahindra & Mahindra Ltd. (1983) (144 ITR 225)* it has been held by the Supreme Court that if any of the taxing provision is ambiguous or capable of more meaning than the one used, then the courts can take the interpretation which favours the assessee, more particularly so, when the provision relates to imposing taxes or levy of penalty.

i) The Supreme Court in the case of *CIT vs. J. H. Gotla (1985) (156 ITR 323)* has held that for equity and taxation are often strangers and attempts should be made that these do not always remain so and if construction results in equity rather than injustice such construction. should be preferred to the literal construction.

In view of the aforesaid discussion, the expression loss brought forward appearing in Explanation (iii) of Section 115JB would mean loss brought forward without adjustments made pursuant to High Court order sanctioning compromise or arrangement.

A perennial controversy arising for interpretation of a taxing statute concerns with the preference of form over substance or vice versa.

Thus, interpretation of statutes is keenly debated in taxing matters, as there are several ways of interpretation which cannot be covered in a single article. However, we can look to one more battle scene in which the courts have debated at length viz. whether while interpreting the taxing statute courts must look into at the plain language of the statute or must also yield to equity.

It is very often said that equity and taxation are strange bed fellows but even while accepting this dictum which forbids the courts to read the plain language of the statute, the courts have tried to avoid interpretation which leads to absurd results. The Supreme Court in the case of *CIT vs. Sun Engineering (1992) (198 ITR 297) (SC)* held as follows:

"It is neither desirable nor permissible to pick out a word or a sentence from the judgement of the Supreme Court divorced from the context of the question under consideration and treat it to be the complete law declared by the Court. The judgement must be read as a whole and the observations from the judgement have to be considered in the light of the questions which were before the Court. A decision of the Supreme Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, courts must carefully try to ascertain the true principle laid down by the decision."

The Supreme Court, again in the case of *Madhavrao Scindia vs. Union of India AIR 1971 SC 530 at page 533* held as under:

"Precedence – It is not proper to regard a word a clause or a sentence occurring in a judgement of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgement".

This judgement was delivered by the Constitution Bench consisting of 11 Judges. As early as in (1949) 17 ITR at page 493, the Chief Justice Chhagla has held that the courts should as far as possible try to avoid interpretation which leads to absurd results.

While dealing with a very ingenuous argument advanced by R.J. Kolah on the interpretation of Section 23A which applies to short declaration of dividend, he argued that the provisions will not apply to the case if no dividends are declared at all. The High Court held that this would lead to absurd results in rendering a person who declares dividend not as per requirement of the statute but would absolve a person who commits total default in not declaring dividend.

Similar conflict arises in the court's mind in determining the priority or form over substance and vice versa. There are number of judgments and notable amongst them are: *Rogers vs. CIT (1946) 14 ITR 336* which was overruled by Supreme Court in *CIT vs. Kharwar (1969) 72 ITR 603 (SC).* This controversy of "form over substance" on many cases culminated in the Supreme Court's judgement in *McDowell & Sons vs. CTO (1985) 154 ITR 148* which again disapproved B.M. Kharwar's case.

These controversies appear to be unending in view of the latest judgement of Supreme Court in the case of *Union of India vs. AZAADI BACHHAO ANDOLAN (2003) 263 ITR 706.*

Suffice it to say that the tenor of the Judicial pronouncements lead to a position where form is important and it has to be discarded only if it is an artifact or tax saving device.

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# GENERAL CLAUSES ACT, 1897 – INTERPRETATION

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## 1. INTRODUCTION

1.1 The General Clauses Act, 1897 is a Central Law which does not change the provisions of any statutory enactment , but as per its statement of objects and reasons proposes to shorten the language of statutory enactments and provides for the uniformity of expression.

1.2 There are also further General Clauses of various States since the subject covered by the General Clauses Act is a part of the Concurrent list of Schedule VII of the Constitution.

1.3 In other words it is a sort of **default statutory dictionary** and provides for the legislative meaning of common terms occurring in enactments, **provided they are not defined in those enactments.**

## 2. SCOPE WITH REFERENCE TO STATUTORY ENACTMENTS

2.1 It also provides the interpretation and guidance on certain important matters in relation to statutory enactments as follows:

a) Amendment, repeal and re-enactment of statutes and their effect and time of operation

b) Scope of the term “LAW”; i.e., what it includes and what it excludes.

c) Prospective and retrospective operation of statutes

d) Certain presumptions which are implied in the interpretation of a statute when nothing is stated therein

e) Mode of service of notices and documents and certain presumptions thereto, for example that the refusal of a Registered Letter by the addressee amounts to good service.

f) Computation of limitation period and distances, when nothing is mentioned in the particular statutory enactment.

g) Certain constitutional principles like *Nemo debet bis vexari pro una et eadem causa* (No person shall be twice vexed for the same offence ie the Doctrine of double jeopardy as per Article 20 of the Constitution)

h) Miscellaneous matters relating to the presumptions, scope and limitations of powers, appointments and interpretation of statutory terms, when nothing is mentioned in the particular statutory enactment.

2.2 Thus it may be safely said that the General Clauses Act is basically a clarificatory general statute which is an aid to the judiciary in interpretation of terms relating to

enactments with a degree of uniformity so that the administration of justice is consistent and not subject to diverse judicial interpretation of the same word or phrase by different judges.

## 3. SPECIAL LAW OVERRIDES GENERAL LAW

3.1 However, as the name suggests, it is a general law and will always be overridden or superseded by a special law as per the canons of judicial interpretation. The Latin maxim *"Generalia specialibus non derogant"* is one of the cardinal maxims of interpretation and means that a general law will always be superseded by a special law. (State *of Gujarat vs. Ramjibhai AIR 1979 SC 1098)*

3.2 Thus since taxing statutes are always special laws and most often self contained enactments which even oust the jurisdiction of Courts in many cases, they would most definitely prevail over the General Clauses Act, 1897, when they define the scope of terms or procedures.

However the general rule would apply wherever the special statute does not define the scope or restricts the scope, the general rule would apply as controlled or cut down by the special rule. *(South India Corporation Pvt. Ltd. vs. Board of Revenue AIR 1964 SC 207)*

## 4. CARDINAL RULES OF INTERPRETATION OF TAXING STATUTES

The cardinal rules of interpretation of Taxing statutes may be briefly enumerated as follows:

**4.1 Literal rule:** This means that if the language of the statute is clear and unambiguous, it would be erroneous to discard the plain meaning of the words even if the consequence of following the plain meaning would lead to an injustice. *(CIT vs. T. V. Sunderam Iyyengar & Sons Pvt. Ltd. (1975) 101 ITR 764 SC).* Thus if an assessee falls within the four corners of a statute, he is to be taxed, if not, no tax is to be levied. *(In Re: Mickelthwatt). Therefore* the literal rule demands that if the meaning of the statutory construction is clear the courts must apply the same regardless of the result.

However if there is a doubt about the sense in which a provision is to be understood, it must be construed in order to harmonise with the Legislative intention behind the enactment (*CIT vs. Chandanbehn Maganlaal (2002) 120 Taxmann 38 Guj).* This is always subject to the caveat that the taxing statute must not be declared unconstitutional.

Thus if the interpretation of the particular term is not defined in the statute per se, then the General Clauses Act would apply if it so defines the term.

**4.2 Golden rule:** The Golden rule implies that if a strict interpretation of a statute would lead to an absurd result then the meaning of the words should be so construed so as to lead to the avoidance of such absurdity. A further corollary to this rule is that in case there are multiple constructions to effect the Golden rule the one which favours the assessee should always be taken. This rule is also known as the Rule of Reasonable Construction. However the application of this rule in the interpretation of taxing statutes is rather limited since the literal rule is more often applicable and it is oft remarked that equity and taxation are strangers (*Grey vs. Pearson (1857) 6HL Cas 61*)

**4.3** **Mischief rule:** This rule is also one of the cardinal rules of interpretation when the words of a taxing statute are ambiguous and incapable of a literal interpretation and generally takes into account four parameters, namely

i) What was the Law prior to enactment of the statute in question

ii) What was the defect or mischief for which the earlier law did not provide

iii) What remedy had the Legislature intended to remedy the defect

iv) The true Legislative intent behind the remedy.

This rule would come into play only if the words of the taxing statute were silent or ambiguous on an issue and the General Clauses Act also did not throw light on the interpretation.

**4.4** **Benefit to the assessee:** One of the most important principles of construction of a taxing statute is that the assessee may so arrange his affairs to minimize the incidence of taxation. This was a landmark judgment given in *IRC vs. Duke of Westminster* and is therefore also known as the Duke of Westminster Principle.

However the Courts in India have severely watered down this principle after McDowell's case wherein it was decided that if an assessee merely follows the letter of the law and contravenes the spirit and legislative intent behind it, the avoidance of tax thereby would be equivalent to evasion. Further the taxing statute must not be declared unconstitutional.

**4.5** **Charging section should be strictly construed while the procedural sections should be liberally interpreted**.

This is also a very practical rule in the interpretation of taxing statutes and the charging section should be liberally construed while the procedure should have the widest possible ambit so as to ensure that no one has a vested right of procedure. The General Clauses Act, 1897 can be a valuable aid in giving effect to this rule of interpretation when the taxing statute is silent.

## 5. INSTANCES OF APPLICATION OF THE GENERAL CLAUSES ACT, 1897 TO THE INCOME-TAX ACT, 1961

Now let us consider a few particular cases when the General Clauses Act would assist in the interpretation of the Income-tax Act 1961 as amended by the latest Finance Bill.

**A)** **Person** as defined under section 2(31) of the Income-tax Act, 1961 *"person" includes* –

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clauses;

*Explanation.- For the purposes of this clause, an association of persons or a body of individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not such person or body or authority or juridical person was formed or established or incorporated with the object of deriving income, profits or gains*

This is an inclusive definition which is much beyond the scope of person as defined in section 2(42) of the General Clauses Act, 1897 which merely states that *"Person" shall include any company or association or body of individuals whether incorporated or not.*

Thus the definition of person in relation to proceedings under the Income- tax Act, 1961 would be as per its own section 2(31) and not as per the General Clauses Act, 1897. Local Authority is not defined in the Income-tax Act separately but however defined under section 2(31) of the General Clauses Act, 1897 as *"shall mean a municipal committee, district board, body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund"*

Thus a local authority is a person under the Income-tax Act, 1961, but what constitutes a local authority is defined in The General Clauses Act, 1897.

**B) Document:** A similar case would arise in the definition of a document

(22AA) "document" includes an electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000;

However section 2(18) of the General Clauses Act, 1897 defines a document as "shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means of which is intended to be used or which may be used, for the purpose of recording that matter"

This is an illustration when the special law, namely the Income Tax widens the scope of the inclusive definition in the General Clauses Act to include electronic records within the ambit of definition of a document.

**C) Presumption against retrospectivity**

The General Clauses Act has a presumption against retrospectivity clearly embodied in section 5. This means that any statute will not be retrospective in its operation unless the statute clearly mentions it. Many provisions of the Income-tax Act are mentioned as having retrospective operation and only these provisions will have a retrospective operation and all other provisions will have only a prospective operation.

Similarly amendments are also not retrospective in operation unless the special statute specifically mentions it.

**D) Repeal**

The General Clauses Act in section 6 provides for the express repeal of any enactment and there is no provision as to implied repeal. Thus any provision, notification or rule in the Income-tax Act needs to be expressly repealed and an assessee cannot presume implied repeal on the strength of a contrary notification at a later date.

**E) Limitation and offences:** Since periods of limitation are specified in the Income-tax Act 1961, the General Clauses Act, 1897 may only be used to clarify how the time for limitation will run, in case the mode is not specifically mentioned in the provisions of the Income-tax Act, 1961

As far as offences are concerned the Income-tax Act specifically mentions and quantifies the penal and prosecutions chargeable under it. These will hold sway against the presumption of "done in good faith" as embodied under section 2(22) of the General Clauses Act, 1897 unless the provision of Income-tax Act, 1961 specifically mentions that "done in good faith" will be a good defence to non applicability of the provisions.

**F) Doctrine of double jeopardy**

Section 26 of the General Clauses Act, 1897 specifically provides that a person cannot be punished twice for the same offence under two or more enactments under the principle of *Nemo debet bis vexari pro una et eadem causa* (No person shall be twice vexed for the same offence ie the Doctrine of double jeopardy as per Article 20 of the Constitution). However a point to note here is that penalty and prosecution under the Income-tax Act or Central Excise Act may be made for the same offence as the respective Act so provides, and the section 26 of the General Clauses Act will have no application. Further just because a penal proceeding under the Central Excise Act has been adjudicated in favour of the assessee, does not mean that the jurisdiction of the Authorities under the power conferred by the taxing statute to impose penalty is taken away

*(A. K. Chakraborty vs. State of West Bengal 1999(3) All India Cr. L.R. 232 at page 237)*

**G) Issue and service of notices**

Generally taxing statutes mention the power of the authorities to issue and serve notices. However if they do not specify the detailed mode of such service, section 27 of the General Clauses Act, 1897 prescribes that service by Registered Post Acknowledgement Due, when refused amounts to good service.

**H) Presumptions of powers conferred by a taxing statute**

Unless there are provisions to the contrary in a taxing statute, the General Clauses Act, 1897 embodies the following presumptions

a) Under section 21 the power to make rules, regulations, notifications etc. would include the power to add, alter, amend, vary or rescind such rules, notifications etc.

b) Sections 15 and 16 of the General Clauses Act, 1897 confer the presumption that the power to appoint conferred by a taxing statute include the power to dismiss or appoint ex-officio.

**I) Gender and number**

Section 13 of the General Clauses Act, 1897 presumes that in any Central statute unless there is anything to the contrary, the words importing to the masculine gender shall include the feminine and the singular shall include the plural.

However section 88C of the Income-tax Act 1961, which confers a tax rebate on all women below sixty five years of age would clearly be out of the scope of section 13 of the General Clauses Act, 1897.

## 6. CONCLUSION

In conclusion, while discussing the General Clauses Act, 1897 from the perspective of interpretation of taxing statutes one must bear in mind the quote of *L J Denning in Seaford Court Estates vs. Asher (1949) 2 All ER 155* "..... a judge must not alter the material of which the Act is woven but he can and should iron out the creases ..... When a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of the Parliament ..... and then he must supplement the written words so as to give 'force and life' to the intention of the Legislature."

□□

# INTERPRETATION OF TAX LAWS
# 72 FREQUENTLY ASKED QUESTIONS

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## I. GENERAL RULES

### Q.1 What is 'Interpretation of law'.

**Ans.** According to Salmond 'Interpretation or Construction' means "the process by which the Courts seek to ascertain the meaning of the legislature through the medium of authoritative forms in which it is expressed.".

The main body of the law is to be found in statutes, together with the relevant statutory instruments and in case law as enunciated by Judges in the Courts. But the Judges not only have the duty of declaring the law, they are also frequently called upon to settle disputes as to the meaning of words or clauses in a statute.

Statutes are normally drafted by legal experts who are experts in the particular branch of law of which the statute was to be a part. Although such persons are skilled in the law, due to the volume of legislation the statutes are often obscure and cryptic and we find courts and lawyers are busy in unfolding the meaning of ambiguous words and expressions in a statute. The age old process of application of the enacted law has led to formulation of certain rules of interpretation or construction.

### Q.2 What are the basic rules of Interpretation governing the taxing statutes in general?

**Ans.** Rules of interpretation or canon of interpretation

The first and the most elementary rule of construction is that it is to be assumed that the words and phrases of legislation are used in their technical meaning if they have acquired one, or otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be construed according to the rules of grammar.

The rule of construction is "to intend the legislature to have meant what they have actually expressed". The object of all interpretation is to discover the intention of Parliament but the intention of Parliament must be deduced from the language used, for it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.

When Parliament enacts law, the law must be understood with reference to the language used in the provision construed in the light of the scheme of the Act and object of the statute and the provisions therein.

Where the plain literal expression of the statutory provision produces a manifestly unjust result, which could never have been intended by the legislature, the Court can modify the language to achieve the intention of the legislature and produce a rational construction.

### A) Literal rule

If the language of the statute is clear and unambiguous, words must be understood in their plain meaning. The wordings of the Act must be construed according to its literal and grammatical meaning, whatever the result may be.

There is no room for any intendment. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

*ICAI vs. Price Waterhouse, (1997) 90 Comp. Case 113, 140, 141 (SC)*

*State of West Bengal vs. Scene Seven P. Ltd. AIR 2000 SC 3089, 3094*

*Harbajan Singh vs. Press Council of India (2002) 3 SCC 722, 727*

**B) Intention of Legislature**

The intention of the legislature assimilates two aspects:

a) In one aspect it carries the concept of "meaning', i.e. what the words mean.

b) In another aspect, it conveys, the concept of purpose and object or the reason and spirit pervading through the statute.

The dominant purpose of construction of any statutory provision is to ascertain the intention of the legislature and the primary role is to ascertain the same by reference to the language used. The Supreme Court in *Doypack Systems Pvt. Ltd. vs. UOI [1998 (2) SCC 299]* laid down :

"It has to be reiterated that the object of interpretation of a statute is to discover the intention of Parliament as expressed in the Act. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context that intention, and therefore, the meaning of the statute, is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous be applied as they stand". The object of all interpretation is to discover the intention of Parliament, but the intention of Parliament must be deduced from the language used."

"It is settled law that the expression used in a taxing statue would ordinarily be understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative intention. It is equally settled law that, if the language is plain and unambiguous, one can only look fairly at the language used and interpret it to give effect to the legislative intention."

*CIT vs. Gwalior Rayon Silk Mfg. Co. Ltd. (1992) 196 ITR 149 (SC)*

*Keshavji Ravji & Co. vs. CIT (1990) 183 ITR 1 (SC)*

*K.P. Varghese vs. ITO (1981) 131 ITR 597 (SC)*

**C) The mischief rule of interpretation (Heydon's rule)**

A statute is to be construed so as to suppress the mischief in the law and advance the remedy. This was set out in Heydon's case (1584) 3 Co. Rep. 7a. Under this rule the judge will look at the Act to see what was its purpose and what mischief in the common law it was designed to prevent.

Broadly speaking, the rule means that where a statute has been passed to remedy a weakness in the law, the interpretation which will correct that weakness is the one to be adopted.

*CIT vs. Shahzada Nand & Sons. (1966 ) 60 ITR 392 (SC)*

*Classic Builders & Developers vs. UOI (2001) 251 ITR 492, 497 (MP)*

*Reckitt Colman of India Ltd. vs. ACIT (2001) 252 ITR 550 (Cal.)*

**D) Strict construction of penal law**

Remedial statutes are known as welfare, beneficial or social justice oriented legislations. Penal statutes, on the other hand, are those which provide for penalties for contravention of the law and are directed against the offender in relation to the state by making him liable to imprisonment, fine, forfeiture or other penalty.

A remedial statute receives a liberal construction, whereas a penal statute is strictly construed. In case of remedial statutes the doubt is resolved in favour of the class of persons for whose benefit the statute is enacted; whereas in case of penal statutes the doubt is resolved in favour of the alleged offender.

The principle applied in constructing a penal act is that if, in construing the relevant provisions, "there appears any reasonable doubt or ambiguity", it will be resolved in favour of the person who would be liable to the penalty. If there are two reasonable constructions we must give the more lenient one. The court must always see that the person to be penalised comes fairly and squarely within the plain words of the enactment. It is not enough that what he has done comes substantially within the mischief aimed at by the statute.

"The subject is not to be taxed without clear words for that purpose ....."

*CIT vs. Provident Inv. Co. Ltd. (1954) 32 ITR 190 (SC)*

*J.K. Steel Ltd. vs. UOI AIR 1970 SC 1173*

*CIT vs. Indo Oceanic Shipping Co. Ltd. (2001) 247 ITR 247 (Bom)*

*Hansraj & Sons vs. State of J & K (2002) 6 SCC 227, 237-39*

**E) The Golden Rule : Purposive interpretation**

This rule is to some extent an extension of the literal rule and under it the words of a statute will as far as possible be construed according to their ordinary, plain, and natural meaning, unless this leads to an absurd result. It is used by the courts where a statutory provision is capable of more than one literal meaning and leads the judge to select the one which avoids absurdity, or where a study of the statute as a whole reveals that the conclusion reached by applying the literal rule is contrary to the intention of Parliament.

A construction which would defeat the very object of the legislature should be avoided.

*Keshavji Ravji & Co. vs. CIT (1990) 183 ITR 1 (SC)*

*CIT vs. Gwalior Rayon Silk Mfg. Co. Ltd. (1992) 196 ITR 149 (SC)*

*Vikrant Tyres Ltd vs. ITO (2001) 247 ITR 821, 826 (SC)*

**F) Ejusdem generis rule**

Under this rule where general words follow particular words the general words are construed as being limited to persons or things within the class outlined by particular words.

The words used together should be understood as deriving colour and sense from each other. They should be read together as one.

The rule of ejusdem generis is to be applied "with caution" and "not pushed too far". It may not be interpreted too narrowly or unnecessarily if broad based genus could be found so as to avoid cutting down words to dwarf size.

— *U.P. State Electricity Board vs. Hari Shanker Jain AIR 1979 SC 65*

— *Rohit Pulp & Paper Mills Ltd. vs. Collector of Central Excise AIR 1991 SC 754*

**G) Expressio unius est exclusio alterius**

The expression of the thing implies the exclusion of another.

**Q.3. What are the principles of natural justice?**

**Ans.** Principles of natural justice are soul of an administration of justice and needs to be adhered to in order to make the order just and fair.

Natural justice is an important concept in administrative law. The doctrine of natural justice is a facet of fair play in action and if a statutory provision can be read consistent with the principles of natural justice, the court must and can do so as the legislature is presumed to intend to act in consonance with those principles.

a) **Nemo debet essejudex in propria causa**

No man shall be a judge in his own cause or the deciding authority must be impartial and without bias; and

b) **Audi alteram partem**

Hear the other side, or both the sides must be heard or no man should be condemned unheard or that there must be fairness on the part of the deciding authority.

The above principle got acceptance in India by The Supreme Court in the case of *A.K. Kraipak vs. UOI AIR 1970 SC 150* and *Maneka Gandhi vs. UOI AIR 1978 SC 597.*

**Q.4. Whether order passed in violation of principles of natural justice is void ab-initio?**

**Ans.** Any order made in violation of principles of natural justice is void and a nullity.

*Shreeram Durga Prasad [RB vs. Settlement Commission (1989) 176 ITR 169 (SC)]*

*Nawaabkhan vs. State of Gujarat AIR 1974 SC 1471*

"..... Any decision which is unfair and arbitrary fall foul of the principles of Article 14 of the Constitution of India which envelops within itself the requirement of fairness which, in turn, in these days is a requirement of the principles of natural justice. ..."

*CWT vs. Jagdish Prasad Choudhary (1995) 211 ITR 472 (Patna) [F.B.]*

The principles of natural justice are so fundamental that it is not to be construed as a mere formality. Where the materials relied upon are not enclosed in a show cause notice, there is no sufficient opportunity.

*Appropriate Authority vs. Vijay Kumar Sharma (2001) 249 ITR 554 (SC)*

The right is so fundamental that the failure to observe the principles of natural justice cannot be made good in appeal.

Lack of opportunity before the Assessing Officer cannot be rectified by the appellate authority by giving such opportunity.

*Tin Box Co. vs. CIT (2001) 249 ITR 216 (SC)*

**Q.5 Whether irregularity in exercise of jurisdiction will render the order void.**

**Ans.** Jurisdiction is a matter, which is at the root of any valid proceedings. Valid service of a valid notice within time is the foundation of a valid assessment

(a) *Jurisdiction is not a matter of consent as held in the case of Sarita Jain vs. CIT (2003) 261 IR 499 (Del.)*

(b) Service of Notice is not a mere procedural requirement

*Upadhyaya (RK) vs. Shanabhai P. Patel (1987) 166 ITR 163 (SC)*

(c) Need for proper sanction prior to filing a prosecution case is a matter of jurisdiction

*Bohra (SA) ITO vs. Krishna Construction Co. (1998) 230 ITR 708 (Guj)*

(d) In ***CIT vs. Bharat Kumar Modi (2000) 246 ITR 693 (Bom).*** The court held that an irregularity in the exercise of jurisdiction cannot result in annulment of the entire assessment proceedings. The appellate authorities were justified in setting aside the assessment.

**Q.6. What is the theory of form and substance?**

**Ans:** In revenue matters, what is material is the substance of the transaction and not the form. The doctrine of substance over the form was cited with approval by House of Lords in the following cases:

(a) *Secretary of State in Council of India vs. Scobel (1903) 4 TC 618 (HL)*

(b) *Duke of Westminster vs. IRC (1936) 19 TC 490 (HL)*

(c) *IRC vs. Wesleyan General Assurance (1940) 30 TC 11 (HL)*

(d) *Sir Kikabhai Premchand vs. CIT (1953) 24 ITR 506 (SC)*

(e) *CIT vs. Kharwar (DM) (1969) 72 ITR 603 (SC)*

(f) *Panipat Woollen & General Milks Co. Ltd. (1976) 103 ITR 66 (SC)*

**Q.7 When two interpretations are possible, how should the court interpret the provision?**

**Ans.** Where a provision in a taxing statute can be reasonably interpreted in two ways, that interpretation which is favourable to the assessee has got to be accepted.

*CIT vs. Vegetable Products Ltd. (1973) 88 ITR 192(SC).*

*Chartered Housing Bhomka Finance Corpn vs. Appropriate Authority (2001) 250 ITR 1, 18 (Kar)*

*CIT vs. A.J. Abraham Anthraper (2004) 268 ITR 417, 432 (Ker)*

*Kapti Comm. Agency vs. State of U.P. (2004) 134 STC 436 448 452 (All)*

**Q.8 What is the meaning of Doctrine of Territorial Nexus.**

**Ans.** Article 245(1) of the Constitution States "Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. Article 245(2) states. No Law made by the Parliament shall be deemed to be invalid on the ground that it would have extra – territorial operation.".

Thus it makes clear that extra-territorial operation will not make a Parliamentary law invalid.

*State vs. Narayandas AIR 1958 Bom 68(FB). AIR 1955 SC 661 at 750.*

## II. EXEMPTION – DEDUCTION

**Q.9 What is the general rule for interpretation of provisions relating to exemptions ?**

**Ans.** Provisions for deduction, exemption and relief should be interpreted liberally, reasonably and in favour of the assessee.

