A.F.R

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

RESERVED ON: 18.04.2024

DELIVERED ON: 22.05.2024

PRESENT:

THE HON'BLE MR. JUSTICE SURYA PRAKASH KESARWANI

AND

THE HON'BLE MR. JUSTICE RAJARSHI BHARADWAJ

ITA/155/2005
WITH
WPO/1585/2006
THE ROYAL BANK OF SCOTLAND N.V.
VS
COMMISSIONER OF INCOME TAX

ITA/154/2005
THE ROYAL BANK OF SCOTLAND N. V.
VS
COMMISSIONER OF INCOME TAX

ITA/19/2017
THE ROYAL BANK OF SCOTLAND N.V. @ ABN AMRO BANK N.V.
VS
DIRECTOR OF INCOME TAX, INTERNATIONAL TAXATION 2(1)
KOLKATA

ITA/20/2017
THE ROYAL BANK OF SCOTLAND N.V. @ ABN AMRO BANK N.V.
VS
DIRECTOR OF INCOME TAX, INTERNATIONAL TAXATION 1(1)
KOLKATA

ITA/21/2017
THE ROYAL BANK OF SCOTLAND N.V. @ ABN AMRO BANK N.V.
VS
DIRECTOR OF INCOME TAX, INTERNATIONAL TAXATION 2(1)

KOLKATA

ITA/22/2017
THE ROYAL BANK OF SCOTLAND N.V. @ ABN AMRO BANK N.V.
VS
DIRECTOR OF INCOME TAX, INTERNATIONAL TAXATION 2(1)
KOLKATA

Appearance:
Sri Percy Pardiwalla, Sr. Adv.
Sri Akhilesh Kumar Gupta, Adv.
Sri Asit Kumar De, Adv. **.....for the Appellant**

Smt. Smita Das De, Adv.
Sri Smarajit Roy Chowdhury, Adv. **.....for the Respondent**

JUDGMENT

Surya Prakash Kesarwani, J.:-

1. Heard Sri Percy Pardiwala, learned senior advocate assisted by Sri Akhilesh Gupta, learned counsel for the appellant and Smt. Smita Das De and Sri Smarajit Roychowdhury, learned senior standing counsel for the respondent.

2. Learned counsels for the parties jointly stated that similar facts and question are involved in all the above noted six appeals and accordingly requested to hear all the appeals together. Therefore, all the afore-noted six appeals have been heard at length on 16.04.2024 and 18.04.2024 and the judgement has been reserved on 18.04.2024. Although by order dated 17.05.2005

the appeal was admitted on three substantial questions of law, but the learned counsel for the appellant has pressed and argued only on substantial question of law no. **(a)** which is reproduced below;-

> *"(a) Whether on a true and proper interpretation of the provisions of sections 2(22A) and 90 of the Income Tax Act, 1961 read with CBDT circular No. 333 dated April 2, 1982 and CBDT letter dated November 21, 1994 and Article 24(2) of the Double Taxation Avoidance Agreement India and Netherlands, the Tribunal was justified in law in holding that the appellant was liable to income tax at the higher rate applicable to a foreign company and not at the rate of tax applicable to a domestic company;"*

Particular of Afore-Noted Appeals:-

3. Afore-noted leading Income **Tax Appeal No. 155 of 2005** arises from the impugned order of the Income Tax Appellate Tribunal, 'E' Bench, Kolkata (for short ITAT) dated ____ November, 2003 passed in (i) ITA No. 58 (Cal) of 2001 (Assessment year 1992-93), (ii) ITA No. 690 (Kol) of 2002 (Assessment year 1993 -94), (iii) ITA No. 106 (Kol) of 2001 (Assessment year 1994-95) and (iv) ITA No. 496 (Kol) of 1999 (Assessment year 1995-96).