*CIT vs. South Arcot District Co-operative Marketing Society Ltd. (1989) 176 ITR 117 (SC),*

*CIT vs. U.P. Co-operative Federation Ltd. (1989) 176 ITR 435 (SC),*

*Bajaj Tempo Ltd. vs. CIT (1992) 196 ITR 188 (SC)*

## IV. PENALTIES

**Q.10 How to interpret the penalty provisions**

**Ans.** The rule of strict construction applies to penal provisions.

*Bhagwati Trading Co. vs. CIT (1977) 109 ITR 353*

*Ganesh Properties P. Ltd. vs. CIT (1993) 202 ITR 434 (Cal)*

In penal statutes if two possible and reasonable interpretation are possible the court must lean towards the construction which exempts the subject from penalty rather than one which imposes the penalty.

*B.K. Agarwal vs. State of Orissa AIR 1966 (SC) 2531*

*CIT vs. Vegetable Products Ltd. (1973) 88 ITR 192 (SC)*

## V. OTHER ACTS, RULES, OPINIONS

**Q.11 Whether interpretation given in different statutes of direct taxes is applicable to other Acts?**

**Ans.** Where there are different statutes in pari materia though made at different times, they will be taken and construed together as one system and explanatory to one another. This principle applies with greater force in case of taxing statutes like Income-Tax, Gift Tax, Wealth Tax which bear intimate connection with one another *(Verghese vs. CIT (1981) 131 ITR 597; C.I.T. vs. Ranga Pai (1975) 100 ITR 413) (Ker).* Accordingly it has been held that rules of valuation prescribed under one Act have to be applied to valuation issues under other Acts *(1983) 141 ITR 802 (Bom)* and *(1974) 96 ITR 87 (Mys)* and *(1985) 155 ITR 637.*

*CWT vs. Imperial Tobacco Co. of India Ltd. (1966) 61 ITR 461 (SC)*

*State of Assam vs. D. P. Barua (1970) 75 ITR 18 (SC).*

*All Kerala C.A. Associations vs. Union of India (2002) 258 ITR 679 (Ker.)*

*Nasiruddin vs. Sita Ram Agarwal (2003) 2 SCC 577, 585*

*Commissioners of Customs vs. Indian Oil Corpn. Ltd. (2004) 267 ITR 272, 277-78 (SC)*

But this principle need not apply to read special provisions of one Act into the provisions of another and vice versa *ITO vs. Varghese K.P. (1973) 91 ITR 49 (Ker)(FB)*

**Q.12. Whether opinion of Law minister is binding on Court?**

**Ans.** In *Builders Association vs. Union of India (1994) 209 ITR 877 (SC)* the court held that the opinion of law minister and reply of minister in Parliament regarding a taxing provision cannot be treated as binding on the Court.

**Q.13 Whether the reports of Select Committees, will be binding while interpreting the taxing statutes ?**

**Ans.** Reports of Commissions or Inquiry Committees preceding the introduction of a Bill have also been referred to for similar purpose, i.e. either as evidence of historical facts or of surrounding circumstances or of mischief or evil intended to be remedied. For example, reference was made to the Indian States Finance Enquiry Committee Reports in *A. Thangal Kunju Musaliar vs. Venkatachalam Potti, AIR 1956 SC 246; 29 ITR 349 (S.C.);* to the Income-tax Enquiry Report, in *CIT vs. Sodra Devi (1957) 32 ITR 615 (S.C.) (AIR 1957 SC 832);* to the Press Commission's Reports, in *Express Newspaper (Pvt) Ltd. vs. Union of India (AIR 1958 SC 578)* and to the report of a committee appointed to bring about changes in Company Law resulting in the passing of amending Act No. 65 of 1960 in *Madanlal Fakirchand Dudhediya vs. S. Changdeo Sugar Mills Ltd. (AIR 1962 SC 1543).* And, reference to the report of the Expert Committee on Financial Provisions was made in U*nion of India vs. Harbhajan Singh Dhillon (1972 83 ITR 582 (S.C.); AIR 1972 SC 1061.* In Gopalan's case, reference was made to the report of the Drafting Committee of the Constituent Assembly in interpreting Article 21 of the Constitution.

In India, reports of Select Committees or their chairmen can be studied to ascertain the meaning of an ambiguous provision. *[S.P. Gupta vs. Union of India AIR 1982 SC 149 (para 313)].* Reports of the committee which preceded the enactment of the legislation, reports of Joint Parliamentary Committee, report of a commission set up for collecting information leading to the enactment are permissible aids to construction *(R.S. Nayak vs. A.R. Antulay, (1984) 2 SCC 183).* The question in *CIT vs. P.K. Noorjahan (1997) 11 SCC 198; (1999) 237 ITR 570 (S.C.),* was whether the word 'may' in section 69 of the Income Tax Act can be read as 'shall'. The Supreme Court of India pointed out that in the Bill introduced in Parliament, the word 'shall' had been used, but during the consideration of the Bill and on the recommendation of the Select Committee, the word was substituted by the word 'may'. It was held this clearly indicates the legislative intent and hence the word cannot be read as 'shall'.

*Report of Commissions & Committees — taken into Consideration*

*Haldiram Bhujiwala and another vs. Anandkumar Deepak Kumar & Anr. (2000) 3 SCC 250*

*Rosy and Another vs. State of Kerala and others. (2000) 2 SCC 230*

Reports of a joint parliamentary committee, report of a commission set up for collecting information leading to the enactment are permissible external aids to construction.

*Nayak (RS) vs. Antulay (AR) AIR 1984 SC 684*

*Against – Asst. CIT vs. Velliappa Textiles Ltd (2003) 263 ITR 550, 560 (SC)*

*Dissenting M.V. Javali vs. Mahajan Borwell (1998) 230 ITR 1 (SC)*

**Q.14 Whether parliamentary debate can be considered for interpretation of taxing statute.?.**

**Ans.** In cases of ambiguity, the legislative debate ,which resulted in coming in to existence of the provision can be looked in to .

*S.P.Gupta vs. Union of India AIR 1982 SC 149. (para 313.) CIT vs. Mahindra & Mahindra Ltd (1983) 144 ITR225 1 (SC).*

**Q.15. Whether the Finance Ministers Speech is relevant for interpretation a provision.**

**Ans.** In *J.B. Boda &CO vs. CBDT (1997) 223 ITR 271 (SC),* the court held that the Finance Ministers speech is relevant for interpretation a provision. In *Allied Motors (P)Ltd vs. CIT (1977) 224 ITR 677 (SC).* ,the court held that the budget speech of the Finance minister and memorandum explaining the Finance Bill as also the Dept. circular showing the departmental understanding are relevant in construing the provision.

**Q.16. Whether budget speech of finance minister and memorandum explaining the provision, are relevant for interpretation?**

**Ans.** In *Allied Motors (P) Ltd vs. CIT (1997) 224 ITR 677(SC),* the court held that, finance ministers, speech, memorandum explaining the provisions are relevant in construing the provision.

In *Kumar J.C. Sinh Eileen AIR 1955 SC 515,* the court held that the statement of object and reasons of an enactment cannot be used to ascertain true meaning and effect of statutory provision, but it can certainly be seen for limited purpose of understanding the background, antecedent state of affairs object of legislation.

*CIT vs. D'costa Brother (1963) 49 ITR 1 (Bom). CIT vs. Mahindra & Mahindra Ltd. (1983) 144 ITR 225(SC)*

Finance Minister's Speech before Parliament can be relied on to throw light on object & purpose of provisions.

*Kerala State ID Corpn Lt d. vs. CIT 259 ITR 51 (SC) (2003)*

*Sound-N-Music (BR) vs. Bhardwaj (OP) 1988 173 ITR 433 (Bom)*

*Narisamha Rao (PV) vs. State CBI AIR, 1998 (SC) 2120*

**Q.17 What is the relevance of a meaning given in dictionaries and text books for interpretation?**

**Ans.** When a word is not defined in the statute a dictionary is often useful in ascertaining its meaning. Courts usually rely on standard dictionaries, such as Webster's or the Oxford Dictionary.

*CIT vs. Raja Benoy Kumar Sahas Roy (1957) 32 ITR 466 (SC)*

**Q.18 When are the provisions of the General Clauses Act applicable to interpretation of taxing statutes.**

**Ans.** The General Clauses Act has been enacted to avoid superfluity and repetition of language in various enactments. The object of this Act is to shorten the language of Central Acts, to provide as far as possible, for uniformity of expression in the Central Acts, by giving definition of series of terms in common use, to state explicitly certain convenient rules for the construction and interpretation of the Central Acts, and to guard against slips and oversights by importing into every Act certain common form clauses, which otherwise ought to be inserted expressly in every Central Act. In other words, the General Clauses Act is a part of every Central Act and has to be read into each Act unless specifically excluded. Even in cases where the provisions of the Act do not apply, courts in the country have applied its principles keeping in mind the inconvenience that is likely to arise otherwise, particularly when the provisions made in the Act are based upon the principles of equity, justice and good conscience.

*State of Punj vs. Harnek Singh (2002) 3 SCC 481, 490*

**Q.19 When there are two special statutes, both containing non obstante clauses, which will prevail.**

**Ans.** Statute latter in time shall prevail.

*Maruti Udyog Ltd vs. Ram Lal (2005) 2 Supreme Court Cases 638.*

## VI. PRECEDENTS

**Q.20. Whether circulars issued by CBDT are binding on the tax authority?**

Section 119 (1) of the Income-tax Act, 1961 specifically empower the CBDT to issue general instructions for the general administration of the Act and such instructions issued are binding on the officers of the Department. The only exception is that such instructions shall not be issued in a particular case nor shall it interfere with the exercise of judicial powers by the appellate authorities. As circulars of CBDT are binding on the authorities and if in spite of his attention being drawn to it, if an authority refuses to follow it, such orders could be set aside by the Appellate Authorities on the sole ground that the ITO was bound to follow the circular. In *Navneetlal Zaveri vs. AAC (1965) (56 ITR 198) (SC)* the Supreme Court laid down that the circulars are binding on the authorities, and they are bound to follow them. In both Navneetlal Zaveri and Ellerman Lines Ltd.'s case (1971) *(82 ITR 913)*, even though the circulars were not strictly according to law, still the Supreme Court held that such circulars were binding. Contrary observations were made in State Bank of Travancore's case (1986) *(158 ITR 102)*. The contrary observations of Madras High Court have not been approved by the Supreme Court in UCO Bank vs. CIT (1999) *237 ITR 889 (SC)*. It has also been held that circulars bind the Department but not the assessee. It is open to an assessee to challenge its correctness before the Appellate Authorities.

*Commissioner of Custom vs. IOC Ltd. (2004) 267 ITR 272, 277 (SC)*

*K. P. Verghesse vs. CIT (1981) 131 ITR 597 (SC)*

A Circular which does not specifically state that it is issued under sec. 119 has still to be treated as one so issued as held in *UOI vs. Azadi Bachao Andolan (2003) 263 ITR 706 (SC)*

**Q.21 What is the binding effect of withdrawal of circular in the middle of the accounting year?**

If a circular was operative at the beginning of the relevant assessment year, its subsequent withdrawal has to be ignored, and for that relevant year the circulars should be given effect to *[CIT vs. Edwards (1979) 119 ITR 335 (Ker) FB].*

*Unit Trust of India vs. Unny (PK) (2001) 249 ITR 612 (Bom)*

**Q.22 Whether notification can Act retrospective.?.**

**Ans.** A notification cannot operate with retrospective effect, unless the statute expressly permits it.

*Cannaore Spg & Wvg Mills vs. Collector 1978 ELT 375 SC..*

**Q.23 Whether the decision of other High Courts are binding?**

**Ans.** In interpreting an all India statute, the decisions of other High Courts should ordinarily be followed, for sake of uniformity.

*Flexoplast Abrasive Ltd vs. Union of India 1980 ELT 513 (Bom). Ramanlal Amarnath (Agency) LTD vs. CIT (1973) 91 ITR 250 (Bom).*

*UOI vs. Kamlakshi Finance Corpn Ltd. AIR 1992 SC 711, 712*

*CIT vs. G.M. Mittal Stainless Steel P. Ltd. (2003) 263 ITR 255, 258 (SC)*

**Q.24 Whether English and American decisions are binding on Indian Courts ?**

**Ans.** In India we have adopted the common law system which pre-vails in England, the United States, Australia etc and not the civil law system which prevails in continental Europe. Hence English and American decisions can be referred to, and on analogous provisions, fundamental concepts, and general principles unaffected by the specialities of the English or American tax statutes, such decisions are useful guides. *(Nown Estates (P) Ltd. vs. CIT AIR 1977 SC 153* (para 6). The decisions relating to specific provisions are of little use, since the Indian tax laws are not in pari materia with those in foreign coun-tries. *(CIT vs. A. Gajapathy Naidu (1964) 53 ITR 114 (SC) (117).*

Decision of the Privy Council rendered before 1950 would be binding upon the High Courts of India, unless, of course, there is a decisions to the contrary by the Supreme Court.

*Salzgitter Industries Bav GMBH vs. CIT (1990) 184 ITR 7 (Bom)*

Any decision of the House of lords (in UK) likewise, only has persuasive values is entitled to respect

*CIT vs. Bai Shirinbai K. Kooka (1962) 46 ITR 86 (SC)*

**Q.25 What is the relevance of Opinions expressed by courts of other countries.**

**Ans.** Generally, opinions expressed by the courts of the countries of United States, Canada or Australia are not helpful in construing the collocation of legislative heads in the constitution of India, although they may be some relevance in determining the true character of particular legislation. *(2005) 139 STC 537 (SC).*

**Q.26 What are the general principles of precedent?**

**Ans.** In *CIT vs. B. R. Constructions (1993) 202 ITR 222 (AP) (FB),* the AP High Court has discussed in detail the general principles regarding the binding nature of precedent which reads: The effect of a binding precedent in India is that the decisions of the Supreme Court are binding on all the Courts. Article 141 of the Constitution embodies the rule of precedents. All the subordinate Courts are bound by the j udgements of the High Courts. A single Judge of a High Court is bound by the judgement of another single Judge and a fortiori judgements of Benches consisting of more Judges than one. So also, a Division Bench of a High Court is bound by the judgement of another Division Bench or a Full Bench. A single Judge or Benches of High Courts can not differ from the earlier judgements of co-ordinate jurisdiction merely because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice is of paramount importance. But if the earlier judgement is erroneous or adherence to the rule of precedents results in manifest injustice, differing from an earlier judgement will be permissible. When a Division Bench differs from the judgement of another Division Bench, it has to refer the case to a Full Bench. A Single Judge cannot differ from a decision of a Division Bench except when that decision or a judgement relied upon in that decision is overruled by a Full Bench or the Supreme Court, or when the law laid down by a Full Bench or the Supreme Court is inconsistent with the decision. It may be noticed that a precedent will not be binding (i) if it is reversed or overruled by a higher Court; (ii) when it is affirmed or reversed on a different ground; (iii) when it is inconsistent with the earlier decisions of the same rank (iv) when it is subsilentio; and (v) when it is rendered per incuriam.

A judgement can be said to be per incuriam if it is rendered in ignorance of the provisions of a statute or a rule having statutory force or a binding authority. But if the provision of the Act was noticed and considered before the conclusion was arrived at, merely on the ground that it has erroneously reached the conclusion, the judgement cannot be ignored as being per incuriam. The rule of per incuriam is of limited application." A judgement can be said to be per incuriam if it is rendered in ignorance of the provisions of a

statute or a rule having statutory force or a binding authority. But if the provision of the Act was noticed and considered before the conclusion was arrived at, merely on the ground that it has erroneously reached the conclusion, the judgement cannot be ignored as being per incuriam. The rule of per incuriam is of limited application.

In *Union of India vs. Raghubir Singh (1989) 178 ITR 548 (551-57) (SC),* the Apex Court held that, the doctrine of binding precedent has merit of promoting certainty and consistency in judicial decisions and enables an organic development of law, besides providing assurance to an individual as to the consequence of transactions, forming part of his daily affairs.

In *Union of India vs. Dhanwanti Devi (1998) 6 SCC 44, 51-52,* the Hon'ble Supreme Court held that a decision is an authority for what it decides. The essence of a decision is its ratio. The principle on which a question has been decided is alone binding precedent.

*Director of Income Tax vs. Paper Product Ltd. (Del) 257 ITR 1 (2002)*

*Y.S.C. Babu vs. Charmanand Managing Director, Syndicate Bank (AP) 253 ITR 1 (2002)*

*Agarwal Warehousing & Leasing Lt d. vs. CIT (MP) 257 ITR 235 (2002)*

*Sayaji Iron & Engg. Co. vs. CIT (Guj) 253 ITR 749 (2002)*

*Goodyear India Ltd. vs. State at Haryana (SC) 188 ITR 402 (1991)*

*Baba Parasu Kaikadi vs. Babu (2004) 1 SCC 681*

**Q.27 What is Ratio decidendi?**

A decision is only an authority for what it actually decides and not for what may logically follow from it. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi *[UOI vs. Dhanwanti Devi (1996) 6 SCC 44, 51-52]* A case is a precedent and binding for what it explicitly decides and no more. The ratio decidendi is the underlying principle, namely, the general reason or the general ground upon which the decision is based on the test of abstract from the specific peculiarities of the particular case which gives rise to the decision. In the course of delivering a judgement the judge may make observations which are not relevant to the issue before the court. These observations may not strictly be relevant to the issue involved or may not be relevant for deciding the issue in question. These observations are known as 'obiter dicta'.

It is easy to describe what is ratio decidendi. But it is very difficult to trace the ratio in a judgement. Several tests are suggested for the purpose of deducing a ratio in a judgement. One of the tests which is supposed to be fairly workable is the test of reversal. As per this test one has to identify the proposition of law put forward in a judgement, reverse it and then see if the reversal would have altered the actual decision. If it alters the decision, then the proposition is the ratio of the decision; on other hand if the reversal does not affect the decision, then the proposition is not the ratio of the decision. In other words, the ratio is the general rule without which the case would have been decided otherwise. This test however is not helpful when no proposition of law is given in support of the decision, nor it is very helpful where a court gives several reasons for its decision logically in such cases it may follow that the first reason is ratio and other reasons are obiter. Where a case has been argued on several points, the judge may decide on one of the propositions of law and merely indicate his views on the remaining points.

The proposition of law which was material to decide the case shall constitute ratio. However, where the judge declares that he is deciding the case on more than one ground, then each proposition on which he bases his decision will qualify as a ratio.

Thus, to be the ratio decidendi amongst others the minimum requirements are: (1) that the matter was directly in issue; (2) that the issue needs to have been decided; and (3) the matter has been decided by giving reasons *[Industrial Credit & Investment Corporation of India Ltd. vs. Dahanesh D. Ruparelia (2000) 99 Comp. Case 181, 185 (Bom).*

*UOI vs. Chajju Ram (2003) 5 SCC 568, 576*

**Q.28 To what extent would a judgment of the Supreme Court constitute a binding precedent?**

**Ans.** Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Thus the law as interpreted by the Supreme Court is binding on all Courts and Tribunals in India *CGT vs. Aluminium Corporation of India Ltd. (1972) 85 ITR 167, 172 (SC).* The decision of the Supreme Court in taxation matters amounts to a declaration of law as contemplated by Article 141 of the Constitution of India. *Karamchand Premchand Pvt. Ltd. vs. CIT (1975) 101 ITR 46, 52 (Guj.).* The High Court cannot ignore a decision of Supreme Court on the ground that the relevant provision was not brought to the notice of the Supreme Court, *Badlachandas Mathurdas Lukhani Municipal Committee AIR 1970 SC 1002. Tata Iron & Steel Co. Ltd. vs. D.V. Bapat ITO (1975) 101 ITR 292, 327 (Bom).* The Tribunal is bound to follow the principle of law laid down by the Supreme Court. It is not open to the Tribunal to say that the Supreme Court decision was not relevant simply because, it was not under the statute under which the Tribunal is working. *Bhavnagar University vs. Palitana Sugar Mill Pvt. Ltd. AIR 2003 SC 511.* Ratio is Binding AIR 2002 SC 1598, AIR 2002 SC 834. *CIT vs. Vallabhdas Vithaldas & Others (2002) 253 ITR 543 (Guj.)*

The view expressed by the Supreme Court is an authority on the subject provided the facts and situation is identical. The Supreme Court in *State of West Bengal vs. Kesoram Industries Ltd. (2004) 266 I.T.R. 721 (SC)* corrected inadvertent error in *India cement Ltd. vs. State of Tamil Nadu (1990) 1 SCC 12* on the aspect of 'Royalty is not tax after 14 years.'

*Deys Medical Stores Ltd. vs. Commissioner of Trade Tax (2004) 134 SC 1, 8, 9 (All)*

*U.P. Pollution Board and others vs. Kaneria Industrial Limited & others 259 ITR 321 (SC)*

*Delhi Administration vs. Manoharlal (2002) 7 SCC 222, 227*

**Q.29 Whether rejection of SLP can be considered as an order of Supreme Court? What is the binding effect?**

**Ans.** A mere dismissal of SLP does not mean that the judgement of the High Court stands affirmed by the Supreme Court. The effect of a dismissal is that no appeal was permitted and not that an appeal against the said judgement was dismissed by the Supreme Court affirming the view of the High Court. *J. K. Charitable Trust vs. WTO (1996) 222 ITR 523 (All.)*

Rejection of SLP does not mean that the judgement of High Court has been approved by the Supreme Court on merit.

*CIT vs. Quality (1997) 224 ITR 77 (Pat.)*

*Smt. Tej Kumari vs. CIT (2001) 247 ITR 210 (Patna) (FB)*

*V.M. Salgaonkar vs. CIT (2004) 243 ITR 383 (SC)*

*Kunhayammed vs. State of Kerala (2000) 245 ITR 360 (SC)*

**Q.30 Whether appeal dismissed by the Supreme Court is binding on the Tribunal though the order may not be speaking?**

**Ans.** Where a decision of the Supreme Court is virtually a non speaking order which does not set out the facts or the reason for the conclusion or direction given, it cannot be treated as a binding precedent. *Government of India vs. Workmen of State Trading Corporation (1997) 11 SCC 641. State of Manipur vs. Thinjujam Brojen Muti AIR 1996 SC 2124. Ajith Kumar Rath vs. State of Orissa AIR 2000 SC 85.*

*Kanhayamal vs. State of Kerala (2000) 245 ITR 360 (SC)*

**Q.31 Whether a judgement of the Supreme Court is retrospective or prospective?**

**Ans.** Law is settled by the Supreme Court. Law laid down by Supreme Court is the law in existence since its enactment. It is retrospective in operation. Such law is from inception unless and until spelt as prospective by the Supreme Court. All Courts, Tribunals, authorities and citizens are bound to follow the diction laid by the Supreme Court or else shall be liable to contempt.

*M. A. Murthy vs. State of Karnataka and Others (2003) 264 ITR 1 (SC), Kil Kotagiri Tea and Coffee Estate Co. Ltd. vs. ITAT (1988) 174 ITR 579 (Ker.)*

*CESC Ltd. vs. Dy. CIT (2004) 270 ITR 383, 387 (Cal.)*

**Q.32 When there are two judgements of the Supreme Court, which are contrary to each other, which judgement should the Tribunal follow? Is obiter dicta of the Supreme Court binding on the Tribunal?**

**Ans.** Article 141 of the Constitution prescribes that judgements of the Supreme Court are binding on all Courts and based on the rule of precedent the latest judgement is to be followed as that is the last word spoken by the Apex Court. The Supreme Court sits in Division Bench of two or three Judges. In Jawed Ahmad's case the Supreme Court observed that it may be inappropriate for a Division Bench of three Judges to purport to overrule the decision of Division Bench of two judges, although it may be otherwise where a Full Bench or a Constitution Bench does so. Obiter dicta of the Supreme Court is binding on the Tribunal. The Full Bench of the Andhra Pradesh High Court in *Ushodaya Enterprises Ltd. vs. Commissioner of Commercial Taxes (1993) 111 STC 711* observed " In a case of conflict arising from the decisions of co-equal Benches of the Supreme Court, the High Court is free to disregard the decision which is based on an obvious mistake of fact or the one which purports to follow the ratio of an earlier decision though such ratio is found to be non-existent. The High Court can legitimately decline to follow such decision and follow the earlier decision which is backed by reasoning – whether it is accepted to the High Court or not, and which is free from an such apparent flaw. The later decision need not be automatically followed despite the fact that it rests on a conclusion based on an erroneous impression that an earlier decision took a particular view which in fact it has not taken." In our view the same principle may be followed by the Tribunal.

*Delhi Development Authority vs. Ashok Kumar Behal, (2002) 7 SCC 135, 141*

*Divisional Controller vs. Mohadeva Shetty, AIR 2003 SC 4172, 4178*

**Q.33 What is the binding nature of the decision of High Courts?**

**Ans.** As per the doctrine of precedent, all lower courts, Tribunals and authorities exercising judicial or quasi-judicial functions are bound by the decisions of the High Court within whose territorial jurisdiction these courts, Tribunals and authorities function. In *CIT vs. Kantilal Nathuchand (1964) 53 ITR 420 (Guj.),* the Court doubted, but followed for the sake of uniformity among the High Courts the judgement of another High Court in the matter of interpretation of the Income-tax Act. Also refer *CIT vs. Chimanlal J. Dalal & Co. (1965) 57 ITR 285 (Bom).* Tribunals functioning within the jurisdiction of a particular High

Court are bound to follow the decision of the jurisdiction High Court — *State of AP vs. Commercial Tax Officer (1988) 169 ITR 564 (AP); Air Conditioning Specialists Pvt. Ltd. vs. Union of India (1996) 221 ITR 739 (Guj).* The Assessing Officer is bound to follow the decision of Supreme Court as also the decision of High Court of the State within whose jurisdiction he is functioning — *K. Subramanian, ITO vs. Siemens India Ltd. (1985) 156 ITR 11 (Bom).* The order of the Tribunal not applying the decision of jurisdictional High Court was held to be erroneous — *Shri Mahabir Industries vs. CIT (1996) 220 ITR 459 (Guwahati).* Not following the decision of the High Court within whose jurisdiction the ITO acts, would tantamount to committing contempt of that court — *Siemens India Ltd. vs. K. Subramaniam (ITO) (1983) 143 ITR 120 (Bom.).*

The decision of a High Court does not have binding force outside the State. *Dr. T. P. Kapadia vs. CIT (1973) 87 ITR 511 (Mys.). CIT vs. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom.), Geoffrey Manners & Co. Ltd. vs. CIT (1996) 221 ITR 695 (Bom.), CIT vs. Vardhman Spinning (1997) 226 ITR 296 (P&H), N. R. Paper and Board Ltd. & Others vs. DCIT (1998) 234 ITR 733 (Guj.).* No reference can be made on a question of law which is settled by a decision of the jurisdictional High Court. *CIT vs. HIM Containers Ltd. (1995) 216 ITR 674 (Guwahati) Kiersentec vs. CIT 11 Taxman 70 (Bom.) (1982), CIT vs. G.M. Mittal Stainless Steel P. Ltd. (2003) 263 ITR 255, 258 (SC) , R.D. Joshi & Co. vs. CIT (2001) 251 ITR 332 (MP), Nicco Corpn. Ltd. vs CIT (2001) 251 ITR 791 (Cal.)*

The decision of one High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside the territorial jurisdiction. The fact that there is only one decision of any one High Court on a particular point or that of different High Courts have taken identical views in that regard is not at all relevant for that purpose. Whatever may be the conclusion, the decisions cannot have the force of binding precedent on other High Courts or any other subordinate courts or Tribunals outside their jurisdiction. That status is reserved only for the decisions of the Supreme Court, which are binding on all courts in the country by virtue of Article 141 of the Constitution. *Consolidated Pneumatic Tool Co. (India) Ltd. vs. CIT (1994) 209 ITR 277, 282 (Bom), Universal Ferro & Allied Chemicals Ltd. vs. P.G.K. Warrier (1983) 143 ITR 959 (Bom.).*

In *CIT vs. G. Dalabhai & Co. (1997) 226 ITR 922 (Guj)*, it was observed

"Before parting with the case, we notice with anguish the language used by the Income Tax Officer in his assessment order saying that 'With due respect to the decision of the Gujarat High Court, I do not follow the same'. The Income Tax Officer in not following the decision of the Gujarat High Court within whose supervisory territory he was functioning, is far from satisfactory, that is the least we can say. The minimum decorum of the system of hierarchy that Tribunals in the administration of justice and their Judicial subordination to the High Court of the territory in which they function requires that they restrain in the use of proper expression while following or not following the decision of the High Court".

*Agrawal Werehousing and Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP)*

**Q.34 When there are two judgements of the jurisdictional High Court, which are contrary to each other and the latter judgement is delivered without referring to the earlier judgement, which judgement should the Tribunal follow?**

**Ans.** It is clear that when there are conflicting judgements of the jurisdictional High Court, normally the latter judgement would prevail provided it has referred to the earlier decision and distinguished the same. However, if the earlier judgement is not referred to at all, and there are two conflicting judgements, it is open to the Tribunal to follow that judgement, the reasoning of which appeals to the Tribunal. Since both the jurisdictional High Court judgement are binding the Tribunal has to prefer one or the other judgment and in such a

case it can prefer either of the two judgments. *Amarsingh Yadav vs. Santi Devi AIR (1987) Patna 191* and *CIT vs. Madhukant M. Mehta (1981) 132 ITR 159 (Guj).*

*Yogiraj Charity Trust vs. CIT (1984) 149 ITR 7, 17, (Del).*

**Q.35 When there are two judgements of the jurisdictional High Court which are contrary to each other which will be binding on Income Tax Appellate Tribunal?**

**Ans.** The later judgement shall be of binding on the Tribunal.

When there are conflictory decisions of Courts of Co-ordinate Jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decision.

*CIT vs. Thomas Electricity Suppliers Ltd. (1994) 206 ITR 737 (Bom.) (738).*

**Q.36 What is the precedent value of orders passed by different Benches of Tribunal?**

**Ans.** A decision of a Division Bench and Third Member Bench is binding on the Single Member Bench. A decision of a Special Bench is binding on all the Benches of the Tribunal. A decision of the Special Bench can be distinguished or disregarded if there is any contrary view of the jurisdictional High Court or of the Supreme Court. A co-ordinate Bench should follow the view of another co-ordinate Bench or else refer the matter to a larger Bench through the President. *S. I. Roopal and Others vs. Government through Chief Secretary, Delhi & Others AIR 2000 SC 594, Union of India vs. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722 (SC), Pradip Chandra Parija vs. Pramod Chandra Patniak (2002) 254 ITR 99 (SC), Agrawal Warehousing and Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP), CIT vs. L. G. Ramamurthi & Others (1977) 110 ITR 453 (Mad.), Export House vs. ITO (1985) 23 TTJ 285 (Amritsar), Chandulal Venichand vs. ITO (1991) 38 ITD 138 (Ahd.)*

**Q.37 Whether one Bench of the Tribunal is bound to follow the order of another Bench?**

**Ans.** For the sake of uniformity, one Bench of the Tribunal is bound to follow the view expressed by another Bench of the Tribunal unless the earlier view is per-incurium — *CIT vs. L. G. Ramamurthi (1977) 110 ITR 453 (Mad), CIT vs. S. Devaraj (1969) 73 ITR 1 (Mad). Modu Timblo (Individual) vs. CIT (1994) 206 ITR 647(Bom.) – Union of India vs. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722 (SC), Pradip Chandra Parija vs. Pramod Chandra Patnaik (2002) 254 ITR 99 (SC), Agrawal Warehousing & Leasing Ltd. vs. CIT (2002) 257 ITR 235 (M.P.),* The Bench should not come to a conclusion totally contradictory to the conclusion reached by the earlier Bench of the Tribunal. Where a Bench wants to differ from an earlier Bench decision, the matter should be referred to a larger Bench on a request made to the President — *CIT vs. Goodlass Nerolac Paints Ltd.. (1991) 188 ITR 1 (5) (Bom). Sayaji Iron and Engineering Co. vs. CIT (2002) 253 ITR 749 (Guj.), Sis Ram Sharma & Co. vs. ITO (1988) 25 ITD 410 (Delhi) (TM), Subarna Plantation & Trading Co. Ltd. vs. ITO (1989) 28 ITD 177 (Cal.), Longwalia Poultry Farm vs. Dy. CIT (1998) 67 ITD 45 (Chan.) (TM), Birumal Gaurishankar Jain vs. Income Tax Settlement Commission (1992) 195 ITR 792 (ITSC) (SB), Union of India vs. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722, 726, 727 (SC), Sub. Inspector Rooplal & Another vs. Lt. Governor, New Delhi & Others (2000) 1 SCC 644, 654 (SC), Dy. CIT vs. Reliance Industries Ltd. (2004) 88 ITD 273 (Mum) (SB).*

**Q.38 Whether the decision of Tribunal is binding on lower authorities?**

**Ans.** Judicial discipline demands that authorities subordinate to the Tribunal accept as binding the decisions of the Tribunal. In *Khalid Automobiles vs. Union of India (1995) 4 SCC (Suppl.) 653,* the Court held that an order of the Tribunal was binding on the assessing officer and the first appellate authority and that failure to follow the same may constitute

contempt of Tribunal's order. See *Rajendra Mills Ltd. vs. Jt. CIT (1971) 28 STC 483 (Mad.), Serethil Raja Metal vs. CTO (1990) 79 STC 38 (Mad.)* and *Union of India vs. Kamlakshi Finance Corporation Ltd. AIR 1992 SCC 711, 712 (SC).*

In *Voest Alpine Ind. GmbH vs. ITO (2000) 246 ITR 745, (749) (Cal.),* the Court condemned the action of assessing officer in making an assessment contrary to the decision of the Tribunal which had become final. Also see *Bank of Baroda vs. H. C. Shrivatsava & Another (2002) 256 ITR 385 (390) (Bom.), Asstt. CCE vs. Dunlop India Ltd. (1985) 154 ITR 172 (SC), Govindram Seksaria Charity Trust vs. ITO (1987) 168 ITR 387 (MP), Agarwal Warehousing & Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP), C. D. Thandani ITO vs. Universal Ferro & Allied Chemicals Ltd. (1988) 172 ITR 30 (Bom.)*

**Q.39 Is CIT(A) bound to follow the decision of the Tribunal?**

**Ans.** Yes. CIT(A) being subordinate to the Tribunal is bound to follow the view of the Tribunal. *Agrawal Warehousing and Leasing Ltd. vs. CIT (2002) 257 ITR 235 (MP)*

**Q.40 When there is a special bench decision and after the decision of Special Bench a High Court other than jurisdictional High Court has taken a contrary view whether Tribunal has to follow Special Bench or High Court.**

**Ans.** High Court decision does not extend beyond its territorial jurisdiction.

*CIT vs. Thana Electricity Supply Ltd 206 ITR 727 (Bom)*

**Q.41 Whether Third member decision is binding on division bench.**

**Ans.** Third member decision is a decision of full bench because Three Judges have applied their mind.

*P.C. Puri vs. CIT (1985) 151 ITR 584 (Del)*

**Q.42 When there are two orders of Tribunal, which one has to be followed.**

**Ans.** Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decisions.

*CIT vs. Thana Electricity Supply Ltd (1994) 206 ITR 727 (Bom)*

**Q.43 When there are two orders of tribunal one of Mumbai Bench against the assessee and the other of Ahmedabad Bench in favour of assessee, which order is binding on the Mumbai Bench.**

**Ans.** If the Ahmedabad Tribunal decided the matter in favour of assessee, after considering the Mumbai Tribunal. The order of Ahmedabad Tribunal required to be followed or otherwise?

*The matter may be referred to special Bench.*

*CIT vs. L.G. Ramamurthi & Others (1977) 110 ITR 453 (Mad),*

*Pradeep Chandra Parija and others vs. Pramod Chandra Patnaik & Others. (2002) 254 ITR 99 (SC)*

## VII. DOUBLE TAXATION AGREEMENTS CONVENTION

**Q.44. What is the binding effect of treaties?**

**Ans.** liberal interpretation of the agreement and the treaty will override t he provisions of domestic law has been accepted by the Apex Court.

*Circular No. 333, dated 2-4-1982 (1982) 137 ITR (St. ) 1*

*Provisions of treaty will prevail over provisions of I. T. Act.*

*UOI vs. Azadi Bachao Andolan (2003) 263 ITR 706 (SC)*

**Q.45. What is the binding effect of types of international instruments, such as, Convention, Protocol, Agreement, Arrangement, Declaration?**

**Ans.** International conventions cannot override express provisions of statute.

*Peoples union for civil Liberties v Union of India (2005) AIR 2419(SC)*

## VIII. GENERAL

**Q.46 When orders passed by the taxing authorities are neither speaking nor reasoned, can it be challenged?**

**Ans.** An order should be speaking, should contain detailed recording of evidence for and against, explanation of both sides, arguments raised by both sides and the reasons for arriving at a particular view. A reasoned and speaking order is bedrock of justice whether or not an appeal or revision lies against it. The Supreme Court in *Siemens Engineering & Manufacturing Co. vs. UOI, AIR 1976 SC 1785* stated:— "It is now well settled law that where an authority makes an order in exercise of a quasi judicial function, it must record its reasons in support of the order it makes and the order must be supported by reasons. The *Supreme Court in S. N. Mukherjee vs. UOI, AIR 1990 (SC).*

The Supreme Court in *State of West Bengal vs. Atul Krishna Shaw, 1990 SC 2205* stated "giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Reasoned decision is not only for the purpose of showing that the citizen is receiving justice but also a valid discipline for the Tribunal itself. Therefore, statement of reasons is one of the essentials of justice."

It stated that the order should be a speaking order. The Supreme Court in *Kishan Lal vs. UOI* observed that even though in section 220(2A) of the IT Act, it is not stated that any reasons are to be recorded in the order deciding such an application, it is implicit in the said provision that whenever such an application is filed the same should be decided by a speaking order. The principles of natural justice in this regard would be clearly applicable. A decision which is taken by the authority under section 220 (2A) can be subjected to judicial review, by filing a petition under Article 226 of the Constitution. This being so and where the decision of the application may have repercussion with regard to the amount on interest which an assessee is required to pay, it would be imperative that some reasons are given by the authority while disposing of the application. The matter was restored to the file of the Chief Commissioner to decide in accordance with law.

*Anusayaben A. Doshi vs. JCIT (2002) 256 ITR 685, 686 (Bom)*

*UOI vs. GTC Inds. Ltd. (2003) 5 SCC 106, 112*

**Q.47 High Court deciding the case without considering the Judgement of Supreme Court, which judgement, the tribunal has to follow**

**Ans.** Article 41 of the Constitution of India -

'The Law declared by the SC shall be binding on all courts – within the territory of India'. Once there is pronouncement of the highest court of land, same is binding on all courts tribunals and all authorities in view of this article. Tribunal must follow the decision of Supreme Court.

**Q.48 Can revenue take conflicting stands?**

**Ans.** The revenue cannot take conflicting stands. It has got the assistance of technical persons and should be consistent. It cannot discriminate between the assessees. *Seshasayee Paper and Boards Ltd. vs. CIT (2003) 260 ITR 419 (Mad.), Union of India vs. Kaumudini Narayan Dalal (2001) 249 ITR 219 (SC), Berger Painters vs. CIT (2004) 266 ITR 99 (SC), Union of India vs. Satish Panalal Shah (2001) 249 ITR 221 (SC).*

**Q.49 What is the rule of interpretation of documents/ agreements?**

**Ans.** It is the duty of Court to interpret a document of contract as was understood between the parties. The terms of the contract have to be construed strictly without attending the nature of the contract as it may affect the interest of parties adversely (2005) 123 Companies Cases 663 (SC) *Polymat India Ltd. and others vs. National Insurance Co. Ltd.*

**Q.50 How to interpret the delay in filing of appeal?**

**Ans.** The *Supreme Court in Collector of Land Acquisition vs. Mrs. Katiji & Others (1987) 167 ITR 471,* has held that the Court should have a pragmatic and liberal approach. The Hon'ble Supreme Court in *N. Balakrishnan vs. M. Krishnamurthy (1998) 7 SCC 123* condoned delay of 883 days and has observed that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not provide discretion only in the cases of delay within a certain limit. The only criterion is the acceptability of explanation irrespective of the length of delay. The primary function of the court, being the adjudication of the disputes between the parties and to advance substantial justice, it is not enough to turn down the plea of the litigant and to shut the door against him for some lapse on his part which has caused the delay. If theaost consideration to the suitor. The *Supreme Court in Vedabai vs. Shantaram Baburao Patil & another (2002) 125 S.T.C. 375* observed that the Court has to exercise its discretion, keeping in mind that the principle of advancing justice is of prime importance and the expression "sufficient cause" should receive a liberal construction. The approach of Courts should be pragmatic so as to impart substantial justice and substantial Justice.

*Collector land acquisition vs. MST, Katiji and Others (1987) 167 ITR 471 (SC)*

**Q.51 Whether mistake of Lawyer or Accountant**

**Ans.** Wrong legal advice given or other mistake made by the assessee's lawyer or chartered accountant may constitute good reason or sufficient cause for condoning delay in filing an appeal or an application or a writ or for not imposing penalty, or for setting aside an ex parte order passed on non appearance of a party. Ordinarily, a case should not be dismissed for failure of the lawyer to appear at the hearing.

*Concord of India Ins. Co. Ltd Vs. Nirmaladevi & Ors (1979) 118 ITR 507 (SC); Manoj Ahuja and Anr. vs. IAC (1984) 150 ITR 696 (P & H); IAC vs. Kedarnath Jhunjhunwala (1981) 133 ITR 746, 755 (Pat); Arun S. Meher vs. M.A. Twigg (1984) 153 ITR 131 (Bom); Avtar Krishandas vs. CIT (1979) 133 ITR 338 (Del);CIT vs. Khemraj Ramshmichand (1976) 114 ITR 75 (MP); Subhkaran & Sons vs. N.A. Kazi (1984) 152 ITR 231 (Bom); Kwality Restaurant & Ice Cream Co. vs. CIT (1984) 158 ITR 188 (Del); CIT vs. India Capacitors Ltd (1987) 180 ITR 641 (Cal); Ganesh, Dass Ram Gopal vs. IAC (1982) 142 ITR 101 (Allah)*

**Q.52 How to interpret sections dealing with procedure?**

**Ans.** There is no vested right in procedure or as to cost. Enactments dealing with this subject apply to pending action, unless a contrary intention is expressed or clearly implied.

*The Hon'ble Supreme Court the case of Shreenath vs. Rajesh (AIR 1998 SC 1827) noted as under:*

"In interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding justice is to be adopted. The procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. "

*K.M. Sharma vs. ITO (2002) 254 ITR 772, 779 - 80 (SC)*

*Haresh Dayaram Thakur vs. State of Maharashtra (2000) 6 SCC 179, 187*

**Q.53 How to interpret sections dealing with limitation?**

**Ans.** Limitation law has to be liberally construed *(Collector Land Acquisition vs. Mst. Katiji (1987) 167 ITR 471 (SC); Premchand Bansal & Sons vs. ITO (1999) 237 ITR 65 (Del), Seshammal (R) vs. ITO (1999) 237 ITR 185 (Mad.), Concord of India Insurance Co. Ltd. vs. Nirmala Devi (1979) 118 ITR 507 (SC) followed in Avtar Krishnan Das vs. CIT (1982) 133 ITR 338 (Del.)*

In *CST vs. Auraiya Chamber of Commerce, (1987) 167 ITR 458 (SC);* the Supreme Court directed admission of delayed claim for refund on the ground that "in interpreting relevant procedural provisions, fairness and justice should be the approach, and even in fiscal statute, equity should prevail wherever language permits".

**Q.54 When AO followed the order of Tribunal can CIT, review the order of AO, on the ground that, there is contrary judgement of Courts ?**

**Ans.** An order passed by ITO following the decision of the tribunal can not be held to be erroneous & prejudicial of the interest of the revenue.

*Kiran Agencies vs. ITO (1983) 15 TTJ 460 (Nag)*

*Indures (P) Ltd. vs. IAC (1991) 38 ITD 635 Del.*

**Q. 55 Whether finding of settlement Commission is binding on tribunal.**

**Ans.** Settlement Commission is a Tribunal and not court

The Finding given by the Tribunal is not binding on the Income Tax Appellate Tribunal Similarly the order of the Income tax Appellate Tribunal will not have binding effect on the Settlement Commission. Order of Settlement Commission and Tribunal will have persuasive value.

*CIT vs. B.N. Bhattacharya (1979) 118 ITR 461 (SC).*

## VII. LEGAL MAXIMS - PRINCIPLES

**Q.56 . Whether interpretation of penal provisions should be construed strictly?**

**Ans.** The penal provisions must be construed strictly.

*CIT vs. Sundaram Iyengar & Sons (P) Ltd (1975) 101 ITR 764 (SC)*

*ITO vs. Kaysons India (2000) 246 ITR 489 (P & H)*

However the penal provision giving benefit to a assessee such as section 273A has to be construed liberally. *Handa (RP) vs. ITO (1992) 198 ITR 54 (P & H)*

**Q.57 What is the binding effect of orders of authority for advance rulings?**

**Ans.** The Act has made the ruling binding in the case of one transaction only and the parties involved in that case in respect of that transaction. For other transactions and for other parties the ruling will be of persuasive nature. Advance ruling are judgments in personam and not in rem. Cyril Engg. Pereira, In re (1999) 239 ITR 650 (AAR)

*Union of India vs. Azadi Bachao Andolan (2003) 263 ITR 706 at 742(SC)*

In *Dy. CIT vs. Biston Consulting Group Pvt. Ltd. (2005) 93 TTJ 293 (Bom.),* the Tribunal held that the Ruling of given by the Authority for Advance Rulings are not certainly not binding precedents on the Tribunal.

**Q.58. How to interpret statutes relating to appeals?**

**Ans.** A right of appeal is the creation of the statute and an assessee has a right of appeal only if there is a statutory provision for it *CIT vs. Ashok Engg. (1992) 194 IRR 645 (SC).* But a provision for appeal should be liberally construed and should be read in a reasonable and practical manner *CIT vs. T.V. Sundaram (1999) 236 ITR 524 (Mad.).* It is always desirable not to place, a restricted meaning to such a provision and take away the right of appeal provided to a party.

*DCIT vs. Shanthabaram (2003) 260 ITR 156 (Kar.)*

**Q.59. What is the rule for lifting the corporate veil?**

**Ans.** A company is a legal personality entirely distinct from it's members and a company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members. But, in certain exceptional cases, the court is entitled to lift the corporate veil and to pay regard to the economic realities behind the legal facade. *(Jindal (MD) vs. CIT (1987) 164 ITR 28 (Cal).*

The doctrine of lifting of corporate veil has been invoked in the following cases ;

(a) where a corporate entity is attempted to use for fraudulent purpose *PNB Finance Ltd. vs. Shital Prasad Jain (1983) 54 Comp Case 66 (Del.)*

(b) To willfully disobey the courts order *Jyoti Ltd vs. Kanwalji Kaur Bhasin (1987) 62 Comp Cases 626 (Del.)*

(c) To frustrate sales tax or capital gains tax liability – *Trackways (P) Ltd. vs. CST (1981) 47 STC 407 (MP), Wood Polymer Ltd. In re (1977) 109 ITR 177 Guj.*

To deprive workman of the legitimate bonus – *Workmen of Associated Rubber Inds. Ltd. vs. Associated Rubber Inds. Ltd. (1986) 157 ITR 77 (SC)*

**Q.60 How to interprete the law relating to Refunds.**

**Ans.** Provisions giving refund must be interpreted liberally in favour of the assessee *Calcutta Electric Supply Corporation (Indian) Ltd. vs. ITO (1992) 197 ITR 563 (Cal.)*

**Q.61 In case of two contradictory decisions, which decision to be followed ?**

**Ans.** If there are two apparently contradictory decisions, decision of larger bench to be followed.

*CIT vs. Sundaram Industries Ltd (2002) 253 ITR 396 (Mad),*

*Siemens India Ltd. vs. State of Maharashtra (1986) 62 STC 40, 50 (Bom)*

*N.C. Dhoundial vs. Union of India (2004) 2 SCC 579, 587*

**Q.62 What is the principle of Resjudicata**

The principle is that the cause of action cannot survive, if it is covered by an earlier judgment. It literally means a matter already decided.

The strict doctrine of resjudicata is not applicable to tax matters. The reason being each assessment year being independent of others all issues relevant to a particular assessment year could be considered and decided, irrespective of the fact that the same issues arose in the earlier years. However questions of fundamental nature or questions relating to assessment which do not vary every year but depends on the nature of the property or questions on which the rights of parties to be taxed are based, principle of res-judicata to that extent would apply to tax matter. Further, principle of finality to a decision and rule of consistency does apply to income tax proceedings.

*Kotak Mahindra Fin. Ltd. vs. Dy. CIT (2004) 265 ITR 114, 149 (Bom)*

*Ashok Leyland Ltd. vs. State of T.N. (2004) 3 SCC 1, 144.*

**Q. 63 What is the Rule of Estoppel**

Estoppel is a rule of equity which forbids truth being pleaded or a representation, on the faith of which another has acted to his detriment, being retracted

*Nirmala L. Mehta vs. CIT (2004) 269 ITR 1, 11 (Bom)*

*B.L. Sreedhan vs. K.M. Munireddy (2003) 2 SCC 355, 366*

*CIT vs. Bhattachargee (BN) (1979) 118 ITR 461 (SC )*

*UOI vs. Anglo Afghan Agencies Ltd. AIR 1968 (SC) 718*

The principle of estoppel strictly does not apply to income tax proceedings (*CIT vs. VMRP Firm (1965) 56 ITR 67 (S.C.).* But rules similar to the rule of estoppel may be applicable under certain circumstances. In any case there cannot be estoppel against a statute. The principle of promissory estoppel was considered in detail by the Supreme Court in Motilal Padampat Sugar Mills case *(1979) 118 ITR 326 (SC).*

**Q.64 What is the rule of Ejusdem Generis. (of the same kind of nature.) ?**

**Ans.** The rule of *Ejusdem Generis* must be applied with great caution, because it implies a departure from the natural meaning of words, in order to give them a meaning on a supposed intention of the legisla-ture. CRAISE on STATUTE LAW (7th Edition p. 178) mentions that the *Ejusdem Generis* rule of limiting general words is one to be applied with caution and not pushed too far. To invoke the application of the rule, there must be a distinct genus or category. The specific words, the rule requires, are all of one genus, in which case, the general words may be presumed to be restricted to that genus. For example, the words “or otherwise” are generally used as ancillary to the specific proposition which precedes them.

SUTHERLAND in his STATUTORY CONSTRUCTION (3rd Edition, Vol. II p. 395) explained the following requisites for the application of the principle of Ejusdem Generis.

i) The statute contains an enumeration of specific words.

ii) The members of the enumeration constitute a class.

iii) The class is not exhausted by the enumeration.

iv) A general term follows the enumeration.

v) There is no clearly manifested intention that the general term is to be given a broader meaning than the doctrine require.

In the background of the above theoretical exposition of the principle by the most noted legal exponents, it can be seen that this rule have been applied in various cases by the Indian Courts viz.,

*Siddeshwari Cotton Mills vs. Union of India (1989) 39 E.L.T. 498 (SC) AIR 1989 SC 1019 at page 1023.*

*Mangalore Electric Supply Co. vs. C.I.T. West Bengal AIR 1978 SC 1272.*

*Lokmat News papers P. Ltd. vs. Shankar Prasad AIR 1999 SC 2423, 2444*

*Grasim Inds. Ltd. vs. Collector of Customs (2002) 4 SCC 297, 304.*

**Q.65 What is the rule of audi alteram partem?**

**Ans.** Both parties should be heard before any decision. The right to a fair hearing has been used by the court as the base on which to build a kind of code for administrative procedure comparable with due process of law. A proper hearing must always include a fair and adequate opportunity to those who are parties in the controversy for correcting and contradicting anything prejudicial to their view. The disclosure of a charge or opposing case must be made and it must be made within reasonable time to allow the person affected to prepare his defence or his comments. He must have fair notice of any accusation against him. The principle of audi alteram partem has two aspects (i) notice and (ii) hearing

**(i) Notice**

Before any action is taken, the affected party should be given a notice to show cause against the proposed action and seek his explanation. Any order passed without giving notice is against the principles of natural justice. Accordingly, even if there is no provision in the statute about giving of notice, if the order in question adversely affects the rights on an individual, the notice must be given. The notice must be clear, specific and unambiguous and the charges should not be vague and uncertain. The object of notice is to give an opportunity to the individual concerned, to present his case. Moreover, the notice must give a reasonable opportunity to comply with the requirements mentioned thereon. Natural justice, therefore, requires that the person directly affected by the proposed acts, decisions or proceedings be given adequate notice of what is proposed so that he may be in a position,

a) to make representation on his own behalf, or

b) to appear at the hearing or inquiry (if any), and effectively prepare his own case and to answer the case he has to meet.