4. Above noted **Income Tax Appeal No. 154 of 2005** arises from the impugned order in (i) ITA No. 694 (Kol) of 2002 (Assessment year 1997-98) and (ii) ITA No. 695 (Kol) of 2002 (Assessment year 1998-99). **Income Tax Appeal No. 19 of 2017** arises from impugn order of the ITAT "C" Bench Kolkata dated 13.04.2016

passed in (i) ITA 519/Kol/2011 (Assessment year 2007-08). **Income Tax Appeal No. 20 of 2017** arises from the aforesaid common order of the ITAT dated 13.04.2016 passed in (i) ITA No. 1926/Kol/2010 (Assessment year 2006-07). **Income Tax Appeal No. 21 of 2017** arises from the aforesaid impugned common order of the ITAT dated 13.04.2016 passed in (i) ITA No. 1738/Kol/2009 (Assessment year 2005-06). **Income Tax Appeal No. 22 of 2017** arises from the aforesaid common impugned order of the ITAT dated 13.04.2016 passed in (i) ITA No. 1805/Kol/2012 (Assessment year 2008-09).

Facts;-

5. Since common substantial question of law is involved in all the above noted Income Tax Appeals, therefore, with the consent of the learned counsel for the parties, the facts of leading Income Tax Appeal No. 155 of 2005 are being noted.

6. Appellant is a branch of ABN Amro Bank NV (Now The Royal Bank of Scotland N.V.) incorporated in the Netherlands with limited liabilities having its original office at Singapore. In India, the appellant is registered as scheduled bank in terms of Schedule-II of the Reserve Bank of India (RBI) Act, 1934. The main activities of the appellant in India are accepting deposits, giving loans, discounting/collection of bills, issue of letters of

credit/ guarantees, executing forward transaction of foreign currencies for importers/exporters, money market lending /borrowings, investment in societies, ect. In terms of the existing rules and regulations governing such transaction. There is an agreement between India and Netherlands for avoidance of double taxation and preventing of fiscal evasion (for short 'DTAA'). Article 7 of the DTAA provides for taxation in India of a foreign enterprise in respect of profits attributable to its permanent establishment (hereinafter referred to as 'PE') in India. Since the appellant has a PE in India, therefore, they are liable to tax in respect of income attributable to the PE. By the impugned order the ITAT has held that the appellant/ assesse is liable to Income Tax at the rate specified for company "other than domestic company". Case set up by the appellant is that in terms of Article 24(2) of DTAA between India and the Netherlands, containing provision of non-discrimination, the appellant/assessee is liable to Income Tax at the rate applicable to a domestic company. The ITAT has held that the rate of Income Tax as provided in the Finance Act applicable to a domestic company shall not apply to the appellant/assessee and instead the appellant/assess is liable to tax at the rate prescribed by the Finance Act for a company other than domestic company. Aggrieved with the order of the ITAT the appellant has filed the present appeal raising the afore-quoted common substantial question of law.

7. Relevant portions of the order of ITAT (subject matter of Income Tax Appeal No. 155 of 2005) dealing with the rate of tax applicable to the appellant/assessee are reproduced below;-

> *"46. We have given our careful consideration to the rival contentions. The issue relating to the applicability of rate of tax in the case of the assessee had come up for consideration of the Tribunal in the assessee's own case for assessment year 1996-97 (supra). The Tribunal vide order dated 30.3.2001 in para-23 relating to applicability of Article 24(1) held - "We are of the opinion to discussed above) that the assessee company cannot be considered to be in the same circumstances as an Indian company in view of the fact that the scope of taxation of the Indian Company is wider enough than that of a non- resident company like the assessee." However, the contention on behalf of the assessee was accepted to be covered under Article 24(2) of DTAA Para 28 of the order of the Tribunal is quoted as under:*
>
> > *226. Taking into consideration the different aspects of the case. We are finally of the opinion that by virtue of Article 24(2) of the DTAA BETWEEN India and Nederland, the assessee company cannot be subjected to taxation in a less favourable manner than an Indian Banking Company. We have already noted above that atleast some of the private Indian Banks are subjected to the lower rate of tax @ 46%) applicable to the domestic companies. Furthermore, the assessee company itself is being subjected to this lower rate of tax by virtue of the non-discrimination provision in the DTAA right from the assessment year 1991-92 onwards. There is no plausible reason to depart from this accepted position when no new facts in this regard have been discovered. The AO himself allowed the lower rate in the assessment order. We feel that the CTT(A) did not have any occasion to disturb the same by directing to apply the higher rate and in disturbing the position accepted even by the*