Accordingly, the notice should be served in sufficient time to enable these representation to be made effectively. If an oral hearing is to be held, the time and the place must be properly noticed. If the charges are to be brought, they should be specified with particulars.

**(ii) Hearing**

The second requirement of audi alteram partem is that the person concerned must be given an opportunity of being heard before any adverse action is taken against him.

*Shamnsaheb M. Mul Hani vs. State of Karnataka (2001) 2 SCC 577 585 - 86*

**Q.66 What is meaning of Doctrine of Stare Decisis?**

**Ans.** The policy of courts is to stand by precedent and not to disturb a settled point. Stare decisis at non quiet amovere. It means, to adhere to precedent and not to unsettle things which are settled. When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent on the same court, or on other courts of equal or lower rank in subsequent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to indicate plain, obvious principles of law and remedy continued injustice. Thus, doctrine of stare decisis means to stand by a decision and not to disturb a legal position which is settled. The importance of this doctrine can be understood from the observations of the Apex Court in the case *Krishena Kumar vs. UOI (1990) 4 SCC 207 233*, wherein it was observed that "It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it.

However, it is very important to understand that the doctrine of stare decisis is a policy as explained by the Madras High Court in the case of *Pierce Leslie & Co. vs. CIT (1995)*

*216 ITR 176, 192 (Mad.).* The doctrine of stare decisis is one of policy grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognised and followed, though later found to be not legally sound, but whether a previous holding of the court shall be adhered to, modified or overruled is within the court's discretion under the circumstances of case before it. His *Lordship Kuldip Singh, J., in Supreme Court Advocates-on-Records Associations vs. UOI. (1993) 4 SCC 441, 644* observed that "It is no doubt correct that the rule of stare decisis brings about consistency and uniformity but at the same time it is not as inflexible in Administrative Law as in Public Law."

*Sakshi vs. UOI (2004) 5 SCC 518, 538 - 39 2001 (1) SCC 748*

*National Insurance Co. Ltd. vs. Swaran Singh*

*AIR 2004 SC 1531, 1556-57*

*Milkfoods Ltd. vs. GMC Icecream P. Ltd.*

*(2004) 121 Comp. Case 581, 606 (SC)*

**Q.67 What is the meaning of sub-silentio?**

**Ans.** A decision is passed sub silentio in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The Court may consciously decide in favour of one party because of point A which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of a particular party unless it has also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances although point B was logically involved in the facts and although the case had a specific outcome the decision is not an authority on point B. Point B is said to pass sub silentio. An interesting question that arises is whether a precedent is deprived of its authoritative force by the fact that it was not argued or not fully argued by the losing party. One of the chief reasons for the doctrine of precedents is that a matter that has been once fully argued and decided should not be allowed to be reopened where a judgement is given without the losing party having been represented there is no assurance that all the relevant considerations have been brought to the notice of the court and consequently the decision ought not to be regarded as possessing, any binding effect. A decision which is not express and is not founded on reasons nor proceeds on consideration of issues cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are the core of judicial discipline. But that which escapes in the judgement without any occasion is not ratio decidendi *[State of U.P. vs. Synthetics & Chemicals Ltd. (1992) 87 STC 289, 309 (SC)].* However now it is well established that a precedent is not destroyed merely because it was badly argued, inadequately considered and reasoned. Thus an arbitrary line has to be drawn between total absence of argument on a particular point, which vitiates the precedent and inadequate arguments which is ground for impugning the precedent only if it is absolutely binding and indistinguishable.

*Arnit Das vs. State of Bihar AIR 2000 SC 2264, 2270*

*Sun N Sand Hotel Ltd. vs. V.V. Kamat AIR 2003 Bom 168, 177*

**Q.68 What is meaning of Per incuriam ?**

**Ans.** The latin expression per incuriam means through inadvertence. In practice per incuriam appears to mean per ignoratium. The English Courts have developed this principle to bring certain degree of flexibility to the doctrine of stare decisis. The rigid or strict implementation of the doctrine of stare decisis may lead to certain anomalous and absurd conclusions. The quotable-in-law is avoided and ignored if it is rendered in ignoratium of a

statute or other binding authority. This principle had been adopted by the Apex Court while interpreting the provisions of Article 141 of the Constitution which embodies the doctrine of precedent as a matter of law. *(State of U.P. vs. Synthetics & Chemicals Ltd. (1992) 87 STC 289, 309 (SC).* To declare a decision per incuriam is not as easy as the definition makes it out to be. The Bombay High Court's observations present the stand or position taken by the courts in declaring a decision per incuriam. The Bombay High Court in the case of *Kamla Kant Dube vs. M.V. Umang, AIR 2000 (Bom) 211, 222* observed that there is no doubt that the per incuriam principle is applied rarely and the court is very slow and reluctant in declaring a judgement per incuriam. But nevertheless if the decision has been given in ignorance or forget fullness of some inconsistent statutory provision or of some authority binding on the court that has resulted in reasons which are apparently and demonstrably unsustainable, the court may be left with no option but to treat such decision per-incuriam and not a binding decision.

Conflicting decisions given by coordinate Benches of the Supreme court-Earlier decision rendered by three-judge Bench unanimously - later decision only by a majority of 2:1. held the latter decision having not noticed the earlier binding precedent of a coordinate Bench was per incurium.

*(2004) 1 Supreme Court Cases 681*

*Govt. of W.B. vs. Tarun R. Roy (2004) 1 SCC 347, 358*

*State of Bihar vs. Kalina Kaur AIR 2003 SC 2443, 2447*

**Q.69 What is the meaning of Obiter dicta?**

**Ans.** It is an expression of opinion by a judge on a question immaterial to the ratio decidendi, and unnecessary for the decision of the particular case. It is in no way binding on any court but may receive attention as being an opinion of higher authority. Thus, the observations made in a judgement which are not relevant to the ratio decidendi do not have any binding force. However, obiter dicta of the Supreme Court are binding or are entitled to the highest respect. *[Shree Swami Advocate vs. State of Rajasthan AIR 1995 Raj 69, 72, Panjumal Hassomao Advani vs. Harpal Singh Abnashi Singh Swahaney, AIR 1975 Bom 120, 125).* The Calcutta High Court held that the obiter dicta of a Supreme Court decision has persuasive value and further observed that the opinion coming from renowned judge, may command respect. *Ratanlal Nahta vs. Nandita Bose AIR 1999 Cal. 29 (FB).*

*Golden Color Lab & Studio vs. Commissioner of Commercial Taxes (2004) 134 STC 570 (Karn)*

*Director of Settlements vs. M.R. Apparao (2002) 4 SCC 638*

**Q.70 What is the meaning of judgment in Rem and judgment in personam?**

**Ans.** A Judgment that determines the status or condition of property & that operates directly on the property itself.

**Judgment in Personam**

1. A judgment that imposes personal liability on a defendant & that may therefore be satisfied out of any of the defendant's property within judicial reach.
2. A judgment resulting from an action in which a court has personal jurisdiction overtime parties.
3. A judgment against a person as distinguished from a judgment against a thing, right, or status.

*Source: Black's Law Dictionary (Seventh Edition)*

**Q.71 Nosciture a Sociis –**

**Ans.** Meaning of doubtful word may be ascertained by reference to meaning of words associated with it. But this rule can not be applied in case provisions of Law being construed is clear and unambiguous.

*Pennar Patenson Ltd. In re (2002) 36 SCL 525, 531 (AP)*

*CIT vs. Sivanandha Steel Ltd. (2000) 243 ITR 770, 773 (Mad)*

*Kalpana Polytec India Ltd. vs. UOI (2001) 106 Comp. Cas. 558, 562 (Cal)*

**Q.72 What is the status of legal opinion for tax assessment**

**Ans.** It is not proper for an assessee to produce legal opinions before an assessing officer nor is it proper for the officer to ask for the same. Where such opinions an appended to petitions, they must be expended.

*Maharajadhiraj of Dharbharaj vs. CIT (1933) 1 ITR 206 (210) 11 (Pt.) affirmed in (1934) 12 ITR 345 (PC)*

**LEGAL MAXIMS**

**1. Actio – Personalis Moriture cum persona**

This maxim signifies that a personal right of action dies with the death of person. A personal right is different from composite and/or corporate right.

**2. Actus non-facit reum, nisi mens sit rea**

The act does not make a man guilty unless there is guilty intention.

The maxim is a cardinal doctrine of criminal law that an act in order to constitute a crime, it must be committed with a guilty mind. In other words, the intent and the act must both concur to constitute the crime.

There are two components for every crime namely a physical element and a mental element usually called actus reus and mens rea. The mental element is always marked by the word "Maliciously, fraudulently, negligently or knowingly. But this rule is flexible, for a statute may make an act criminal whether or not there has been an intention to break the law or otherwise to do wrong e.g. food adulteration act.

In Criminal Law, an act means a conscious movement. It is a conduct which result from operation of will. Involuntary action will not become criminal.

So long as an act rests on bare intention, it is not punishable, but when the act is done, the law judges not only the act itself, but also the intent with which it was done.

As a general rule, based upon this maxim, a master is not criminally responsible for acts done by his servant without his knowledge and the condition of the servant's mind is not to be imputed to the master. But this rule is not absolute. A man may be indicted for a public nuisance upon his premises caused by the act of his servants without his knowledge.

The legislature can create offences which consist solely in doing an act whatever the state of mind of the person may be. Such cases however, should be regarded as exception to the general rule that a person cannot be convicted of a crime unless done with wrongful intention.

An honest and reasonable belief in the existence of circumstances which, if true, would make the act, is a good defence, for it either result in his conduct not being really voluntary, or disprove his foresight of its consequences.

**3. Ab inconvenienti**

A statute has to be interpreted according to the language used therein. Rival interpretation many times create hardship, injustice or absurdity as it avoids a particular

construction. Therefore, this rule has to be applied with great care. It should be remembered that individual cases of hardship or injustice have no bearing for rejecting a natural construction. It is true that very often laws which are enacted for general advantage do result in individual hardship, for example laws of limitation, Registration. Though attestation was enacted for public benefit, it may work injustice in particular cases. But there is no need to depart from the normal rule. Hence, it is the duty of all courts of justice to take care of the general good of the community that hard cases do not make bad law. Therefore, the doctrine ab inconvenienti must not be used to rewrite the language in a way different from that in which it was originally framed. However, in case of ambiguity, that construction which better serves the ends of fairness and justice will be accepted. If no alternative construction is open, the court cannot ignore the statutory provision. Therefore, the rule of avoiding a particular construction with its elements of absurdity and hardship has to be applied with great care.

### 4. Cessante Ratione Legis Cessat Ipsa Lex

Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself.

A Member of Parliament is privileged from arrest or civil process during the session, in order that he may discharge his public duties and trust reposed in him, but the reason of this privilege ceases at a certain time — probably forty days after termination of the parliamentary session, because the public has then no longer an immediate interest in the personal freedom of the individuals composing the representative body.

The same principle applies where a right exits of common; a right depending upon a general custom and usage, which appear to have originated, not in any actual contract, but in a tacit acquiescence of all parties for their mutual benefit. This right does not, indeed, enable its processor to put his cattle at once on the neighbouring waste, but only on the waste which is in the manor where his own land is situated; and it seems that the right of common of vicinage should be considered merely as an excuse for the trespass caused by the straying of the cattle, which excuse the law allowed by reason of the ancient usage, and in order to avoid the multiplicity there is no separation or enclosure of adjacent common.

As regards the consent of parents to the marriage of their minor children, it has been observed that “any analogy which existed between marriage by banns and marriage — by notice to the registrar has been effaced — the attempt at securing that consent in marriages of the latter clan by publicity relinquished and the procurement of actual consent substituted in the same manner as had always been used in marriage by licence. There is no reason, therefore, why those decision which have hitherto only been applied to marriage by banns, and which have their foundation in the necessity for securing that publicity through which it is the subject of banns to reach the parent’s consent, should be applied to marriage in which that consent is otherwise attained and secured.”

### 5. De Fide Et Officio Judicis Non Recipitur Quaestio, Sed De Scientia Sive Facti

The honesty and integrity of a Judge cannot be questioned, but his decision may be impugned for error either of law or of fact.

The credit and authority of judges command a great deal of respect. However, no action will lie against a judge of record for any act done by him in the exercise of his judicial function provided such act was within the scope of his jurisdiction. The law has much respect for the certainty of judgments. The rule is that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction and also the rule that a matter of fact so adjudicated by him cannot be put in issue in an action against him have been uniformly maintained.

**6. Ex-debito Justitiae**

The maxims herein speaks of a remedy which the applicant gets as a matter of right. On the principle of equity and justice, every Court of plenary jurisdiction has the power to correct ex debito Justitiae its judgment and order to prevent the abuse of its process and grave and palpable errors. Many times the court is called upon to act ex debito justitiae to rectify its own mistake or orders inadvertently passed or to prevent gross miscarriage of justice.

Thus, we see that this maxim conveys an important rule of law wherein a review is resorted to only when a glaring omission or a patent mistake has crept in due to judicial fallacy. Otherwise a judgment pronounced by the Court is final. Therefore, in the circumstances, where there is some manifest illegality or want of jurisdiction in the earlier order, the court is called upon to ex debito Justitiae its own wrong to undo the injustice caused. This power can be traced to Article 142 of the constitution, or in case of Supreme Court the power inherent in the Court as Apex Court or the guartian of the constitution.

**7. Expressio – unius personae vel rei est exclusio alterius**

This maxim is very often used to ascertain the legislative intent of any piece of legislation. It conveys an important rule of interpretation to signify the circumstances where the express mention of one person or thing results in totality the exclusion of another. In other words, in any particular provision where the statutory language is plain or straight and its meaning is apparently clear, there is no scope of applying the rule. However, this maxim could be accepted as a valuable servant but it is definitely a dangerous master in the construction of statutes and documents. It is used when there is imperfect enactment of statutory language.

Coming corollary to this maxim is expressum facit cessare facitum which states that when there is express mention of certain things, then anything not mentioned is excluded.

**8. Generalia Speciali bus non derogant and generalia bus specialia derogant**

General things do not derogate from special things and special things derogate from general things.

This maxim comes into help when two apparently conflicting provisions clash with each other wherein it becomes necessary to find out which provision is more general and which is more specific and to construe the more general one so as to exclude the more specific. When a special provision is made on a certain matter, that matter is excluded from the general provision. This principle also helps in resolving the conflict arising between two different Acts. The Hon'ble Supreme Court had applied this principle in resolving a conflict between Articles 25(2)(b) and 26(b) of the constitution. *[Venkataramana Devara vs. State of Mysore, AIR 1958 SC 255]*. Similarly, while resolving the conflict between Articles 19(1)(a) and 194(3) of the Constitution, the Hon'ble Supreme Court had relied on this maxim as shown in *M.S.M. Sharma vs. Shri Krishna Sinha, AIR 1959 SC 395.*

**9. Incumbit Probatio Qui Dicit non Qui Negat**

In the matter of casting onus or burden, this maxim has its share of importance to lay stress on the principle that the burden lies upon one who alleges and not upon one who denies the existence of a fact. In the case of *Lakshmi Jewellery vs. CIT 171 ITR 649 (AP)*, it was held that the burden is far more greater on the Revenue where penalty is sought to be justified not with reference to the Explanation to section 271(1)(c) of the Income Tax Act but with reference to the provisions contained in the substantive section itself.

Even under criminal law a convict is presumed innocent unless proved guilty. Therefore, in the interpretation exercise of any criminal and/or quasi-criminal proceedings, the general intent of this maxim is applied to specify upon whom the onus lies.

## 10. Ignorantia Facit Excusat – Ignorantia Juris Non Excusat

Ignorance of fact excuses, Ignorance of law does not

Ignorance may be either of law or of fact. If the heir is ignorant of the death of his ancestor, he is ignorant of a fact; but if, being aware of the death, but ignorance of certain rights which have been vested in himself, he is ignorant of the law, which every man is presumed to know and it does not afford excuse.

It is a rule that every man must be cognizant of the law otherwise there will be no limit to the extent where the excuse of ignorance might be carried. It would be urged in almost every case .

Ignorance of fact is inevitable. But ignorance of law is never inevitable for the law can be and ought to be definite and knowable. If ignorance of law were admitted as a ground of exemption, the courts would be involved in question hardly possible to solve and which would lead administration of justice totally impracticable.

In criminal cases, the maxim ignorantia facit applies, except in cases where mens rea in the ordinary sense is not requisite. When a man intending to do a lawful act does that which is unlawful. If a man intending to kill a burglar under circumstances which would justify him in so doing, by mistake kills one of his family, this is no criminal act.

Therefore, this maxim conveys an important rule of law that ignorance of laws could not be pleaded as an excuse.

## 11. Nonest factum: It is not his deed

The applicability of this doctrine comes into play when a person says that his signature in a deed or document is obtained by fraud, his plea in effect a plea of nonest factum. Normally, this doctrine does not find much support by law save certain exceptional circumstances. It is generally presumed that one who is signing a document is aware of its meaning, content and character. Later on after signing, he can't plead that it is not his document. But in exceptional cases, the plea of the non est factum could be admissible. A document should be held void as opposed to voidable only when the element of consent as regards its content is totally absent. Therefore, if an innocent person raises the plea of non est factum, the law would protect such person if they diligently prove that they are the victims of tricky situations and swayed into signing the documents without knowing the content and character it conveys to the world.

## 12. Nova constitutio futuris forma-mimponere debet, non practeritis

This maxim conveys a valuable meaning in the construction and interpretation of statutes. It lays down that a new law ought to regulate what is to follow, not the past. Every framed law ought to be prospective in nature. It is in bad taste if past is dug into for retrospective effect.

Thus the relevant maxim embodies a particular rule of construction which is valuable only when the words of an Act of parliament are not plain. The inertia speaks that as far as practicable effort should be made so as not to give a statute a retrospective operation. Except in special cases, the new law ought to be construed so as to interfere as little as possible with the vested rights.

## 13. Nemo Tenetur Seipsum Accusare

No man can be compelled to criminate himself.

The rule of this maxim goes to say that the evidence of a confession by the accused is not admissible unless it be proved that such confession was free and voluntary. The maxim forms the general rule that a witness in any proceeding is privileged from answering not

merely where his answer will criminate him directly, but also where it may have a tendency to criminate him. However, the protection does not extend to excuse a person from answering questions on the ground that the answers may establish or tend to establish he owes a debt or otherwise subject to a Civil Suit at the instance of any other person.

**14. Nemo Est Haeres Viventis**

"No one can be heir during the life of his ancestor"

Non inheritance could vest, nor could any person be the actual complete heir of another, till the ancestor was dead. Before the happening of this event the person who would be heir, if the ancestor immediately dies, was called heir-apparent or heir-presumptive this claim would only be to an estate remaining with the ancestor at the time of his death, and of which he had made no testamentary disposition, might be defeated by the superior title of an alienee in the ancestor's lifetime or of a devisee under his will. Therefore, at common law, if an estate were granted to A for life, remainder to the heirs of B, if A died before B, the remainder failed, for during B's life, he had no heir. But if B died first, the remainder then immediately vested in his heir, and he was entitled to the land on the death of A.

So, a "will" takes effect only on the testator's death. During his life, it is subject to his control, and until it was consummated by his death, no one had, in a legal view, any interest in it.

The general rule being that the law recognizes no one as heir until the death of his ancestor. Though a party may be heir-apparent or heir-presumptive, yet he is not very heir, living the ancestor but this rule has been relaxed in many cases and an exception, engrafted on it, that, if there be sufficient on the will to show that by the word 'heir' the testator meant heir apparent, it shall be so construed and in such case, popular sense shall prevail against, the technical. *(Winter vs. Perratt).*

Where a testator gave property to his wife for life, and after the death, "to such person as at the decease of my said wife shall be my heir", and the testator's wife predeceased him, it was held that the property went to the person who would have been the testator's heir, if he had died at the time of his wife's death, for the law leans against an intestacy. In like manner the familiar expressions, "heir to the throne," "heir to a title or estate" "heir apparent," "heir-presumptive," proves that the existence of a parent is quite consistent with the popular idea of heirship in the child. In all such cases the legal maxim has no place, nor can it have in any in which the person speaking knows of the existence of the parent, and intends that the devise to the child shall take effect during the life of the parent.

**15. Nemo Dat Quod Non Habet**

No one gives what he does not possess

No man can transfer better title than he himself has; i.e., no person can give to another that which he was not the true owner. Thus, if a thief transfer to me for value a thing stolen by him, the true owner can claim it from me even though I paid value for it, and had no notice of the theft.

So no one can give a better title than he himself has. This general rule of nemo dat quod non habet is applicable to both movable and immovable property.

However, there are few exception to this rule. Sale by mercantile agent and sale in open market or sale by a person in possession of movable goods under a voidable contract does not attract this maxim. Also, when the true owner is stopped, by his own conduct, from denying the seller's authority to sell, the buyer may get a valid title to the goods.

**16. Nemo Debet Esse Judex in Propria Sua Causa**

No man can be a judge in his own cause

Justice should not only be done but must also be seem to be done. Interest or bias would disqualify a person from being on a judicial or quasi judicial body. The principle of natural justice and fair procedure require that the complainant cannot be the judge. Interest and bias become a disqualifying factor. A person who sits on a committee for selection of candidates for jobs or admission to a course must not be a candidate himself. A person whose near relation is appearing for the examination is not allowed to undertake assessment of answer books - bias may arise due to pecuniary interest. Personal bias may arise out of blood relations or marital relations or friendship or hostility. Bias may also be official bias.

*S. Maheswar Rao vs. State of Orissa (1989) Supp (2) SCC 248 at 251 (SC)*

**17. Quod Ab Initio Non Valet in Tractu Temporis Non Convalescit**

That which was originally void, does not by lapse of time become valid.

The rule of this maxim has general importance in our day-to-day practice, in pleading and in the application of legal principles to various occurrences of facts and events. This maxim finds its significance in the interpretation of Law of Contract and other Commercial Law.

**18. Qui facit per alium facit per se**

He who acts through another is deemed to act in person. This maxim proposes a vicarious liability upon a person who delegates the exercise of his rights and privileges upon another to act on his behalf. Thus we say, a master is vicariously liable for the acts of his servants. So is owner servant relationship, teacher student relationship, father son relationship etc. The court does not generally restrict the common law rule of qui facit per alium facit per se unless the statute expressly or by implication or by necessary intendment excludes it.

**19. Res ipsa loquitur**

"The event speaks for itself or tells her own story." The maxim herein conveys an important rule of interpretation. The doctrine of "things speaks for itself" traces its origin to the law of tort and specifically not applicable to criminal prosecutions. The application of this principles squarely depends upon the nature of event and the surrounding circumstances. More particularly, when there is an evidence to show that an event has occurred in such way, the question of applying res ipsa loquitur does not arise. It applies in the cases of actions for negligence when the negligent act of the defendant could be presumed.

**20. Respondent Superior**

Let the principal be held responsible

The dictionary meaning of the word "respondent" is let him answer; i.e., to say let the person against whom a relief is claimed answer that he is not liable for the claim.

The maxim means let the principal be responsible. According to this maxim, the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the masters benefit, though no express command or privity of the master be proved. *(Barwick vs. English Joint Stock Bank).* A Municipal Board was held to be liable for the acts of its secretary in executing an illegal distress warrant acting under the order of the Chairman of the Board. *(Municipal Board Mussorrie vs. Goodall).*

The doctrine of respondent superior is the doctrine of vicarious liability. Generally master is liable for the tort of his servant, when it is done in the course of his employment. To impose vicarious liability on the master, there should be a master and servant relationship and the tort must have been committed by the servant during the course of employment. In *Sitaram vs. Shantanu Prasad, AIR 1966 SC 1967* the owner of the car entrusted the car to his driver for plying it as a taxi Driver was training C to drive and even took him for driving test.

Due to his negligence during test ride, there was an accident. Neither driver nor trainee were held not to be working during the course of employment and hence the owner was not vicariously liable.

However, when fraud is committed by the agent when he was acting not in the interest of his employers, but entirely in his own interest, the principal cannot be held responsible for consequences of his fraudulent conduct.

The general rule is that the master is liable for the tort of his servant when done in the course of his employment. This involves two points.

1) The relationship of master and servant exists

2) A tort is committed by the servant in the course of his employment.

The maxim has its origin in the legal presumption that acts done by the agent/servant in the master's business by master's authority (expressly or impliedly) are in truth the acts of the master.

The two main reasons for the recognition of this rule are

1) The difficulty in the way of proving actual authority and

2) That the employers usually are, while their servants are not financially, capable of bearing the burden of civil liability.

The general principle which render a private individual liable for his servant's acts apply to render a corporation which can only act through agents liable for its agents acts provided such agent act within the scope of their employment.

Public functionaries like judges, magistrate are protected from the consequences of an illegal and wrongful acts done by an officer or other person employed in the inferior ministerial capacity, provided that the principal himself acted in the discharge of his duty and within the scope of his jurisdiction and of authority delegated to him.

A person who employs not his own servant but an individual contractor to do a lawful act is not answerable for wrongful and negligent acts unnecessarily committed by the contractor or his servant in the performance of the contract.

### 21. Rex Non Potest Peccare

This maxim means that the King can do no wrong.

It is an ancient and fundamental principle of the English constitution that the king can do no wrong. But this maxim must not be understood to mean that the king is above the law, in the unconfined sense of those words, and that every thing he does is necessarily just and lawful. Its true meaning is, first that the sovereign, individually and personally, and in his natural capacity, is independent of and is not amenable to any other earthly power or jurisdiction, and that anything arises in the conduct of public affairs is not to be imputed to the king, so as to render him personally answerable for it to his people.

Secondly, the maxim means that the prerogative of the Crown extends not to do any injury, because being created for the benefit of the people, it cannot be exerted to their prejudice; and it is therefore a fundamental and general rule that the king cannot sanction an act forbidden by law; so that from this point of view, he is under and not above the laws, and is bound by them equally with his subjects.

### 22. Vigilantibus, Non Dormientibus Jura Subveniunt

The law assist those who are vigilant, not to those who sleep over their rights.

The court of justice require that parties to a litigation shall exercise due degree of vigilance or caution.

Limitation has been prescribed in law for taking cognizance of cases. In the limitation Act 1963, limitation has been prescribed for various steps to be taken by the parties. If a party has not taken the appropriate steps within the time, he cannot enforce his right at a later time unless he has a sufficient reason for not taking those steps.

Limitation has been prescribed in criminal law also. If an offence is punishable with fine only, then the offence must be taken cognizance of by the Court within 6 months from the date of commission of the offence, otherwise it will accelerate the activities of the investigating agency. If the matter is not sent to the court within 6 months then the State will not get any opportunity to prosecute the offender.

The laws of limitation are founded on public policy. That public policy is an unlimited and perpetual threat as litigation leads to disorder and confusion. It creates insecurity and uncertainty. The object of the Limitation Act is to quiet long possession and to extinguish state demands.

□□

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# ALPHABETICAL SUBJECT INDEX


**A.**

Absence of Classification .....208
Absoluta Senetentia Expositore
Non indiget .....187
Absurd results to be avoided .....145
Acts in Pari Materia .....145
Agreement vs. Act ..... 190
Aids in Construing Tax Treaties .....200
Article
10 ..... 45
14 .....32, 217
21 .....1
246..... 5
265..... 4
266 ..... 5
Audi Alteram Partem ..... 28, 184
Autrefois Acquit .....89
Azadhi Bachao Case ..... 117

**B.**

Backward Area..... 63
Basic Principles ..... 25
Beneficial Construction .....78, 165
Beneficial Interpretation ..... 59
Benefit to the assessee ..... 216
Bias or Interest .....26
Burden of proof .....150, 176

**C.**

Cardinal rules of interpretation
of taxing statues .....215
Case law of different statute .....145
Casus Omissus .....19, 87, 168
Charging and Machinery Provisions..... 6
Charging Section .....217
Circulars and Interpretation by tax authorities 128
Circulars and its effects ..... 65
Clifford Chance Case .....121
Conflict Between earlier and later
problems of document..... 212
Conflicting decision of Supreme Court
or High Court .....156
Conjunction Disjunction ..... 168
Consequences of Repeal ..... 99
Consequences of repeal on
subordinate legislation .....100
Constitution .....1
Constitution of India .....152
Construction of Taxing Statutes
and evasion of Statutes ..... 171

Contemporanea Expositio Est
Optima Et Fortissima in Lege .....187
Contemporanea Expositio..... 85
Contextual Limitations..... 50

**D.**

Decisions of Appellate Tribunal .....159
Declaratory Statutes ..... 96
Deeming Provision ..... 13, 147, 169
Default Statutory Dictionary ..... 214
Definition and Objects ..... 24
Definition clause and undefined words 127
Devinath Nadar Case ..... 117
Dictionary Meanings ..... 132, 242
Difference between Tax and fee .....209
Discretion ..... 22
Dismissal of Social Leave by
Supreme Court ..... 158
Doctrine of double jeoparady ..... 219
Doctrine of Reading Down ..... 219
Doctrine of Res Judicata .....157
Doctrine of Stare Decis .....151
Document ..... 218
Double Non-taxation .....197
Double Taxation permissible .....145

**E.**

Effect of expiry of temporary statutes .98
Effect of Repeal & Omission of a
provision in the Act .....181
Ejusdem Generis 21, 67, 81, 127, 185, 259
Element of Mens Rea (Guilty Mind) ..172
End-use not conclusive ..... 150
Entitlement To Claim Benefit of a
Treaty ..... 198
Exemption or Deduction ..... 72
Exemptions ..... 48, 124, 148
Existing rights and vested rights ..... 93
Expert evidence ..... 150
Expiry of the Statute ..... 97
Explanation ..... 13, 125
Express Repeal ..... 99
Expressio Unius Est Exclusio Alterius 186
Expression “terms” meaning of .....213
Expression Unius ..... 169
External aids to construction ..... 128

**F.**

Falsification of books of account or document, etc. 136
Fiat Juastitia Ruat Coelum ..... 184
Finality or orders ..... 97
Finance Minister’s Speech .....21
Fiscal Statutes ..... 94
Flakt Case ..... 120
Foreign Judgements .....116
Fundamental Rule of Construction .... 211

**G.**
Gender and number .....220
General Exemption.....48
General Principles ..... 142
Generalia Specialibus ..... 169
Golden Rule ..... 216
Golden Rule of Interpretation of Deeds 211
Grammatical Construction ..... 166

**H.**
Harmonious Construction ..... 166
Hearing .....30
High Court decisions as binding
precedents .....157

**I.**
Implied Repeal .....99
Important Constitutional Provisions 205
Indian Legal System ..... 3
Instances of application of the General Clauses Act, 1987 to the IT Act,1961 217
Integrated scheme of direct taxation and equities 131
Internal Aids to Construction ..... 124
Interpretation favourable to the
assessee to be adopted ..... 144
Interpretation in favour of
constitutionality ..... 148
Interpretation not to restrict the scope 145
Interpretation of Deeds, Documents
& Wills..... 210
Interpretation of Entries .....69
Interpretation of exemption notification 149
Interpretation of Mandatory and
Directory Statute ..... 105
Interpretation of notifications ..... 148
Interpretation of Penal and remedial
Statutes .....171
Interpretation of Penal Statutes
– Whether Strict or Liberal .....174
Interpretation of Tariff heading /
principles relating to classification 149
Interpretation regarding benefit of
Deduction .....107
Interpretation regarding exemptions 113
Interpretation to be reasonable ..... 144
Interpretation to be uniform ..... 144
Interpretation with regard to
deductions claimed .....110
Issues and services of notices ..... 219

**J.**
Judicially defined works .....127

**L.**
Last word .....160
Legal proceedings under expired statute 98
Legislative Actions .....38
Legislative Fiction .....70

Legislative history and background .. 128
Liberal Interpretation ..... 74
Liberal vs. Literal Construction ..... 166
Life of a Treaty..... 199
Limitation and offences ..... 219
Limitation Interpretation .....46
Limitations of Court's Power ..... 143
Limitations on the application on
the Rule .....34
Literal Construction .....8
Literal Rule .....215
Long Standing Interpretation .....68
Long title ..... 124

**M.**

Machinery / charging sections –
relation between ..... 146
Machinery provisions – Strict rule inapplicable 146
Mandatory or Directory.....15, 105
Marginal notes and headings ..... 126
McDowell Case ..... 117
Mens Rea .....179
Mischief Rule..... 216

**N**

Natural Justice .....24, 32, 44, 237
Nemo Debet Esse Judex in Propria
Sua Causa ..... 184
New Remedies for existing rights ..... 95
Non obstante Clause .....17, 126
Noscitur A Sociis .....186, 264
Notice .....29
Notification of Exemption.....70
Nova Constitutio Futuris Formam
Imponere Debet, Non Praeteritis ..186

**O.**

Operation .....92
Operation of the Statute – Whether prospective or retrospective 175

**P.**

Part of Statutory Provisions .....33
Penal Statutes ..... 95
Perpetual ..... 97
Person .....217
Port Trust Case .....119
Presumption against retrospectivity.. 218
Presumption as to assets, books of
accounts, etc ..... 138
Presumption as to culpable mental
state .....140
Presumptions of powers conferred by
a taxing statute .....220
Previous judicial interpretation of
legislation ..... 130
Promissory Estoppels .....64
Prosecution of company .....180

Provision of other statutes and subsequent enactments .....131
Proviso .....14
Provisos .....125
Punctuation ..... 126

**Q.**

Qui Aliquid Statuerit Parte Inaudita Altera Aequum Licet Dixerit, Haud Aequum Fecerit 185
Qui Haeret in Litera Haeret in Cortice 187

**R.**

Ratio dedidend ..... 20, 154
Reading Down ..... 169
Recital meaning of .....213
Reddendo Singula Singulis ..... 84, 168
References ..... 102
Remedial Statutes ..... 95
Repeal .....181
Reports of Commissions ..... 130
Retrospective Law .....71
Retrospective operation – validity .... 146
Retrospective Operation..... 93
Retrospective or Prospective .....15
Retrospective validation .....147
Revenue Statute ..... 104
Right to have Counsel .....31
Ruat Coelum ..... 184
Rule of Cassus Omissus .....181
Rule of Construction of Document in case of Ambiguity ..... 212
Rule of Ejusdem Generis ..... 81, 127, 168
Rules ..... 58
Rules for interpreting tax legislation .170
Rules of Interpretation .....103, 150
Rules of strict construction ..... 142

**S.**

Sale..... 47
Sanction ..... 182
Schedule..... 128
Scope of Legal effect of proviso and exception in interpreting deeds 213
Scope with reference to statutory enactments ..... 214
Section 24 – Continuation of orders . 102
Section 278E..... 140
Section 5 – coming into operation of enactments 101
Section 6 – Effect of repeal .....101
Section 7 – Revival of repealed enactments ..... 102
Seneca ..... 184
Speaking Orders or Reasoned Decisions 39
Special Law overrides general law .....215
Special Maxims ..... 81
Specific Principles applicable to Tax Laws .....207

Speech of a Minister ..... 129
Stare Decisis .....17, 151
Statement of objects and reasons ..... 130
Statute to be read as a whole ..... 164
Statutes dealing with procedure ..... 93
Statutes dealing with substantive rights 93
Strict Interpretation of the provisions 178
Subsidiary Rules ..... 74, 168

**T.**

Tax Laws – Levy, Assessment and recovery .....208
Tax Laws and fundamental rights ..... 207
Tax Laws and the commerce clause .. 209
Taxation not by subordinate legislation .....208
Temporary Statute ..... 97
The use of other Foreign Authorities . 119
Treaty Shopping ..... 194
True Legal position in matters of proof of documents – Wills .....213
Two Admissible Construction of Documents ..... 212

**U.**

Ut Res Magis Valeat Quam Pereat .... 186

**V.**

Vires of Tax Laws ..... 207

**W.**

Who can tax income .....195
Wide Dictionary power..... 35
Wilful action ..... 138
Wilfully committed..... 138
Words of Rank ..... 84, 168

# ALPHABETICAL CASE LAWS INDEX

**A**


*A. K Roy vs. U.O.I. AIR (1982) (SC) 710, 732-733.* ..... 93
*A. K. Chakraborty vs. State of West Bengal 1999(3) All India Cr. L.R. 232 at page 237* ..... 231
*A. S. Mani vs. Union of India 2003 264 ITR 5 (Karn.)* ..... 112
*A.K. Kraipak vs. UOI AIR 1970 SC 150* ..... 237
*A.T.B. Mehtab Majid & Co. vs. State of Madras AIR 1963 SC 928, 931* ..... 209
*A.V.S. Fernandez vs. State of Kerala, AIR 1957 SC 657* ..... 143
*A.W.A.R.E. vs. DCIT 2003 263 ITR 13 (AP)* ..... 115
*Aboobacker vs. UOI (1989) 177 ITR 358 (Ker.)* ..... 215, 216
*ACC Ltd. vs. Collector of Customs 124 STC 59 (SC)* ..... 50
*ACC vs. Commr. of Customs 2001 124 STC 59* ..... 113
*ACE Investments P. Ltd. vs. CIT 157 CTR 185* ..... 159
*Addl. CIT vs. Surat Art Silk Cloth Manufacturers Association (1980) 121 ITR 1* ..... 22, 114
*Advani Oerlikon Ltd. vs. ACCE, 1993 (63) ELT 427, 439 (Mad)* ..... 143
*Advocates-on-Records Associations vs. UOI. (1993) 4 SCC 441, 644* ..... 261
*Agarwal Warehousing & Leasing Ltd. vs. CIT (MP) 257 ITR 235 (2002)* 246, 250, 252, 251
*Agreement vs. Act* ..... 190
*Agriculture vs. Central Reig Refining Co. 1950, 94 L.Ed. 381* ..... 107
*Ahmedabad Mfg & Calico Ptg Co. Ltd. vs. S.G. Mehta, AIR 1963 SC 1431, 1443* ..... 145
*Ahmedabad Urban Development Authority vs. Sharadkumar Jayantikumar Pasawalla AIR 1992 SC 2038* ..... 208
*Air Conditioning Specialists Pvt. Ltd. vs. Union of India (1996) 221 ITR 739 (Guj)* ..... 249
*Airfreight Ltd. vs. State of Karnataka 1999 6 SCC 561* ..... 110
*Ajanta Industries vs. CBDT (102 ITR 281)(1976)* ..... 43
*Ajith Kumar Rath vs. State of Orissa AIR 2000 SC 85.* ..... 248
*Alembic Glass Industries Ltd. vs. UOI, 1992 (59) ELT 207, 216 (Guj)* ..... 145
*All India FTP vs. UOI (1997) 228 ITR 68 (Bom.)* ..... 215, 217
*All India FTP vs. UOI (1999) 236 ITR 1 (Del.)* ..... 215, 217, 218
*All India FTP vs. UOI (2002) 256 ITR 401 (Bom.)* ..... 215, 216, 217
*All Ker CAA vs. UOI (2002) 258 ITR 679 (Guj.)* ..... 215
*All Kerala C.A. Associations vs. Union of India (2002) 258 ITR 679 (Ker.)* ..... 215, 217, 240
*Alladi Venkateshwarlu vs. Government of Andhra Pradesh [1978] 41 STC 394 (SC)* ..... 49
*Allied Motors (P) Ltd vs. CIT (1997) 224 ITR 677(SC)* ..... 242
*Allied Motors (Pvt) Ltd. vs. CIT AIR (1997) SC 1361* ..... 97
*Altmesh vs. Union of India AIR (1988) SC l768* ..... 92
*Amar Chandra vs. Collector of Excise, Tripura AIR 1972 SC 1863* ..... 21
*Amarsingh Yadav vs. Santi Devi AIR (1987) Patna 191* ..... 250
*Ambience Space Sellers vs. Asia Industrial Technology P. Ltd. 1998 PTC 19* ..... 113
*Ambika Prasad Mishra vs. State of UP AIR 1980 SC 1762* ..... 155
*Anusayaben A. Doshi vs. JCIT (2002) 256 ITR 685, 686 (Bom)* ..... 254
*Appropriate Authority vs. Vijay Kumar Sharma (2001) 249 ITR 554 (SC)* ..... 237
*Arnit Das vs. State of Bihar AIR 2000 SC 2264, 2270* ..... 262
*Artemiou vs. Procopiou (1966) 1 QB 878 (CA)* ..... 19
*Arun S. Meher vs. M.A. Twigg (1984) 153 ITR 131 (Bom)* ..... 255
*Arvind Board & Paper Products Ltd. vs. CIT (1982) 137 ITR 635* ..... 152
*Ashiq Hassan Khan vs. Sub-Divisional Officer, AIR 1965 Patna 446* ..... 111

*Ashok Leyland Ltd. vs. State of T.N. (2004) 3 SCC 1, 144.* ..... *258*
*Ashok Leyland Ltd. vs. State of Tamil Nadu, 134 STC 473 (SC)* ..... *70*
*Ashoka vs. CIT (1994) 209 ITR 679 (Pat))* ..... *215, 216*
*Aspinwall and Co. Ltd. vs. CIT 2001 251 ITR 323* ..... *110*
*Asst. CIT vs. Velliappa Textiles Ltd (2003) 263 ITR 550, 560 (SC)* ..... *180, 181, 241*
*Asstt. CCE vs. Dunlop India Ltd. (1985) 154 ITR 172 (SC)* ..... *252*
*Attar Singh vs. ITO (1991) 191 ITR 667 (SC)* ..... *216, 219*
*Attorney General vs Carloun Bank (1899 (2) QB 158 at 164)* ..... *105*
*Avtar Krishandas vs. CIT (1979) 133 ITR 338 (Del)* ..... *255, 256*
*Azam Jah Bahadur (H.H. Prince) vs. E.T.O. (1972) 83-ITR-82 (SC)* ..... *12*

**B**

*B. G. Jain vs. HSC 195 ITR 792 (SC)* ..... *159*
*B. Noorsingh vs. UOI (2001) 249 ITR 378 (Mad.)* ..... *218*
*B.K. Agarwal vs. State of Orissa AIR 1966 (SC) 2531* ..... *239*
*B.L. Sreedhan vs. K.M. Munireddy (2003) 2 SCC 355, 366* ..... *259*
*Baba Parasu Kaikadi vs. Babu (2004) 1 SCC 681* ..... *246*
*Baburao alias P.S. Samant vs. Union of India and Others (1988) AIR 440 (SC)* ..... *129*
*Bajaj Tempo Ltd. vs. CIT (1992) 196 ITR 188 (SC)* ..... *109, 115, 239*
*Balram Kumawat vs. Union of India, 134 STC 626 (SC)* ..... *50*
*Banashankari vs. State of Karnataka (1992) 194 ITR 650(Kar.)* ..... *217*
*Banashankary vs. State of Karnataka (1990) 182 ITR 8 (Kar.)* ..... *217*
*Banerji vs. Mallikarjun AIR 1960 SC 137.* ..... *221*
*Bank of Baroda vs. CIT (2002) 256 ITR 385 (Bom)* ..... *160*
*Bank of Baroda vs. H. C. Shrivatsava & Another (2002) 256 ITR 385 (390) (Bom.)* .... *252*
*Barras vs. Aberdeen Steam Trawling and Fishing Co. Ltd. (1933) AC 402 (HL)* ..... *127*
*Bashesharnath vs. CIT (1959) 35 ITR 190 (SC).)* ..... *219*
*Becker vs. St.Louis Union Trust Company 296 US 48, 56 S.Ct. 78, 80L* ..... *118*
*Belapur Sugar & Allied Industries Ltd. vs. CCE, 1999 (108) ELT 9 (SC).* ..... *149*
*Bengal Immunity Co. Ltd. vs. State (AIR 1955 S.C. 661)* ..... *164*
*Bengal Immunity Co. vs. State of Bihar (1955) 2 SCR 603* ..... *153*
*Bengal immunity Co. vs. State of Bihar (1955) 6 STC 446 (SC)* ..... *76*
*Bengal Nagpur Railway Co. Ltd. vs. Ruttanji Ramji – AIR 1938 PC 67* ..... *7*
*Berger Painters vs. CIT (2004) 266 ITR 99 (SC),* ..... *254*
*Bhagwati Coke Industries Pvt. Ltd. vs. State of Jharkhand, 136 STC 57 (SC)* ..... *70*
*Bhagwati Trading Co. vs. CIT (1977) 109 ITR 353* ..... *239*
*Bharat Bank vs. Employees AIR 1950 SC 188* ..... *221*
*Bharat Cottage Industries vs. Union of India, 1992 (59) ELT 30, 34 (Bom).* ..... *144*
*Bharat Debi vs. ITO, 53 ITR 100 (SC).* ..... *146*
*Bharat Hansraj Gandhi vs. Addl. CCE, 1991 (55) ELT 462 (Kant)* ..... *145*
*Bharat Nidhi vs. Union of India (1973) 92 ITR 1* ..... *44*
*Bharat Petroleum Corporation Ltd. vs. Mumbai Shramik Sangh 249 ITR 669 (SC)* ..... *151*
*Bharat vs. CWT (1994) 207 ITR 1 (SC)* ..... *217*
*Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. (A.I.R. 2003 SC 511)* ..... *163, 247*
*Bimalchandra Banerjee vs. State of Madhya Pradesh AIR 1971 SC 517, 520* ..... *208*
*Binani Industries Ltd. vs. ACCT reported in 129 STC 199* ..... *66*
*Birumal Gaurishankar Jain vs. Income Tax Settlement Commission (1992) 195 ITR 792 (ITSC) (SB)* ..... *251*
*Blue Star Ltd. vs. CIT (1996) 217 ITR 514 (520).* ..... *155*
*Board of Revenue vs. Sidnath, AIR 1965 SC 1092* ..... *144*
*Bohra (SA) ITO vs. Krishna Construction Co. (1998) 230 ITR 708 (Guj)* ..... *238*
*Briharilal vs. CIT (1981) (131 ITR 129)* ..... *43*

*Budhan vs. State of Bihar AIR 1955 SC 191* ..... *218*
*Builders Association vs. Union of India (1994) 209 ITR 877 (SC)*.....*240*

**C**

*C. D. Thandani ITO vs. Universal Ferro & Allied Chemicals Ltd. (1988) 172 ITR 30 (Bom.)* ..... *252*
*C.A. Abraham vs. ITO (1961) 41 ITR 425 (SC)*.....*144*
*C.B. Gautam vs. Union of India (1993) 199 ITR 530*.....*34, 164*
*C.S.T. vs. Modi Sugar Mill, AIR 1961 SC 1047*.....*143*
*Calcutta Electric Supply Corp. (India) Ltd. vs. ITO and Others (1992) 197 ITR 563 (Cal.)*.....*80, 258*
*Calcutta Gujarathi Education Society vs. Calcutta Municipal Corporation (2003) 10 SCC 533]*.....*169*
*Campbell vs. IRC[1967] Ch 651* ..... *117*
*Canada Sugar Refining Co. vs. R (1898) AC 735)* ..... *76*
*Cannaore Spg & Wvg Mills vs. Collector 1978 ELT 375 SC* ..... *244*
*Cape Brandy Syndicate vs. I R C 1921 (1) KD 64, 71* ..... *10, 104, 117, 143, 172, 203*
*Carew & Co. vs. UOI (1975) 2SCC 791*..... *74*
*Casher vs. Holmes (1831) 109 E.R. 1263*..... *84*
*CCE vs. Krishna Carbon Paper Co. 1988 (37) ELT 480 (SC).*.....*149*
*CCE vs. Parle Exports (P) Ltd., 1988 (38) ELT 741, 749 (SC).* .....*143*
*CED vs. Alladi Kuppuswamy, (1977) 108 ITR 439 (SC).*.....*143*
*CED vs. Kanakasabai, (1973) 89 ITR 251 (SC)*.....*144*
*CED vs. Kantilal Trikamlal (1976) 105-ITR-92*..... *11*
*CED vs. Sileshkumar R. Mehta (1990) 181 ITR 10 (Mad) (FB)]* ..... *131*
*Central Provinces Manganese Ore Co. Ltd. vs. Commissioner of Income-tax (1986) 160 ITR 961 (SC)*.....*7*
*Century Spinning Mfg. Co. Ltd. vs. State of West Bengal 73 STC 277*.....*156*
*CESC Ltd. vs. Dy. CIT (2004) 270 ITR 383, 387 (Cal.)* ..... *248*
*CGT vs. Aluminium Corporation of India Ltd. (1972) 85 ITR 167, 172 (SC)* ..... *247*
*CGT vs. N.S. Getti Chettiar (1971) 82 ITR 599 (SC)]* .....*132*
*Chandavarkar Sita Ratna Rao vs. Ashalata S. Guram, AIR 1987 SC 117*.....*18*
*Chandi Prasad vs. Rameshwar Prasad Agarwal, AIR 1961 Patna 41* .....*111*
*Chandra Kumar vs. UOI (1997) 228 ITR 725 (SC).)* ..... *220, 221*
*Chandulal Venichand vs. ITO (1991) 38 ITD 138 (Ahd.)*.....*251*
*Chartered Housing Bhomka Finance Corpn vs. Appropriate Authority (2001) 250 ITR 1, 18 (Kar)*..... *239*
*Chhotabhai Jethabhai Patel and Co. vs. Union of India AIR 1962 SC 1006, 1020* .....*206*
*Chhotabhai vs. UOI AIR 1952 Nag 139.*.....*214*
*Chunnilal vs. UOI (1996) 221 ITR 459(MP)*.....*217*
*CIT vs. A. Gajapathy Naidu (1964) 53 ITR 114 (SC)* .....*131, 244*
*CIT vs. A.J. Abraham Anthraper (2004) 268 ITR 417, 432 (Ker)* ..... *239*
*CIT vs. Ajax Products Ltd. (1964) 55 ITR 741 (SC)*..... *125, 131, 203*
*CIT vs. Ajax Products Ltd., AIR 1965 SC 1358*.....*142*
*CIT vs. Anglo Indian Jute Mills (1993) 202 ITR 104 (Cal)*.....*82, 127*
*CIT vs. Ashok Engg. (1992) 194 IRR 645 (SC)*..... *257*
*CIT vs. Auraiya Chamber of Commerce (1987) 167 ITR 458 (SC)].* ..... *76*
*CIT vs. B. R. Constructions (1993) 202 ITR 222 (AP) (FB)*.....*152, 245*
*CIT vs. B.C. Srinivasa Setty (1981) 128 ITR 294, 299 (SC).*.....*146*
*CIT vs. B.N. Bhattacharya (1979) 118 ITR 461 (SC).* .....*204, 256, 259*
*CIT vs. Bai Shirinbai K. Kooba (1962) 46 ITR 86 (SC)* ..... *244*
*CIT vs. Balkrishna Malhotra (1971) 81 ITR 759 (SC)*..... *127, 155*

*CIT vs. Best & Co. (1979) 119 ITR 830 (Mad).* ..... *94*
*CIT vs. Bharat Kumar Modi (2000) 246 ITR 693 (Bom)* ..... *238*
*CIT vs. Bhogilal Laherchand [1954] 25 ITR 50 (SC)* ..... *135*
*CIT vs. Bombay Trust Corporation, AIR 1930 PC 54, 55.* ..... *147*
*CIT vs. Calcutta Stock Exchange Association Ltd. [1959] 36 ITR 232 (SC)* ..... *135*
*CIT vs. Central Bank of India Ltd. (1990) 185 ITR 6 (Bom) (FB)* ..... *130*
*CIT vs. Chandanbehn Maganlaal (2002) 120 Taxmann 38 Guj)* ..... *228*
*CIT vs. Chemiquip Ltd. (2004) 265 ITR 265* ..... *158*
*CIT vs. Chimanlal J. Dalal & Co. (1965) 57 ITR 285 (Bom)* ..... *249*
*CIT vs. D'costa Brother (1963) 49 ITR 1 (Bom). CIT vs. Mahindra & Mahindra Ltd. (1983) 144 ITR 225(SC)* ..... *242*
*CIT vs. Digvijay Cement Co. Ltd. 1998 232 ITR 709 (SC)* ..... *113*
*CIT vs. Dungarmal Tainwala (1991) 191 ITR 445 (Patna)* ..... *124*
*CIT vs. Edwards (1979) 119 ITR 335 (Ker) FB].* ..... *244*
*CIT vs. Electro House (1971) (82 ITR 284)* ..... *42, 44*
*CIT vs. Elphinstone Spinning & Weaving Mills Co. Ltd., AIR 1960 SC 1016* ..... *142*
*CIT vs. G. Dalabhai & Co. (1997) 226 ITR 922 (Guj), it was observed* ..... *250*
*CIT vs. G. Krishnan Nair 2003 259 ITR 727 (Ker.)* ..... *110*
*CIT vs. G.M. Mittal Stainless Steel P. Ltd. (2003) 263 ITR 255, 258 (SC)* ..... *244, 249*
*CIT vs. Gangaram Chopotia & Co. (1990) 53 Taxman 183* ..... *44*
*CIT vs. Goodlass Nerolac Paints Ltd. (1991) 188 ITR 1 (5) (Bom)* ..... *159, 251*
*CIT vs. Gwalior Rayon Silk Mfg. Co. Ltd. (1992) 196 ITR 149 (SC)* ..... *108, 235, 236*
*CIT vs. Harijan Nigam (1997) 226 ITR 696* ..... *214*
*CIT vs. Hasmath Unissa Begum, 176 ITR 98 (SC)* ..... *142*
*CIT vs. Him Containers Ltd. (1995) 216 ITR 674 (Guwahati)* ..... *249*
*CIT vs. India Capacitors Ltd (1987) 180 ITR 641 (Cal)* ..... *255*
*CIT vs. Indian Tube Co. Ltd. (1992) 197 ITR 522 (Cal.)* ..... *80*
*CIT vs. Indo Oceanic Shipping Co. Ltd. (2001) 247 ITR 247 (Bom)* ..... *236*
*CIT vs. ISR Patton (1992) 193 ITR 49 (Ker)* ..... *96*
*CIT vs. Isthmian Steamship Lines 20 ITR 572* ..... *199*
*CIT vs. J.H. Gotla, (1985) 156 ITR 323 (SC) (1985) 4 SCC 343* ..... *56, 146, 204, 224*
*CIT vs. Jai Kishan Gupta (2003) 264 ITR 482 (All)* ..... *110*
*CIT vs. Kantilal Nathuchand (1964) 53 ITR 420 (Guj.)* ..... *249*
*CIT vs. Karamchand Premchand, (1960) 40 ITR 106, 118 (SC)* ..... *144*
*CIT vs. Karthikeyan (1993) 201 ITR 866 (SC)* ..... *216*
*CIT vs. Kelvinator (2002) 256 ITR 1 (FB)* ..... *218*
*CIT vs. Kerala Electric Lamp Works (2003) 261 ITR 721 (Kerala)* ..... *96*
*CIT vs. Kharwar (DM) (1969) 72 ITR 603 (SC)* ..... *225, 238*
*CIT vs. Khemraj Ramshmichand (1976) 114 ITR 75 (MP)* ..... *255*
*CIT vs. Kishoresinh Kalyansinh Solanki (1960) 39 ITR 522 (Bom)* ..... *204*
*CIT vs. Kulandagan Chettiar and Other Appeals (2004) 267 ITR 654 (SC)* ..... *196, 199*
*CIT vs. Kulu Valley Transport Co. P. Ltd., (1970) 77 ITR 518, 530 (SC)* ..... *144*
*CIT vs. L. G. Ramamurthi & Others (1977) 110 ITR 453 (Mad.)* ..... *158, 251, 253*
*CIT vs. Laxmi Textile Exporters Ltd. (2000) 245 ITR 521 (Mad)* ..... *197*
*CIT vs. M & G Stores, AIR 1968 SC 200* ..... *143*
*CIT vs. Madan Parnami Family Trust (2004) 269 ITR 16 (Raj)* ..... *109*
*CIT vs. Madho Prasad Jatia (1976) 105 ITR 179 (SC)]* ..... *131*
*CIT vs. Madhukant M. Mehta (1981) 132 ITR 159 (Guj).* ..... *250*
*CIT vs. Mahaliram Ramjidas, AIR 1940 PC 124, 127* ..... *146*
*CIT vs. Maharashtra Sugar Mills Ltd., AIR 1971 SC 2434* ..... *143*
*CIT vs. Mahendra Mills (2000) 243 ITR 56 (SC)* ..... *110*
*CIT vs. Mahindra & Mahindra Ltd. (1983) 144 ITR225 1 (SC)* ..... *241*

*CIT vs. Mangalore Ganesh Beedi Works 193 ITR 77 (Kar)*.....126
*CIT vs. Manilal Dhanji. (1962) 44 ITR 876 (SC)* .....131
*CIT vs. Mirza Ataullaha Baig and Another (1993) 202 ITR 291 (Bom)*.....80
*CIT vs. N.C. Budhiraja & Co. (1993) 204 ITR 412 (SC).* ..... 76
*CIT vs. Naga Hills Tea Co. Ltd., 89 ITR 236, 240* .....144
*CIT vs. Nagi Reddi 144 ITR 62.*.....156
*CIT vs. National Taj Theatres (1980) (121 ITR 525).* ..... 43, 44, 223
*CIT vs. P.K. Noorjahan (1997) 11 SCC 198*.....241
*CIT vs. Patel Bros. (1994) 215 ITR 165 (SC)* ..... 96
*CIT vs. Podar Cement Pvt. Ltd. AIR (1997) SC 2523 at 2538; 226 ITR 625 (SC)*..... 97
*CIT vs. Provident Inv. Co. Ltd. (1954) 32 ITR 190 (SC)* ..... 236
*CIT vs. Pyarilal Kasam Manji & Co. 198 ITR 110 (Ori.)* .....125
*CIT vs. Quality (1997) 224 ITR 77 (Pat.)*..... 248
*CIT vs. R.M.Muthaiah (1993) 202 ITR 508*.....196
*CIT vs. Raja Benoy Kumar Sahas Roy (1957) 32 ITR 466 (SC)*..... 242
*CIT vs. Ranga Pai (1975) 100 ITR 413) (Ker)* .....240
*CIT vs. Reunion Engineering Co. (P) Ltd. (1993) 203 ITR 274 (Bom.)* .....125
*CIT vs. S. Devaraj (1969) 73 ITR 1 (Mad)*..... 159, 251
*CIT vs. SAE Welfare Trust 192 CTR 70 (Del)*.....152
*CIT vs. Sanwarmal Shivkumar (1988) 171 ITR 377 (Raj)*.....129
*CIT vs. Shaan Finance (P) Ltd. (1993) 199 ITR 409 (Ker.)* .....81
*CIT vs. Shah Elec. (1994) 207 ITR 350(Guj.)*.....215
*CIT vs. Shahzada Nand & Sons. (1966 ) 60 ITR 392 (SC)* .....142, 235
*CIT vs. Sham Finance (1998) 231 ITR 308 (SC)*..... 113
*CIT vs. Shriram Pistons & Rings (1990) 181 ITR 230 (Del)*..... 113
*CIT vs. Sivanandha Steel Ltd. (2000) 243 ITR 770, 773 (Mad)*..... 264
*CIT vs. Sky Room Pvt. Ltd. (1992) 195 ITR 412 (Ker.);*..... 79
*CIT vs. Sodra Devi (1957) 32 ITR 615 (S.C.) (AIR 1957 SC 832)*.....240
*CIT vs. South Arcot District Co-operative Marketing Society Ltd. (1989) 176 ITR 117 (SC),*
..... 239
*CIT vs. Statesman Ltd. (1992) 198 ITR 582 (Cal.)*.....83, 127
*CIT vs. Sudarshan Chemical Industries Ltd. (2000) 245 ITR 769* .....157
*CIT vs. Sun Engineering (1992) (1992) 198 ITR 297 (SC)* ..... 224
*CIT vs. Sundaradevi (1957)(32 ITR 615) (SC)* ..... 223
*CIT vs. Sundaram Industries Ltd (2002) 253 ITR 396 (Mad)*..... 258
*CIT vs. Sundaram Iyengar & Sons (P) Ltd (1975) 101 ITR 764 (SC)* .....142, 227, 257
*CIT vs. T.V. Sundaram (1999) 236 ITR 524 (Mad.)*..... 257
*CIT vs. Tata Iron & Steel Company Ltd. 66 TTJ 463 (2000) (248 ITR 190)* .....200
*CIT vs. Teja Singh, (1959) 35 ITR 408, 413 (SC).* ..... 148
*CIT vs. Thana Electricity Supply Ltd (1994) 206 ITR 727 (Bom)*.....249, 251, 252, 253
*CIT vs. Thane Electric Supply Ltd. (1994) 206 ITR 727 (Bom)*.....159
*CIT vs. U.P. Co-operative Federation Ltd. (1989) 176 ITR 435 (SC)*..... 239
*CIT vs. Udaipur Distillery Co. Ltd. (2004) 186 CTR 1 at 14 268 I.T.R. 305 (Rajashtan)* ..21
*CIT vs. V. K. Srinivasan and K. Gopalan (1953) 23 ITR 87 (SC)*..... 128
*CIT vs. V.R.S.R.M. Firm& Others (1994) 208 ITR 400*.....195
*CIT vs. Vallabhdas Vithaldas & Others (2002) 253 ITR 543 (Guj.)* ..... 247
*CIT vs. Vardhman Spinning (1997) 226 ITR 296 (P&H)*..... 249
*CIT vs. Vazir Sultan & Sons (1959) 36 ITR 175 (SC)*.....131
*CIT vs. Vegetable Products Ltd (1973) 88 ITR 192(SC).* .....76, 174, 223, 239, 240
*CIT vs. Vijay Ship Breaking Corp. (2003) 261 ITR 113*.....202
*CIT vs. Visakhapatnam Port Trust (1983) 144 ITR 146*..... 190, 202
*CIT vs. VMRP Firm (1965) 56 ITR 67 (S.C.)* ..... 259

*CIT vs. Voltas Ltd. (1994) 205 ITR 569 (Bom)* ..... *126*
*Classic Builders & Developers vs. UOI (2001) 251 ITR 492, 497 (MP)*..... *235*
*Clifford Chance vs. Deputy Commissioner of Income Tax MANU/IT/0219/2002* ..... *121*
*Collector Land Acquisition vs. MST, Katiji and Others (1987) 167 ITR 471 (SC)*.... *255, 256*
*Collector of Central Excise vs. Himalayan Co-op. Milk Products Union Ltd. 122 ELT 327 (SC)* ..... *61*
*Collector, Land Acquisition, vs. Mst. Khatiji and Ors. 66 STC 228 (SC); (1987) 167 ITR 471*..... *63, 255*
*Collins vs. Kentucky, 234 U.S. 634, 638*..... *171*
*Commercial Taxes Officer vs. Meera Granite Pvt. Ltd., 127 STC 586 (Raj)* ..... *62*
*Commissioner for Special Purposes of Income-tax vs. Pemsel, (1891) AC 531, pp. 590, 591 (HL)*..... *85*
*Commissioner of Central Excise vs. Sharma Chemical Works, 132 STC 251 (SC)*..... *69*
*Commissioner of Commercial Taxes, Ranchi vs. Swarn Rekha Cokes And Coals Pvt. Ltd.70*
*Commissioner of Custom vs. IOC Ltd. (2004) 267 ITR 272, 277 (SC)* ..... *243*
*Commissioner of Customs vs. P.S. Ltd.. 125 STC 255 (SC)*..... *50*
*Commissioner of Income Tax vs. P.V.A.L. Kulandagan Chettiar (dead) through L.Rs. (2004) 267 ITR 654 (SC)*..... *121*
*Commissioner of Income Tax vs. Vijay Ship Breaking Corporation (2003) 261 ITR 113 (Guj.)* ..... *120*
*Commissioner of Income Tax, A. P. I. vs. Visakhapatnam Port Trust 144 ITR 146 (A.P.)119*
*Commissioner of Income-tax vs. Mahaliram Ramjidas (1940) 8 ITR 442 (PC)*.....*7*
*Commissioner of Income-tax vs. Vr.S.R.M. Firm (1994) 208 ITR 0400 (Mad)* ..... *121*
*Commissioner of Income-tax, A.P. vs. M. Chandra Sekhar (1985) 151 ITR 433 (SC)* .....*7*
*Commissioner of Sales Tax vs. Industrial Coal Enterprises (SC) 114 STC 365 (SC)*..... *59*
*Commissioner of Sales Tax vs. Jaswant Singh Charan Singh [1967] 19 STC 469 (SC)*.... *49*
*Commissioner of Sales Tax vs. Paper & Pulp Conversion Ltd., 41 STC 64 (Bom)* ..... *54*
*Commissioner of Wealth Tax vs. Dr Karan Singh and Ors 1993 Supp (4) SCC 500* .....*122*
*Commissioners of Customs vs. Indian Oil Corpn Ltd. (2004) 267 ITR 272, 277 - 78 (SC)240*
*Concord of India Ins. Co. Ltd Vs. Nirmaladevi & Ors (1979) 118 ITR 507 (SC)*..... *255, 256*
*Consolidated Pneumatic Tool Co. (India) Ltd. vs. CIT (1994) 209 ITR 277, 282 (Bom) 250*
*Constitution of India. Karamchand Premchand Pvt. Ltd. vs. CIT (1975) 101 ITR 46, 52 (Guj.)* ..... *247*
*Constitution. (Chandra Kumar vs. UOI (1981) 128 ITR 725 (SC)*.....*221*
*Continental Exporters vs. Assistant Collector of Customs, 1995 (77) ELT 801 (SC).*.....*144*
*Corporation of Calicut vs. Thachambalath Sadasivan AIR 1985 SC 756* ..... *209*
*Craven vs. White (1988) 3 All ER 495*..... *118*
*CST vs. Auraiya Chamber of Commerce, (1987) 167 ITR 458 (SC)*..... *256*
*CWT vs. Ellis Bridge Gymkhana and Others (1998) 229 ITR 1* ..... *6*
*CWT vs. Guna Shenoy (1992) 197 ITR 325 (Ker.)*.....*221*
*CWT vs. Hash Matunissa Begam, 1989 (40) ELT 239, 245, 246 (SC)*..... *148*
*CWT vs. Imperial Tobacco Co. of India Ltd. (1966) 61 ITR 461 (SC)* .....*240*
*CWT vs. Jagdish Prasad Choudhary (1995) 211 ITR 472 (Patna) [F.B.]* ..... *237*
*CWT vs. Jindal (1992) 194 ITR 539 (Ker.)*.....*219*
*CWT vs. Karan Singh (1993) 200 ITR 614 (SC)* .....*216*
*CWT vs. Kripashankar Worah, AIR 1971 SC 2463, 2466*.....*144*
*CWT vs. Shravan Kumar Swarup (1994) 210 ITR 886 (SC)* ..... *94*
*CWT vs. Tulsi Dass (2002) 256 ITR 73 (Raj)*.....*110*

**D**

*D.R. Yadav vs. R.K. Singh [(2003) 7 SCC 110].* .....*169*
*Dafedar Niranjan Singh vs. Custodian Evacuee Property AIR (1961) SC 1425* ..... *97*
*Darshan Singh vs. Ram Pal Singh AIR 1991 SC 1654* ..... *69*

*Dattatrays vs. State of Bombay (AIR 1952 SC 181)* ..... *10*
*Davis vs. Sebastian (1999) 6 SCC 604 (SC)* ..... *110*
*Dayal Singh vs. Union of India) (AIR 2003 SC 1140).* ..... *163*
*Daypack Systems P. Ltd. (1988) 2 SCC 299* ..... *128*
*DCIT vs. Central Concrete (1999) 236 ITR 595 (Cal.)* ..... *217*
*DCIT vs. Shanthabaram (2003) 260 ITR 156 (Kar.)* ..... *257*
*Delhi Administration vs. Manoharlal (2002) 7 SCC 222, 227* ..... *247*
*Delhi Development Authority vs. Ashok Kumar Behal, (2002) 7 SCC 135, 141* ..... *249*
*Dena Bank vs. Bhikabhai Prabhudas Parekh AIR (2000) SC 3654 at 3660.* ..... *95*
*Deputy Commissioner of Income Tax vs. I.T.C. Ltd. (2003) 80 TTJ (ITAT) 798* ..... *120*
*Desh Bandhu Gupta vs. Delhi Stock Exchange Asson. Ltd. AIR 1979 SC 1049, 1054* ..... *85*
*Deys Medical Stores Ltd. vs. Commissioner of Trade Tax (2004) 134 SC 1, 8, 9 (All)* .. *247*
*Dhakeshsari Cotton Mills vs. CIT (26 ITR 775) (SC)* ..... *32*
*Director of Income Tax vs. Paper Product Ltd. (Del) 257 ITR 1 (2002)* ..... *246*
*Director of Settlements vs. M.R. Apparao (2002) 4 SCC 638* ..... *263*
*Dissenting M.V. Javali vs. Mahajan Borwell (1998) 230 ITR 1 (SC)* ..... *241*
*Divisional Controller vs. Mohadeva Shetty, AIR 2003 SC 4172, 4178* ..... *249*
*Dollar vs. UOI (1993) 204 ITR 103 (Mad.)* ..... *217, 218*
*Doy Pack Systems (Pvt.) Ltd. vs. Union of India, 1988 (36) ELT 201 (SC).* ..... *142, 148*
*Doypack Systems Pvt. Ltd. vs. UOI [1998 (2) SCC 299]* ..... *234*
*Dr. P.K.P. Mohammad vs. CBDT (1993) 203 ITR 479 (Ker.);* ..... *79, 80*
*Dr. T. P. Kapadia vs. CIT (1973) 87 ITR 511 (Mys.)* ..... *249*
*Duke of Westminster vs. IRC (1936) 19 TC 490 (HL)* ..... *104, 238*
*Duncan Agro Industries Ltd. vs. Union of India, 1989 (39) ELT 211, 224 (Del).* ..... *143*
*Dunlop India Ltd. vs. Union of India, 1983 ELT 1566 (SC)* ..... *149, 150*
*Dutta vs. Lawrence (1968) 68 ITR 272 (SC)* ..... *218*
*Dy. CIT vs. Biston Consulting Group Pvt. Ltd. (2005) 93 TTJ 293 (Bom.)* ..... *257*
*Dy. CIT vs. Reliance Industries Ltd. (2004) 88 ITD 273 (Mum) (SB)* ..... *251*
*Dy. Commissioner of Income-tax vs. ITC Ltd. 82 ITD 239* ..... *203*
*Dy. CTO vs. Sha Sukraj Peerajee AIR (1968) SC 67, 70* ..... *92*

**E**

*E.I. Tobacco Co. Ltd. vs. State of A.P. AIR 1962 SC 1733* ..... *207*
*E.Palanisamy vs. Palanisamy (Dead) by Lrs. And Others, (2003) 1 SCC 122* ..... *16*
*East End Dwellings Co. Ltd. vs. Finsbury Borough Council (1952) AC 109* ..... *148*
*East India Comm VS. Coll AIR 1962 SC 1893, 1903.)* ..... *220*
*Eastman Photographic Materials Company Ltd. vs. Comptroller-General of Patents, Designs and Trade-Marks (1898) AC 571, 576 (HL)* ..... *9*
*Eknath Mukkawar vs. State of Maharashtra AIR 1977 SC 1177* ..... *157*
*Elel Hotels vs. UOI (1989) 178 ITR 140 (SC)* ..... *216, 217*
*Elgi Equipments vs. Assistant Commissioner of Commercial Taxes, 136 STC 215 (SC)* ... *49*
*Elphinstone Spinning and Weaving Mills Co. Ltd. vs. CIT (1955) 28 ITR 811 (Bom)* ..... *204*
*Escorts Ltd. vs. Commissioner of Central Excise, Delhi-II, 173 ELT 113 (SC)* ..... *72*
*Existing rights and vested rights* ..... *93*
*Export House vs. ITO (1985) 23 TTJ 285 (Amritsar)* ..... *251*
*Express Hotels P. Ltd. vs. State of Gujarat AIR 1989 SC 1949* ..... *208*
*Express Hotels vs. State of Gujarat (1989) 178 ITR 151 (SC)* ..... *216*
*Express Mills vs. Municipal Committee, AIR 1958 SC 341* ..... *144*
*Express Newspaper (Pvt) Ltd. vs. Union of India (AIR 1958 SC 578)* ..... *240*

**F**

*Federation of Hotel and Restaurant Association of India vs. UOI (1989) 178 ITR 97 (SC)*.....215, 216, 217, 218
*Federation of Hotel and Restaurant Association vs. Union of India AIR 1990 SC 1637*.....207, 208
*Fitwell Fastners (India) Pvt. Ltd. vs. CC, 1993 (68) ELT 50 (Cal).*.....144
*Flakt (India) Ltd. (2004) 267 ITR 727 (AAR)*.....120
*Flexoplast Abrasive Ltd vs. Union of India 1980 ELT 513 (Bom)*.....244
*Furniss vs Dawon (55 T C 324).*.....104

**G**

*G.D. Karkare vs. T.L. Shevde AIR 1952 Nag. 330, 334*.....83
*Ganesh Properties P. Ltd. vs. CIT (1993) 202 ITR 434 (Cal)*.....239
*Ganesh, Dass Ram Gopal vs. IAC (1982) 142 ITR 101 (Allah)*.....255
*Gangadhar Narasingdas Agarwal vs. Union of India 1967 1 MLJ 197*.....111
*Gannon Dunkerley & Co. Ltd. vs. Union of India, 135 STC 168 (Bom)*.....47
*Geep Flashlight vs. UOI (1996) 218 ITR 638 (All)*.....215, 217, 218
*General Finance Co. and Another vs. Asstt. Commissioner of IT reported in 257 ITR 338*.....181
*General Finance Co. vs. Asst. CIT AIR (2002) (SC) 3126*.....100
*Geoffrey Manners & Co. Ltd. vs. CIT (1996) 221 ITR 695 (Bom.)*.....249
*Ghulam Hussain vs. State of Rajasthan AIR 1963 SC 379.*.....214
*Gladstone vs. Bower (1960) 3 All E.R. 353 (CA)*.....88
*Godavaribai Saraf vs. CIT (1978) 113 ITR 589 (Guj)*.....158
*Golden Color Lab & Studio vs. Commissioner of Commercial Taxes (2004) 134 STC 570 (Karn)*.....263
*Goodyear India Ltd. vs. State at Haryana (SC) 188 ITR 402 (1991)*.....215, 216, 246
*Gopalkrishnan vs. CBDT (1994) 206 ITR 183 (Mad.)*.....217
*Gopiram Bhagwandas vs. State of Bihar reported in 28 STC 322(SC)*.....55
*Gorham vs. Exeter (BP), (1850) 15 QB 52, P. 74*.....85
*Government of India vs. Workmen of State Trading Corporation (1997) 11 SCC 641*.....248
*Government of Madras vs. P. R. Sriramulu [1996] 1 SCC 345*.....116
*Govind Saran Ganga Saran (1985) 155 ITR 144 (SC)*.....130
*Govindram Seksaria Charity Trust vs. ITO (1987) 168 ITR 387 (MP)*.....252
*Govt. of W.B. vs. Tarun R. Roy (2004) 1 SCC 347, 358*.....263
*Goyal vs. Reliance Industries Ltd., (2003) 113*.....167
*Graphite India Limited vs. Deputy Commissioner (2003) 86 ITD 384 (Cal)*.....119
*Grasim Inds. Ltd. vs. Collector of Customs (2002) 4 SCC 297, 304*.....259
*Grasim Industries Limited vs. Collector of Customs, Bombay, 128 STC 349 (SC)*.....67
*Grasim Industries Ltd. vs. CC, 2002 (141) ELT 593 (SC).*.....143
*Greater Bombay vs. Mafatlal Industries AIR 1996 SC 1541*.....110
*Greenberg vs. IRC [1971] 3 All ER 136; 3 WLR 386*.....117
*Gregory vs. Helvering 293 US 465, 469 55 S.Ct. 226, 267, 78 L.ed.566, 97 ALR 1335*.....118
*Grey vs. Pearson (1857) 6HL Cas 61)*.....228
*Grindlays Bank P.L.C. vs. CIT (1993) 202 ITR 148 (Cal.)*.....80
*Gulabchand Sharma vs. H.P. Sharma, CIT (1974) 95 ITR 117 (Delhi)*.....91
*Gursahai Saigal vs. CIT, (1963) 48 ITR 1 (SC)*.....7, 143, 146
*Gursahai Saigal vs. CIT, AIR 1963 SC 1062, 1064, 1065*.....146
*Gurucharan Singh vs. Kamla Singh (1976) 2SCC 152*.....75
*Gwalior Rayon Silk Mfg. Co. Ltd. (1992) 196 ITR 149 (SC)*.....115

**H**

*HA Shah vs. CIT 30 ITR 618.*.....158
*Hajee Abdul Shukoor & Co. vs. State of Madras AIR (1964) SC 1729 at 1735*.....93
*Haji Lal Mohd. Biri Works vs. State of U.P. (1973) 32 STC 496, 500 (SC)*.....92

*Haldiram Bhujiwala and another vs. Anandkumar Deepak Kumar & Anr. (2000) 3 SCC 250* ..... *241*
*Handa (RP) vs. ITO (1992) 198 ITR 54 (P & H)* ..... *257*
*Hanif vs. State of Bihar AIR 1958 SC 731* ..... *218*
*Hansraj & Sons vs. State of J & K (2002) 6 SCC 227, 237 - 39* ..... *236*
*Harbajan Singh vs. Press Council of India (2002) 3 SCC 722, 727* ..... *234*
*Haresh Dayaram Thakur vs. State of Maharashtra (2000) 6 SCC 179, 187* ..... *256*
*Haryana vs. Karnal Co-op. Farmers' Society AIR (1994) SC 1.* ..... *95*
*Helvering vs. St. Louis Trust Company 296 US 48, 56 S.Ct. 78, 80L* ..... *118*
*Hindustan Construction vs. CIT (1994) 208 ITR 291 (Bom)].* ..... *126*
*Hindustan Ferodo Ltd. vs. CCE 1997 (89) ELT 16, 19 (SC).* ..... *150*
*Hindustan Petroleum Corporation vs. CIT 143 ITR 318 (Bom)* ..... *157*
*Hindustan Petroleum Corporation vs. Collector of Central Excise 1995 3 Scale 1* ..... *108*
*Hiradevi vs. District Board, Shahjahanpur, reported in AIR 1952 SC 362* ..... *88*
*Hiralal Ratanlal vs. Sales Tax Officer AIR 1973 SC 1034* ..... *208*
*Hitech vs. UOI (1997) 227 ITR 446 (AP)* ..... *218*
*Hitendra Vishnu Thakur vs. State of Maharashtra, AIR 1994 S.C. 2623* ..... *15*
*Hnter Douglaas Australia Pty. vs. Perma Blinds (1979) 44A.L.J.R* ..... *134*
*Hoechst Pharmaceuticals Ltd. vs. State of Bihar AIR 1983 SC 1019* ..... *207*
*Homi Phiroze Ranina & Ors. vs. State of Maharashtra & Ors. reported in (2003) 263 ITR 636 (Bom)* ..... *180*
*Hotel Manasarovar vs. UOI (1995) 213 ITR 668 (AP)* ..... *218*
*House of Lords (i) Ramsay vs I R (54 T C 101)* ..... *104*
*Housing Board of Haryana vs. Haryana Housing Board Employees Union AIR 1996 SC 434* ..... *21*
*HRE vs. L.Swamiyar AIR 1954 SC 282* ..... *209*
*Hussein Kasarn Dada (India) Ltd. vs. State of M. P. AIR (1953) SC 221* ..... *94*

**I**

*I R C vs. Ross and Coulter 1948 (1) All E.R. 616 at 625 (H.L.)* ..... *104*
*I R vs. Burmah Oil (54 T C 200)* ..... *104*
*IAC vs. Kedarnath Jhunjhunwala (1981) 133 ITR 746, 755 (Pat)* ..... *255*
*ICAI vs. Price Waterhouse, (1997) 90 Comp. Case 113, 140, 141 (SC)* ..... *234*
*ICICI vs. D.D. Ruparelia (2000) 99 Com. cases 181* ..... *156*
*India United Mills Ltd. vs. CEPT, AIR 1955 SC 79, 82.* ..... *146*
*Income-tax Officer, Tuticorin vs. T.S. Devinath Nadar and Ors AIR 1968 SC 623* ..... *117*
*India cement Ltd. vs. State of Tamil Nadu (1990) 1 SCC* ..... *247*
*India Cement Ltd. vs. State of Tamil Nadu, (1991) 188 ITR 690, 699 (SC)* ..... *214, 215, 216*
*India United Mills Ltd. vs. Commissioner of Excess Profits Tax, Bombay (1955) 27 ITR 20 (SC)* ..... *7, 146*
*Indian Chamber of Commerce vs. CIT (1975) 101 ITR 796* ..... *22, 114*
*Indian Newspapers Society vs. State of Karnataka reported in 93 STC 95 (SC)* ..... *56*
*Indira Sohanlal vs. Custodian of Evacuee Property AIR (1956) SC 77 at 84* ..... *97*
*Indo International Industries vs. CST 1981 ELT 325, 329 (SC)* ..... *149*
*Indo Swiss Tune Ltd. vs. Umrao AIR 1981 Punj 213* ..... *156*
*Indramani Pyarelal Gupta (Dr.) vs. W.R. Natu, AIR 1965 SC 1167 at p. 1172* ..... *83*
*Indures (P) Ltd. vs. IAC (1991) 38 ITD 635 (Del)* ..... *256*
*Industrial Credit & Investment Corporation of India Ltd. vs. Dahanesh D. Ruparelia (2000)* ..... *247*
*Inland Revenue Commissioner vs. Rossminster Ltd. (1980) 1 All ER 80).* ..... *174*
*International Harvester Co. vs. Kentucky, 234 U.S. 216, 221* ..... *171*
*IRC vs. Duke of Westminster [1936] AC I; 19 TC 490* ..... *117*

*IRC vs. Fisher's Executors [1926] AC 395* ..... *117*
*IRC vs. Wesleyan General Assurance (1940) 30 TC 11 (HL)* ..... *238*
*Ishwar Das vs. Union of India AIR (1972) SC 1193* ..... *92*
*ITAT vs. V.K. Aggarwal 235 ITR 175 (SC)* ..... *159*
*ITO vs. D. Manoharlal Kothari 236 ITR 357 (Mad)* ..... *178*
*ITO vs. Damodarbhat (1969) 71 ITR 806 (SC)* ..... *165*
*ITO vs. Devinatha Nadar, AIR 1968 SC 623* ..... *142, 143*
*ITO vs. Kaysons India (2000) 246 ITR 489 (P & H)* ..... *257*
*ITO vs. N. Takin Roy Rymbai (1976) 103-ITR-82 (SC); (1976) 1 SCC 916* ..... *5*
*ITO vs. V.D. Manoharlal Kothari, 236 ITR 357 (Mad.)].* ..... *128*
*ITO vs. Varghese K.P. (1973) 91 ITR 49 (Ker)(FB)* ..... *240*
*Ittyavira Mathai vs. Varkey AIR (1964) SC 907 at 914.* ..... *94*

**J**

*J. K. Charitable Trust vs. WTO (1996) 222 ITR 523 (All.)* ..... *248*
*J.B. Boda & CO vs. CBDT (1997) 223 ITR 271 (SC)* ..... *242*
*J.K. Steel Ltd. vs. Union of India, AIR 1970 SC 1173, 1177* ..... *143, 236*
*J.P. Jani ITO vs. Induprasad D. Bhatt (1969) 72 ITR 595 (SC).* ..... *93, 95*
*Jaganath Agarwala vs. B.N. Dutta; AIR 1963 Cal. 26)* ..... *78*
*Jagannath Baksh Singh vs. State of UP (1962) 46 ITR 169 (SC)* ..... *215, 217*
*Jain Brothers vs. Union of India, 77 ITR 107, 112 (SC).* ..... *145*
*Jain Engineering Co. vs. CC, 1987 (32) ELT 3 (SC)* ..... *149*
*Jaipur Hosiery Mills (P.) Ltd. vs. State of Rajasthan (1970) 26 STC 341* ..... *5*
*Janapada Sabha vs. C.P. Syndicate, (1971) 1 SCC 509.* ..... *143*
*Jindal (MD) vs. CIT (1987) 164 ITR 28 (Cal)* ..... *257*
*Jiwandas vs. CIT 4 ITC 40* ..... *203*
*Jodha Mal Kuthiala vs. CIT, 82 ITR 570 (SC).* ..... *143*
*Jodhpur Chartered Accountants Society vs. UOI (2003) 264 ITR 529* ..... *22*
*Jotindranath vs. Province of Bihar AIR (1949) F.C 175.* ..... *97*
*Joyanarayan Panigrahi vs. CIT (1974) 93 ITR 102 (Orissa)* ..... *131*
*Julius vs. Bishop of Oxford 5 Appeal Cases 214 )* ..... *103*
*Jyoti Ltd vs. Kanwalji Kaur Bhasin (1987) 62 Comp Cases 626 (Del.)* ..... *257*

**K**

*K. M. Sharma vs. ITO (2003) 354 ITR 773 (SC)* ..... *96*
*K. Manikchand vs. Elias Saleh AIR (1969) SC 751, 761.* ..... *92*
*K. P. Varghese vs. ITO (1981) 131 ITR 597 (SC)* ..... *9, 22, 126, 129, 164, 235, 240, 243*
*K. Sham Bhat vs. Agricultural ITO AIR 1963 SC 591.* ..... *207*
*K. Subramanian, ITO vs. Siemens India Ltd. (1985) 156 ITR 11 (Bom)* ..... *249*
*K. V. Kamath vs. K. R. Baliga & Co. AIR 1969 SC 504 at P.511* ..... *85*
*K.C. Builders And Anr. vs. Assistant Commissioner of Income Tax. (2004) 265 ITR 562 (SC)* ..... *173*
*K.K. Kochunni vs. State of Madras, AIR 1960 SC 1080)* ..... *83*
*K.M. Sharma vs. ITO (2002) 254 ITR 772, 779 - 80 (SC)* ..... *256*
*K.T. Moopil Nair vs. State of Kerala AIR 1961 SC 552* ..... *208*
*Kalpana Polytec India Ltd. vs. UOI (2001) 106 Comp. Cas. 558, 562 (Cal)* ..... *264*
*Kamla Kant Dube vs. M.V. Umang, AIR 2000 (Bom) 211, 222* ..... *262*
*Kanchenjunga Properties vs. State of Sikkim (1991) 191 ITR 575(Sik.)* ..... *215*
*Kanhayamal vs. State of Kerala (2000) 245 ITR 360 (SC)* ..... *248*
*Kapti Comm. Agency vs. State of U.P. (2004) 134 STC 436 448 452 (All)* ..... *239*
*Kapurchand vs. CIT (131 ITR 451) (SC)* ..... *43, 44*
*Karimtharuvi Tea Estate vs. State of Kerala (1966) 60 ITR 262 (SC)* ..... *94*
*Karnataka State vs. Union of India AIR 1978 SC 68* ..... *89*

*Kartar Singh vs. State of Punjab JT (1994) (2 SC 423)*.....163
*Kavalappara vs. State (AIR 1960 SC 1080)* ..... 168
*Kedar Nath vs. State of WB AIR 1953 SC 404*.....217
*Kedarnath Jute Manufacturing Co. vs. CTO (AIR 1966 SC 12)*.....105
*Kehar Singh vs. State (A.I.R. 1988 Supreme Court 1883)* .....162
*Ker State Coir Corpn vs. UOI (1994) 210 ITR 121 (Ker.)*.....215
*Kerala High Court in P. Ummali Umma vs. I.A.C. (1967) 64 ITR 669 (Ker.)*.....91
*Kerala State ID Corpn Lt d. vs. CIT 259 ITR 51 (SC) (2003)*..... 242
*Keshar Mills Ltd. vs. CIT [1953] 23 ITR 250 (SC)* .....135
*Keshavji Ravji & Co. vs. CIT (1990) 183 ITR 1 (SC)*.....131, 235, 236
*Keshavlal Jethalal Shah vs. Mohanlal AIR (1968) SC 1336*..... 97
*Khalid Automobiles vs. Union of India (1995) 4 SCC (Suppl.) 653*.....159, 252
*Khandubhai vs. DCIT (1999) 236 ITR 73 (Guj.)* ..... 218
*Khazan Chand vs. State of Jammu & Kashmir AIR 1984 SC 762*.....208
*Khushal Kishore Biyani vs. Union of India 256 ITR 679* .....181
*Khyerbhari Tea Co. Ltd. vs. State of Assam AIR 1964 SC 925*.....208
*Kiersentec vs. CIT 11 Taxman 70 (Bom.) (1982)*..... 249
*Kil Kotagiri Tea and Coffee Estate Co. Ltd. vs. ITAT (1988) 174 ITR 579 (Ker.)*.....248
*Kiran Agencies vs. ITO (1983) 15 TTJ 460 (Nag)*..... 256
*Kishan Lal vs. UOI & Co. vs. ITO (5 TTJ 305)* ..... 254
*Kolhapur Cane Sugar Works vs. Union of India AIR (2000) SC 811 at 819.* ..... 99
*Kotak Mahindra Fin. Ltd. vs. Dy. CIT (2004) 265 ITR 114, 149 (Bom)*..... 258
*Koteswar Vittal Kamath vs. K. Rangappa Baliga & Co. (AIR 1969 SC 504).* ..... 168
*Kraipak vs. Union of India AIR 1970 S.C. 150* ..... 25
*Krishena Kumar vs. UOI (1990) 4 SCC 207 233*.....260
*Krishi Utpadan Mandi Samiti vs. Shankar Industries 1993 Supp. 3 SCC 361*.....112
*Krishi Utpadan Samiti vs. Ashok Kumar Dinesh Chandra (1996) 10 SCC 100* .....209
*Krishi Utpadan vs. Shree Mahalaxmi 1995 Supp (3) SCC 433*.....214
*Kunhammed vs. UOI (1989) 176 ITR 481(Ker.)* ..... 215, 216
*Kunhayammed v State of Ker (2000) 245 ITR 360 (SC)*..... 221, 248
*Kwality Restaurant & Ice Cream Co. vs. CIT (1984) 158 ITR 188 (Del)* ..... 255

**L**

*L. Hirday Narain vs. I.T.O. (1970) 78 I.T.R. 26 (SC)* .....16
*Lakshmi Jewellery vs. CIT 171 ITR 649 (AP)*..... 267
*Laxmipat Singhania vs. CIT, 72 ITR 291 (294) (SC).*.....145
*Lohia Machines Ltd. vs. Union of India, 152 ITR 308 (SC).* .....147
*Loka Shikshana' Trust vs. CIT (1975) 101 ITR 234*..... 22
*Lokmat News papers P. Ltd. vs. Shankar Prasad AIR 1999 SC 2423, 2444*..... 259
*London Graving Dock Co. Ltd. vs. Horton (1951 AC 737 at p. 761)*..... 73
*Longwalia Poultry Farm vs. Dy. CIT (1998) 67 ITD 45 (Chan.) (TM)*.....251
*Lord Campbell in R. vs. Edmundson (1859) 28 LJ MC 213* .....81
*Lord Halsbury, L.C., in Sharp vs. Wakefield, (1981)*..... 23
*Lord Howard de Walden vs. IRC [1942] 1 KB 389; 25 TC 13 1*..... 117
*Lord Reid in Luke vs. IRC (1964) 54 ITR 692; (1963) AC 557*.....20
*Lord Simon in Latilla vs. IRC [1943] AC 377; 25 TC 107* ..... 117
*Lucy vs. W.T. Honleys Telegraphs Works Co. Ltd. (1969) All E.R.456*..... 89
*Luke vs. IRC (1963) AC 557; (1964) 54 ITR 692 (Cal)*..... 9

**M**

*M. A. Murthy vs. State of Karnataka and Others (2003) 264 ITR 1 (SC)*.....248

*M.C.T. Bank Ltd. (in liquidation) vs. CIT (1963) 48 ITR 678 at 692 (Mad.)*.....132
*M.H. Daryani vs. CIT (1993) 202 ITR 731 (Bom.)*..... 79
*M.K. Venkatachalam vs. Bombay Dyeing Mfg. Co. Ltd., 34 ITR 143 (SC)* ..... 148
*M.P. Industries vs. Union of India, AIR 1966 SC 671*.....30
*M.P. vs. Galla Telhan Vyapari Sangh (1977) 1 SCC 657*.....75
*M.S.M. Sharma vs. Shri Krishna Sinha, AIR 1959 SC 395*..... 267
*Maclay vs. Dixon (1944) 1 All E.R 22) Scott L.J* .....166
*MacNiven (Inspector of Taxes) vs. Westmorland Investments Ltd. (2001) 1 All ER 865*118
*Madanlal Fakirchand Dudhediya vs. S. Changdeo Sugar Mills Ltd. (AIR 1962 SC 1543)*240
*Madhavrao Scindia V s. Union of India AIR 1971 SC 530* ..... 224
*Madras vs. YMA, Madras (AIR 1970 SC 1212)*.....175
*Mafatlal Industries Ltd. (1998) 111 STC 467*..... 5
*Magor & St. Mellons R.D.C. vs. Newport Corporation (1951) 2 All ER 839 (HL)* ..... 89
*Magor & St. Mellons Rural District Council vs. New Port Corporation (1950) 2 All. E.R. 1226 Page 1236 (CA)*..... 89
*Maharajadhiraj of Dharbharaj vs. CIT (1933) 1 ITR 206 (210) 11 (Pt.)* ..... 264
*Maharashtra State Electricity Board vs. Deputy Commissioner of Income Tax (2004) 270 ITR 36 (AT)*.....119
*Maharashtra Tubes Ltd. vs. State Industrial and Investment Corporation of Maharashtra Ltd. (1993) 78 Comp Case 803* .....19
*Mamleshwar vs. Kanahaiyalal AIR 1975 SC 907* ..... 151
*Manek Lal vs. Premchand (AIR 1957 SC 425)*..... 27
*Maneka Gandhi vs. UOI AIR 1978 SC 597.*..... 33, 237
*Mangalore Chemicals & Fertilizers Ltd. vs. DCCT 83 STC 234, (SC)*..... 55, 58, 62
*Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commissioner, 1991 (55) ELT 437 (SC).*143, 144
*Mangalore Electric Supply Co. vs. C.I.T. West Bengal AIR 1978 SC 1272.* ..... 82, 259
*Mangin vs. IRC 1971 AC 739*.....172
*Manohar N. Samarth vs. Marotrao (1979) 4 SCC 93* .....77
*Manoj Ahuja and Anr. vs. IAC (1984) 150 ITR 696 (P & H)* ..... 255
*Maqbool Hussain vs. State of Bombay (AIR 1953 S. 325) observed.* ..... 90
*Maruti Udyog Ltd vs. Ram Lal (2005) 2 Supreme Court Cases 638.* ..... 243
*Mathews vs. Chicory Marketing Board 60 CLR 263-276*..... 205
*Maxwell on Interpretation of Statutes, 12th Edition, p. 66.* .....145
*McDowell and Company Ltd. vs. Commercial Tax Officer [1985] 154 ITR 148 (SC)*105, 117, 225
*Meenakshi vs. State of Karnataka AIR 1983 SC 1283*.....208
*Meganbhai vs. Union of India AIR 1969 SC 783* .....199
*Merind Ltd. vs. State of Maharashtra, 136 STC 462 (Bom)* ..... 68
*Mersy Docks and Harbour Board vs. Hinderson Brothers (1988) 13 App. Cas 595* ..... 87
*Milkfoods Ltd. vs. GMC Icecream P. Ltd.* .....261
*Mirch vs. Russel 12 LRA 125; AIR 1928 R. 31)*.....81
*Mishri Lal vs. Dhirendra Nath (1999)* .....17
*Mithilesh Singh vs. Union of India (AIR 2003 SC 1145).* .....163
*Modi Engg vs. UOI (1996) 218 ITR 50 (Raj.)* .....217
*Modu Timblo (Individual) vs. CIT (1994) 206 ITR 647(Bom.)*.....251
*Moh. Begum vs. CIT (158 ITR 662)*..... 42
*Mohanlal vs. Kondilal, AIR 1979 SC 1132.* .....145
*Morey vs. Deud (1957) 354 US 457* ..... 106

*Morgan vs. Crawshay, (1871) LR 5 HL 304* ..... *85*
*Moti Ram vs. Suraj Bhan AIR (1960) SC 655 at 657* ..... *97*
*Motilal Padampat Sugar Mills case (1979) 118 ITR 326 (SC)* ..... *259*
*Mrs. Arathi Shenoy vs. JCIT 246 ITR 1 (AT)* ..... *159*
*MSCO Pvt. Ltd. vs. Union of India, 1985 (19) ELT 15, 18 (SC).* ..... *145*
*Muktul vs. Manbhari, AIR 1958 SC 918* ..... *17*
*Multifilms Plastic P. Ltd. vs. SICOM reported in 105 STC 458* ..... *63*
*Municipal Board Mussorrie vs. Goodall* ..... *271*
*Municipal Corporation for the City of Pune vs. Bharat Forge Co. Ltd. AIR 1996 SC 2856 at 2861* ..... *86*
*Municipal Corporation of Delhi vs. Mohd. Yasin AIR 1983 SC 617* ..... *209*
*Municipal Council vs. Narayanan (AIR 1975 2193)* ..... *165*
*Municipal Council, Kota vs. Delhi Cloth (2001) 249 ITR 560 (SC)* ..... *215, 217*
*Mysore Minerals Ltd. vs. CIT 1999 239 ITR 775 (SC)* ..... *113*

**N**

*N. Balakrishnan vs. M. Krishnamurthy (1998) 7 SCC 123* ..... *255*
*N. R. Paper and Board Ltd. & Others vs. DCIT (1998) 234 ITR 733 (Guj.)* ..... *249*
*N.C. Dhoundial vs. Union of India (2004) 2 SCC 579, 587* ..... *258*
*N.O.C.I.L. vs. The State of Maharashtra, reported in 135 STC 50 (Bom)* ..... *71*
*Nagpur Copra Industries vs. The State reported in 60 STC 380 (Bom):* ..... *48*
*Nagpur Electric Light & Power Co. Ltd. vs. Shreepathirao 1959 SCR 463; AIR 1958 SC 658).* ..... *84*
*Nandanam Construction vs. Asst. Commissioner (1983) Tax L. R. 2816* ..... *156*
*Narendrakumar Khandelwal & Ors. vs. Union of India & Ors. 259 ITR 593* ..... *181*
*Narinder Chand Hem Raj vs. Lt. Governor, Himachal Pradesh AIR 1971 SC 2399, 2401208*
*Narisamha Rao (PV) vs. State CBI AIR, 1998 (SC) 2120* ..... *242*
*Nasiruddin vs. Sita Ram Agarwal (2003) 2 SCC 577, 585* ..... *240*
*National & Grindlays Bank vs. Municipal Corporation of Gr. Bombay AIR 1969 SC 104886*
*National Insurance Co. Ltd. vs. Swaran Singh* ..... *261*
*National Textiles vs. CIT (2001) (249 ITR 125) (Guj)* ..... *175*
*Navneetlal Zaveri vs. AAC (1965) (56 ITR 198) (SC)* ..... *129, 243*
*Nawaabkhan vs. State of Gujarat AIR 1974 SC 1471* ..... *237*
*Nayak (RS) vs. Antulay (AR) AIR 1984 SC 684* ..... *241*
*Nazeeruddin vs. Sitaram Agarwal AIR 2003 SC 1543)* ..... *166*
*Nectar Beverages Pvt. Ltd. vs. UOI, 1994 (70) ELT 172 (Kar)* ..... *142*
*Netley vs. ACAgIT (1999) 238 ITR 876 (Kar.)* ..... *217*
*New Delhi Municipal Comm vs. State of Punjab AIR 1997 SC 2847)* ..... *214*
*New India Ass. Co. Ltd. vs. Shanti Misra AIR (1976) SC 237* ..... *94*
*New India Assurance Co. Ltd. vs. C. Padma) (2003) 7 SCC 713* ..... *165*
*New Manek Chowk Spinning & Weaving Mills Co. Ltd. vs. Municipal Corporation, Ahmedabad AIR 1967 SC 1801* ..... *208*
*New Prahlad Mills vs. State of Maharashtra 35 STC 352 (Bom)* ..... *50*
*Newsprint & Papers Ltd. vs. Appraiser Madras Customs, (1988) 33 ELT 22 (Mad).* ..... *149*
*Nicco Corpn. Ltd. vs CIT (2001) 251 ITR 791 (Cal.)* ..... *249*
*Nirmala L. Mehta vs. CIT (2004) 269 ITR 1, 11 (Bom)* ..... *258*
*North Eastern Railway Company vs. Berriman (1946) 1 All E.R 255)* ..... *167*
*North Western Salt Co. Ltd. vs. Electrolyte Corporation Ltd. 1914 AC 461* ..... *133*

*Nown Estates (P) Ltd. vs. CIT AIR 1977 SC 153 ..... 244*

**O**

*Oil and Natural Gas Corporation Ltd. vs. Sawpipes Ltd. (AIR 2003 S.C. 2629) .....165*
*Omkar Kanwar vs. UOI (2002) 254 ITR 337 (Guj.) .....219*

**P**

*P. Kasilingam vs. P. S .G. College of Technology 1995 Supp. 2 SCC 348 ..... 112*
*P.C. Cheriyan vs. Mst. Barfi Devi, 1979 ELT J 593, J 596 (SC) .....145*
*P.C. Puri vs. CIT (1985) 151 ITR 584 (Del)..... 252*
*Panipat Woolen & General Milks Co. Ltd. (1976) 103 ITR 66 (SC) ..... 238*
*Panjumal Hassomao Advani vs. Harpal Singh Abnashi Singh Swahaney, AIR 1975 Bom 120, 125..... 263*
*Parasuramaiah vs. Lakshamma AIR 1965 AP 220.....126*
*Paryankandiyal Eravath Kanapravan Kalliani Amma vs. K. Devi (1996) AIR 1996 SC 1963. .....18*
*PB Roy vs. UOI 1972 SC 908 .....217*
*Petron Engineering Construction Pvt. Ltd. vs. CBDT (1989) 175 ITR 523 (SC).....115, 125*
*Pierce Leslie & Co. vs. CIT (1995) 216 ITR 176, 192 (Mad.).....151, 261*
*PNB Finance Ltd. vs. Shital Prasad Jain (1983) 54 Comp Case 66 (Del.)..... 257*
*Polymat India Ltd. and others vs. National Insurance Co. Ltd..... 255*
*Poppatlal Shah vs. State (AIR 1953 S.C. 274).....164*
*Prabodh vs. State of UP AIR 1985 SC167. .....220*
*Pradeep Chandra Parija and others vs. Pramod Chandra Patnaik & Others (2002) 254 ITR 99 (SC).....251, 253*
*Prakash Nath Khanna vs. Commissioner of Income Tax and Anr. 266 ITR 1 .....179, 181*
*Pranlal vs. UOI (1995) 212 ITR 362 (Guj.) .....217*
*Pratibha Rani vs. Suraj Kumar (1985) 155 ITR 190 (SC) .....91*
*Prem Raj vs. Ram Charan (1974) 2 SCC 1 ..... 74*
*Premchand Bansal & Sons vs. ITO (1999) 237 ITR 65 (Del)..... 256*
*Premier Tyres Ltd. vs. CCE, 1987 (28) ELT 58, 60 (SC). .....145*
*Printers (Mysore) Ltd. vs. ACTO (1994) 93 STC 95 (SC) ..... 56*
*Printers House vs. Mistry Lal, AIR 1970 P & H 1 ..... 83*
*Pritam Singh vs. State [1950] SCR 452.....221*
*Punjab Traders vs. State of Punjab AIR 1990 SC 2300 at page 2304 ..... 86*
*Pushpa Devi vs. Milkhi Ram (dead) by his L.Rs. (1990) 2 SCC 134 at 140, para 14..... 56*
*Pyarelal Sharma vs. MD, Jammu & Kashmir Industries Ltd (AIR 1989 SC 1854) .....176*

**Q**

*Quazi vs. Quazi (1979) 3 All E.R. 897 at p. 916 (HL)..... 83*

**R**

*R Laxmichand vs. UOI (1990) 184 ITR 376(Guj.) .....215*
*R. K. Garg vs. Union of India, 133 ITR 239 at Pg. 255..... 106*
*R. Krishnamurthy vs. CIT (1993) 203 ITR 47 (Guj.).....80*
*R. Rajagopal Reddy vs. Padmini (1995) 213 ITR 340 (SC); CED vs. N. A. Merchant (1989) 177 ITR 490 (SC). ..... 93*
*R. S. Nayak vs. A.R. Antulay (1984) AIR 684 (SC) ..... 130*
*R. vs. Casement (1917) I.K.B.98. ..... 85*
*R.B. Shreeram Religious & Charitable Trust vs. CIT (1988) 172 ITR 373 (Bom) .....126*
*R.D. Joshi & Co. vs. CIT (2001) 251 ITR 332 (MP)..... 249*

*R.S. Nayak vs. A.R. Antulay, (1984) 2 SCC 183*.....241
*R.S. Raghunath vs. State of Karnataka (AIR 1992 S.C.81)*.....164
*Rai Ramkrishna vs. State of Bihar AIR 1963 SC 1667* ..... 207
*Raj Narain Pandey vs. Sant Prasad Tewari (1973) 2 SCC 35; AIR 1973 SC 291* ..... 69
*Raja Jagannath Baksh Singh vs. State of Uttar Pradesh AIR 1962 SC 1563*.....206, 207
*Raja Jagdambika Pratap Narain Singh vs. C.B.D.T. (1975) 100 ITR 698*.....12
*Raja vs. CIT (1984) (147 ITR 212) (Mad)*..... 43
*Rajendra Mills Ltd. vs. Jt. CIT (1971) 28 STC 483 (Mad.)*.....251
*Ram Adhar Singh vs. Bansi, (1987) 2 SCC 482* ..... 85
*Ram Charan Das vs. Girja Nandini Devi, AIR 1966 SC* .....213
*Ramakrishna vs. Janpad Sabha AIR (1962) SC 1073 at 1080.* ..... 98
*Ramakrishna vs. State of Bihar (1963) 50 ITR 171(SC)*.....219
*Ramanlal Amarnath (Agency) LTD vs. CIT (1973) 91 ITR 250 (Bom)* ..... 244
*Ramdas Dossa & Co. vs. CIT (1956) 29 ITR 1001 (Bom)* .....132
*Ramkishan Mandal vs. State of Bihar (1987) AIR 250 (Patna)* ..... 130
*Ramkrishna Kulwantrai vs. the Commissioner of Sales Tax, this High Court* ..... 72
*Ramsaran vs. CTO AIR 1962 SC 1326*.....221
*Rao Bahadur Ravulu Subba Rao & Ors. vs. CIT (1956) 30 ITR 163 (SC)* ..... 130
*Rao Shiv Bahadur Singh vs. State of U.P. AIR (1953) SC 394 at 398*..... 93
*Ratanlal Nahta vs. Nandita Bose AIR 1999 Cal. 29 (FB)* ..... 263
*Rayala Corporation vs. Director of Enforcement AIR (1970) SC 494 at 503*..... 99
*Raymond Ltd. vs. Dy. Commissioner of Income-tax 86 ITD 791* .....202
*Recitt Colman of India Ltd. vs. ACI T (2001) 252 ITR 550 (Cal.)* ..... 235
*Regional Director, Employees' State Insurance Corporation, Trichur vs. Ramanuja Match Industries (1985) 1 S.C.C. 281*..... 79
*Reliance Jute & Ind. vs. CIT (1979) 120 ITR 921 (SC)* ..... 94
*Ridge vs. Baldwin (1964 AC 40)* ..... 25, 34
*Rly Co. vs. Owners of S.S. Mostyn (1928) A.C. 57*.....154
*Rogers vs. CIT 14 ITR 336* ..... 225
*Rohit Pulp & Paper Mills Ltd. vs. Collector of Central Excise AIR 1991 SC 754* ..... 236
*Rosy and Another vs. State of Kerala and others. (2000) 2 SCC 230* .....241

**S**

*S. I. Roopal and Others vs. Government through Chief Secretary, Delhi & Others AIR 2000 SC 594*.....251
*S. Maheswar Rao vs. State of Orissa (1989) Supp (2) SCC 248 at 251 (SC)* ..... 270
*S. N. Mukherjee vs. UOI, AIR 1990 (SC)*..... 253
*S.G. Jaisinghani vs. Unkon of India and Other (AIR 1967 SC 1427).* ..... 23
*S.G. Kale vs. Union of India reported in 256 ITR 148 (Raj)* ..... 182
*S.P. Gupta vs. Union of India and Another (1982) AIR 149 (SC)* .....128, 241
*Sajjan Singh vs. State of Rajasthan (1965) 1 SCR 933 AIR 1965 SC 845* .....77
*Sakshi vs. UOI (2004) 5 SCC 518, 538 - 39 2001 (1) SCC 748*.....261
*Sales Tax case in McDowell vs. CTO (1985) (154 ITR 148)(SC)*..... 104
*Salzgitter Industries Bav GMBH vs. CIT (1990) 184 ITR 7 (Bom)*..... 244
*Sam Fashion Wear Pvt. Ltd. vs. CIT (1994) 209 ITR 214 (Bom)*..... 79
*Samuel vs. Union of India, AIR 2004 (SC) 218* .....12
*Sanctus Drugs vs. UOI (1997) 225 ITR 252 (M.P.)*.....215
*Sandoz India Ltd. vs. Union of India 1980 ELT 696, 700, 701 (Bom)*.....150
*Sant Lal vs. UOI (1996) 222 ITR 375(P & H)*..... 218

*Sanyasi Rao vs. Govt of AP (1989) 178 ITR 31(AP)*.....*216, 219*
*Sarala Birla vs. CWT (1989) 176 ITR 98 (SC)* .....*217*
*Sarita Jain vs. CIT (2003) 261 IR 499 (Del.)*.....*238*
*Sat Pal vs. ETC (1990) 185 ITR 375(P & H)* .....*215, 216*
*Sattur's Sushrushalya vs. State of Karnataka (1992) 198 ITR 480 (Kar.)* .....*217*
*Sayaji Iron and Engineering Co. vs. CIT (2002) 253 ITR 749 (Guj.)*.....*246, 251*
*SCE vs. R.K. Chemical Industries P. Ltd., 1987 (30) ELT 641A (Cal).* .....*142*
*SDS Srivastava vs. Union of India (74) ASC 338.*.....*155*
*Seaford Court Estates Ltd. vs. Asher (1994) All. E.R. 155 page 164 (CA)*..... *89, 232*
*Seetha Rama vs. State of Karnataka (1993) 199 ITR 588 (Ker.)*..... *217, 218*
*Serethil Raja Metal vs. CTO (1990) 79 STC 38 (Mad.)*..... *252*
*Seshammal (R) vs. ITO (1999) 237 ITR 185 (Mad.)* ..... *256*
*Seshasayee Paper and Boards Ltd. vs. CIT (2003) 260 ITR 419 (Mad.)* ..... *254*
*Shamnsaheb M. Mul Hani vs. State of Karnataka (2001) 2 SCC 577 585 - 86* .....*260*
*Shamrao vs. Pondicherry ( 67) ASC 1480* .....*154*
*Shankar Construction Co. vs. CIT (1991) 189 ITR 463 (Ker.)*..... *79*
*Shanthi vs. Asst DI (1992) 197 ITR 330 (Mad.)*..... *217, 218*
*Shashikant Laxman Kale vs. Union of India (1990) 185 ITR 104 (SC)* .....*128, 215, 217*
*Shiv Kripal Singh vs. V.V. Giri AIR 1970 SC 2097* ..... *83*
*Shree Mahavir Oil Mills vs. State of Jammu & Kashmir (1996) 11 SCC 39, 54*.....*209*
*Shree Sajjan Mills Ltd. vs. CIT, 156 ITR 585, 603 (SC).*.....*142*
*Shree Swami Advocate vs. State of Rajasthan AIR 1995 Raj 69, 72* ..... *263*
*Shreenath vs. Rajesh (AIR 1998 SC 1827)* ..... *256*
*Shri Bakul Oil Industries vs. State of Gujarat AIR (1987) SC 122* ..... *93*
*Shri Mahabir Industries vs. CIT (1996) 220 ITR 459 (Guwahati)*..... *249*
*Shri Prithvi Cotton Mills Ltd vs. Broach Borough Municipality, 2000 (123) ELT 3 (SC).147*
*Shriram Vinyl & Chemical Industries vs. CC, 2001 (129) ELT 278 (SC).*.....*145*
*Shyam Sunder vs. Ram Kumar AIR 2001 S.C. 2472.*.....*15*
*Siddheshwari Cotton Mills vs. Union of India (1989) 39 E.L.T. 498 (SC) AIR 1989 SC 1019*..... *82, 259*
*Siemens A.G. vs. ITO (1987) 22 ITD 87 (SB)* .....*194*
*Siemens Engineering & Manufacturing Co. vs. UOI, AIR 1976 SC 1785* ..... *40, 253*
*Siemens India Ltd. vs. K. Subramaniam (ITO) (1983) 143 ITR 120 (Bom)* .....*157, 249*
*Siemens India Ltd. vs. State of Maharashtra (1986) 62 STC 40, 50 (Bom)*..... *258*
*Sikkakollu Subba Rao & Co vs. State of Andhra Pradesh, 1999 (110) ELT 447 (AP).*.....*144*
*Sir Kikabhai Premchand vs. CIT(1953) 24 ITR 506 (SC)*..... *238*
*Sis Ram Sharma & Co. vs. ITO (1988) 25 ITD 410 (Delhi) (TM)*.....*251*
*Sitaram vs. Shantanu Prasad, AIR 1966 SC 1967* ..... *273*
*Sl Rooplal & Another vs. L. G. of New Delhi (2000) ISCC 644.*.....*159*
*Smith Kline Beecham Consumer Healthcare Ltd. vs. Dy. Commissioner Commercial Taxes, 128 STC 189 (W.B.T.T.)* ..... *68*
*Smt. Tarulata Shyam vs. CIT (1972) 108 ITR 345 (SC)* ..... *88*
*Smt. Tej Kumari vs. CIT (2001) 247 ITR 210 (Patna) (FB)* ..... *158, 248*
*Sole Trustee, Loka Shikshana Trust vs. CIT 1975 101 ITR 234 (SC)*..... *114*
*Sound-N-Music (BR) vs. Bhardwaj (OP) 1988 173 ITR 433 (Bom)* ..... *242*
*South India Corporation (P) Ltd. vs. Secretary, Board of Revenue, AIR 1964 SC 207; (1964) 4 SCR 280* .....*18*
*South India Corporation (P.) Ltd. vs. Secretary, Board of Revenue (1964) 15 STC 74* .....*18*

*South India Corporation (P.) Ltd. vs. Secretary, Board of Revenue, AIR 1964 SC 20718, 227*
*South India Trust Association vs. Telgu Church Council (1996) 2 SCC 520 ..... 157*
*Sri Banashankari vs. State of Karnataka (1992) 194 ITR 650 (Kar.) ..... 217*
*Sri Lakshmi Coconut Industries vs. State of Karnataka [1980] 46 STC 404 ..... 49*
*Sri Srinivasa Theatre vs. Government of Tamil Nadu AIR 1992 SC 999 ..... 207*
*Sri Venkateswara vs. UOI (1991) 189 ITR 741(Ori.) ..... 216*
*St. Aubyn (LM) vs. A.G., (1951) 2 All ER 473. ..... 117*
*State (through CBI, Delhi) vs. Gian Singh AIR (1999) SC 3450 ..... 95*
*State in Council of India vs. Scobel (1903) 4 TC 618 (HL) ..... 238*
*State of AP vs. Commercial Tax Officer (1988) 169 ITR 564 (AP) ..... 249*
*State of Assam vs. D. P. Barua (1970) 75 ITR 18 (SC). ..... 240*
*State of Assam vs. K. B. Kurkalang AIR (1972) SC 223. ..... 92*
*State of Bihar vs. Kalina Kaur AIR 2003 SC 2443, 2447 ..... 263*
*State of Bihar vs. Kameshwar AIR 1965 SC 575 ..... 220*
*State of Bombay vs. Ali Gulshan, AIR 1955 SC 810 ..... 83*
*State of Bombay vs. Automobile and Agricultural Industries Corporation (1961) 12 STC 122 ..... 11*
*State of Bombay vs. Pandurang Vinayak, AIR 1953 SC 244. ..... 148*
*State of Gujarat vs. Prakash Trading Co. [1972] 30 STC 348 (SC) ..... 49*
*State of Gujarat vs. Ramjibhai AIR 1979 SC 1098 ..... 227*
*State of Gujarat vs. Sakarwala Brothers [1967] 19 STC 24 (SC) ..... 49*
*State of Gujarat vs. Shri Ambica Mills Ltd. (1974) 4-SCC-916 ..... 5*
*State of Gujarat vs. Wood Polymers Ltd. reported in 50 STC 229 ..... 57*
*State of Karnataka (1985) 59 STC 1, 9 (Karn) ..... 92*
*State of Kerala vs. Haji K. Haji K. Kutty Naha AIR 1969 SC 378 ..... 208*
*State of Kerala vs. Joseph AIR 1958 SC 296.) ..... 214*
*State of Kerala vs. V. Padmanabhan 2000 9 SCC 262. ..... 110*
*State of M.P. vs. Chotabhai Jethabhai Patel, AIR 1972 SC 971, 975 (SC). ..... 148*
*State of Madhya Pradesh & Anr. vs. G.S. Dall & Flour Mills (1991) 187 ITR 478 (SC) .... 129*
*State of Madhya Pradesh vs. Bharat Heavy Electricals (AIR 1997 SC 3285) ..... 172*
*State of Maharashtra vs. Billimoria (2003) 7 SCC 336) ..... 167*
*State of Maharashtra vs. Madhavrao (68) A.S.C. 1395 ..... 154*
*State of Maharashtra vs. Suresh Trading Co. 109 STC 439 (SC) ..... 55*
*State of Manipur vs. Thinjujam Brojen Muti AIR 1996 SC 2124 ..... 248*
*State of Orissa vs. Bhupendra Kumar AIR (1962) SC 945 at 954 ..... 98*
*State of Orissa vs. Binapani (AIR 1967 SC 2169) ..... 35*
*State of Orissa vs. M. A. Tullock & Co. [1964 (15) STC 641 (SC)] ..... 105*
*State of Orissa vs. Tulloch & Co; reported in 15 STC 641.(SC) ..... 54*
*State of Punj vs. Harnek Singh (2002) 3 SCC 481, 490 ..... 243*
*State of Punjab vs. Naranjan Dass Doomra Rice & General Mills AIR 1998 SC 537 ..... 206*
*State of Punjab vs. Nestle India Ltd., 136 STC 34 (SC) ..... 65*
*State of Rajasthan vs. Sajanlal Panjawat AIR 1975 SC 706, 725-726 ..... 206*
*State of Travancore-Cochin vs. Shanmugha Vilas Cashew-nuts Factory [1953] 4 STC 205 (SC) ..... 49*
*State of U. P. vs. Kamla Palace [2000] 1 SCC 557 ..... 116*
*State of U.P. vs. L.J. Johnson and Another, 1983 A.W.C. 789 S.C. ..... 79*
*State of U.P. vs. Synthetics & Chemicals Ltd. (1992) 87 STC 289, 309 (SC) ..... 261, 262*
*State of W.Bengal vs. Kesoram Industries Ltd (supra) ..... 172*

*State of West Bengal vs. Atul Krishna Shaw, 1990 SC* ..... *254*
*State of West Bengal vs. Kesoram Industries Ltd. (2004) 266 I.T.R. 721 (SC)*.....*170, 247*
*State of West Bengal vs. Scene Seven P. Ltd. AIR 2000 SC 3089, 3094* ..... *234*
*State vs. Jullunder Veg. Syndicate, AIR 1966 SC 1295*.....*143*
*State vs. Kailashchand Mahajan (AIR 1992 S.C. 1227*.....*164*
*State vs. Narayandas AIR 1958 Bom 68(FB). AIR 1955 SC 661 at 750*..... *239*
*STP Ltd. vs. CCE, 1998 (97) ELT 16 (SC).* .....*144*
*Sub. Inspector Rooplal & Another vs. Lt. Governor, New Delhi & Others (2000) 1 SCC 644, 654 (SC)*.....*251*
*Subarna Plantation & Trading Co. Ltd. vs. ITO (1989) 28 ITD 177 (Cal.)*.....*251*
*Subhkaran & Sons vs. N.A. Kazi (1984) 152 ITR 231 (Bom)* ..... *255*
*Sukhdev vs. UOI (1995) 211 ITR 157(Guj.)*..... *218*
*Sun N Sand Hotel Ltd. vs. V.V. Kamat AIR 2003 Bom 168, 177* ..... *262*
*Supt. Excise vs. Pratap Rai (1978) (114 ITR 231)* ..... *43*
*Suresh Trading Co. vs. State of Maharashtra, 48 STC 207 (Bom)* .....*55, 72*
*Swadeshi Cotton Mills etc. vs. Union of India, AIR 1981 Supreme Court 818* ..... *33*
*Syed vs. UOI (1994) 209 ITR 746 (Pat.)* .....*217*

**T**

*Tata Iron & Steel Co. Ltd. vs. D.V. Bapat ITO (1975) 101 ITR 292, 327 (Bom)*..... *247*
*Tata Iron & Steel Co. Ltd. vs. Dy. Commissioner of Income-tax 62 ITJ 17* .....*200*
*Tata Iron & Steel Co. Ltd. vs. State of Jharkhand 137 STC 93 (SC)*..... *64*
*Tata Motors Ltd. vs. State of Maharashtra, 136 STC 1*.....*71*
*Thakur Amar Singh vs. State of Rajasthan, AIR 1955 SC 504* ..... *83*
*Thangal Kunju Musaliar vs. Venkatacham Potti, AIR 1956 SC 246; 29 ITR 349 (S.C.) 240*
*The case of Estate of Michel Hausmann vs. Her Majesty The Queen, 1998 Can. Tax Ct. LEXIS 1140*.....*118*
*Thomson vs. Lord Clan. Morris, Lord Lindley M.R.* ..... *223*
*Timken India Ltd. vs. CIT (2002) 256 ITR 460 (Cal)*.....*199*
*Tin Box Co. vs. CIT (2001) 249 ITR 216 (SC)* .....*238*
*Tinsukhia Electric Supply Co. Ltd. vs. State (AIR 1990 S.C. 123)*.....*165*
*Titaghur Paper Mills Co. Ltd. vs. State of Orissa (1983) 142 ITR 663 (SC)*.....*132*
*Titanium Equipments vs. UOI (1994) 207 ITR 566 (Mad.)* ..... *217, 221*
*Tolaram vs. State of Bombay (AIR 1954 SC 496)* .....*167*
*Trackways (P) Ltd. vs. CST (1981) 47 STC 407 (MP)*..... *258*
*Tribhuvandas vs. Ratilal 70 Bom L. R. 73*.....*154*
*Tuhi Ram vs. LAC (1993) 199 ITR 490 (P & H)* ..... *215, 216*
*Tungabhadra Industries Ltd. vs. Commercial Tax Officer [1960] 11 STC 827 (SC)* ..... *49*
*Twenty First Century Steels vs. DCIT 2004 269 ITR 173* .....*107*

**U**

*U.P. Pollution Board and others vs. Kaneria Industrial Limited & others 259 ITR 321 (SC)* ..... *247*
*U.P. State Electricity Board vs. Hari Shanker Jain AIR 1979 (SC) 65*.....*127, 236*
*U.P. vs. Synthetics & Chemicals Ltd. (1991) 4 SCC 139* ..... *151*
*UCO Bank vs. CIT (1999) 237 ITR 889 (SC)*..... *243*
*Ujagar Prints vs. U.O.I. (1989) 179 ITR 317 (SC)*.....*95, 147*
*Ujjambhai vs. State of UP (AIR 1962 SC 1621)*.....*219*

*Ulahannan Mathai vs. State AIR 1955 TC 82 (FB)* ..... *84*
*Union Drug Co. Ltd. vs. CIT West Bengal (1974) 93 ITR 91 (Cal.).* ..... *82*
*Union of India (UOI) and Anr. vs. Azadi Bachao Andolan and Anr [2003] 263 ITR 707 (SC)* ..... *117*
*Union of India and Others vs. Filip Tiago De Gama of Vedem Vasco De Gama, (AIR 1990 SC 981 (1989) Suppl. 2 SCR 336)* ..... *16*
*Union of India vs. A.L. Rallia Ram (1964) 2 SCR 164* ..... *7*
*Union of India vs. AZAADI BACHHAO ANDOLAN) (2003) 263 ITR 706 (SC).17, 190, 195,* ..... *199, 200, 225, 243, 253, 257*
*Union of India vs. B.N. Prasad (1978) 2 SCC 462* ..... *75*
*Union of India vs. B.S. Aggarwal) (AIR 1998 S.C. 1537).* ..... *166*
*Union of India vs. Dhanwanti Devi (1998) 6 SCC* ..... *246*
*Union of India vs. Harbhajan Singh Dhillon (1972 83 ITR 582 (S.C.)* ..... *240*
*Union of India vs. Kamalakshi Finance Corporation Ltd. (1991) 53 ELT 433* ..... *155*
*Union of India vs. Kamlakshi Finance Corporation Ltd. AIR 1992 SCC 711, 712 (SC).* .. *252*
*Union of India vs. Kaumudini Narayan Dalal (2001) 249 ITR 219 (SC)* ..... *254*
*Union of India vs. Kokil (G.M.) AIR 1984 SC 1022* ..... *18*
*Union of India vs. KS Subramanium AIR 1976 S.C. 2433* ..... *156*
*Union of India vs. Paras Laminates P. Ltd. 186 ITR 722 (SC)* ..... *159, 251*
*Union of India vs. Raghubir Singh (1989) 178 ITR 548 (551-57) (SC)* ..... *153, 245*
*Union of India vs. Raj Continental Exports P. Ltd., (1991) 31 ECC 369 (Mad)* ..... *144*
*Union of India vs. Rajeev Kumar (AIR 2003 6 SC 516)* ..... *166*
*Union of India vs. Rajiv Kumar (AIR 2003 SC 2917)* ..... *168*
*Union of India vs. Satish Panalal Shah (2001) 249 ITR 221 (SC).* ..... *254*
*Union of India vs. Shiv Dayal & Sons (AIR 2003 SC 1877)* ..... *169*
*Union of India vs. Suksha International & Nutan Gems, 1989 (39) ELT 503, 507 (SC).* *145*
*Union of India vs. Wood Papers Ltd. (1991) 83 STC 251; AIR (1991) SC 2049* ..... *8, 62, 80*
*Union of India vs. Wood Papers Ltd., 1990 (28) ECC 182, 186 (SC).* ..... *149*
*Unit Trust of India vs. Unny (PK) (2001) 249 ITR 612 (Bom)* ..... *244*
*United Town Electric Company Ltd. vs. A.G. for Newfoundland (1939) 1 All ER 423 (PC).83*
*Universal Ferro & Allied Chemicals Ltd. vs. P.G.K. Warrier (1983) 143 ITR 959 (Bom.)250*
*UOI vs. Anglo Afghan Agencies Ltd. AIR 1968 (SC) 718* ..... *259*
*UOI vs. Chajju Ram (2003) 5 SCC 568, 576* ..... *247*
*UOI vs. Dhanwanti Devi (1996) 6 SCC 44, 51-52* ..... *246*
*UOI vs. GTC Inds. Ltd. (2003) 5 SCC 106, 112* ..... *254*
*UOI vs. Harbhajan Singh Dhillon (1972) 83 ITR 582 (SC)* ..... *216*
*UOI vs. Kamlakshi Finance Corpn Ltd. AIR 1992 SC 711, 712* ..... *244*
*UOI vs. Sahney Steel & Press Works Ltd. 1992 (58) ELT 38 (Bom)* ..... *150*
*UOI vs. Sanyasi Rao (1996) 219 ITR 330 (SC)* ..... *216, 217*
*UP vs. Indra Industries (SC) 122 STC 100 CST* ..... *65*
*Upadhyaya (RK) vs. Shanabhai P. Patel (1987) 166 ITR 163 (SC)* ..... *238*
*Urmila Bala Dasi vs. Probodh Chandra Ghosh (1990) 184 ITR 604 (Cal)* ..... *124*
*Ushodaya Enterprises Ltd. vs. Commissioner of Commercial Taxes (1993) 111 STC 711248*

**V**

*V.M. Salgaonkar vs. CIT (2004) 243 ITR 383 (SC)* ..... *158, 248*
*V.M. Syed Mohammad & Co. vs. State of Andhra Pradesh AIR 1954 (SC) 314 AIR* ..... *208*
*V.P. Punj vs. Asst Commissioner of Income Tax & Anr reported in 253 ITR 369* ..... *179*
*V.V Trans-Investment vs. CIT (1994) 207 ITR 508 (AP)* ..... *131*

*Ved Prakash Agarwal vs. Commissioner, Gorakhpur Division (1997) 11 SCC 331 ..... 209*
*Vedabai vs. Shantaram Baburao Patil & Another (2002) 125 STC 375..... 255*
*Venkataramana Devara vs. State of Mysore, AIR 1958 SC 255..... 267*
*Venkateswara Stainless Steel and Wire Industries vs. Union of India, 1986 (26) ELT 201 (Mad). ..... 145*
*Venkateswara vs. UOI (1991) 189 ITR 741 (Ori.) ..... 217, 218, 219*
*Venugopal Varma vs. UOI, (1969) 74 ITR 49 (SC)..... 217*
*Venugopala Ravi Varma Rajah vs. Union of India AIR 1969 SC 1094..... 207*
*Vide Kanniyan vs. Income Tax Officer [1968] 68 ITR 244 (SC; [1968] 2 SCR 103 ..... 56*
*Vijayan vs. UOI (1995) 215 ITR 371 (Mad.)..... 215, 217, 218*
*Vikrant Tyres Ltd vs. ITO (2001) 247 ITR 821, 826 (SC)..... 236*
*Vinod Paper Mills vs. A.P. Singh 256 ITR 350 (Del) ..... 179*
*Voest Alpine Ind. GmbH vs. ITO (2000) 246 ITR 745, (749) (Cal.) ..... 251*
*Voest-Alpine Ind. GmBH vs. ITO (2000) 246 ITR 745 (Cal) ..... 160*
*Vrajlal Manilal & Co. vs. State of M.P. 1986 Supp. SCC 201 ..... 207*

**W**

*W.T. Ramsay Ltd. vs. IRC [1982] AC 300; [1981] 2 WLR 449 (HL) ..... 117*
*Waliram Waman Hiray (Dr.) vs. Mr. Justice B. Lentin AIR (1988) SC 2267..... 87*
*Waryan Singh vs. Amarnath AIR 1954 SC 215 ..... 221*
*Watchman vs. East Africa Protectorate 1919 AC 533 ..... 86*
*Wells vs. Minister of Housing and Local Government [1967] 1 WLR 1000 at 1007)..... 55*
*Whitney vs. Commissioner of Inland Revenue (1926) AC 37..... 7*
*Workmen of Associated Rubber Inds. Ltd. vs. Associated Rubber Inds. Ltd. (1986) 157 ITR 77 (SC)..... 258*

**Y**

*Y.S.C. Babu vs. Charmanand Managing Director, Syndicate Bank (AP) 253 ITR 1 (2002)246*
*Yogiraj Charity Trust vs. CIT (1984) 149 ITR 7, 17, (Del). ..... 251*
*Young vs. Bristol Aeroplane Co. Ltd. (1944)1 BK) 718. ..... 154*

**Z**

*Zodiac Advertisers vs. Union of India, [2004] 265 ITR 262 (Ker) ..... 116*

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