CBDT in that way. Finally, therefore, we knock down the enhancement, as directed by the CIT(A) in this case and on the other hand, order that the rate of tax as considered in the assessment be adopted.

47. The decision of the Tribunal has been arrived at after consideration of the detailed arguments advanced on behalf of the assesee which have been reiterated before us. We would have no difficulty in following the elaborate decision of the coordinate Bench but the amendment in Section 90 of the I.T. Act, 1961 by the Finance Act, 2001 w.r.e.f. 1.4.1962. We, therefore, do not consider it necessary to deal with the contentions advanced on behalf of the assessee without taking into account the above amendment in Section 90. We consider it necessary to examine the effect of the amendment of Section 90 in regard to the application of rate of tax.

48. It will be useful to quote Section 90 as under :-

"90.(1) The Central Government may enter into an agreement with the Government of any country outside India –

(a) for the granting of relief in respect of income on which have been paid both income-tax under this Act and income-tax in that country, or

(b) for the avoidance of double taxation of incomeunder this Act and under the corresponding law in force in that country, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion of avoidance, or

(d) for recovery of income tax under this Act and under the corresponding law in force in that country, and may by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

2. Where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax, on as the case may be avoidable of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."

The following explanation was inserted by the Finance Act, 2001 w.r.e.f. 1.4.1962 :-

"Explanation - For the removal of doubts, it is hereby declare that the change 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, where such foreign company has not made the prescribed arrangement for declaration and payment within India of the dividends (including dividends on preference shares) payable out of first come in India."

49. Before considering the claim of the assessee in the light of the amendment of Section 90 w.r.e.f. 1.4.1962, we consider it useful to keep in mind the applicability of the Indian Tax Laws vis-a-vis DTAA with the foreign country. In this connection reference to the decision of the Hon'ble Supreme Court in the case of Gramophone Co. of India Ltd. -Vs- Birendra Bahadur Pandey & Ors. ***[AIR 1984 (SC) 6671]*** *is relevant. In this case their Lordships of the* ***Supreme Court held that in the event of conflict between international law, the Court must follow Municipal Law.*** *The relevant para-5 is quoted hereunder for the sake of reference :-*

> *"5 There can be no question that nations must march with any international community and the Municipal Law must respect rules of International Law each as nations respect international opinion. The comity of Nations requires the Rules of International law may be accommodated in the Municipal Law even without express Legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted Legislature in making the laws may not be subjected to external rules except to the extent legitimacy accepted by the constituted legislatures themselves.* ***The doctrine of incorporation also cognizes the position that the rules of international law are incorporated into national law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament.*** *Comity of nations or no.* ***Municipal Law must prevail in case of conflict****. National*

Courts cannot say "yes" if Parliament has said no to a principle of international law. National Courts will endorse international law but not if it conflicts with national law. National courts being organs of the National State and not organs of international law must perforce apply national law if international law conflicts with it. But the Courts are under an obligation within legitimate limits, to so interpret the Municipal Statute as to avoid confrontation with the comity of Nations or the well established principles of International law. But if conflict is inevitable, the latter must yield."

50. Section 90 of the Income Tax Act empowers the Central Government to enter into an agreement with the Government of any country outside India for granting of relief or for avoidance of double taxation of income, etc. ***Thus the source of double taxation avoidance agreement with Nederland is Section 90 of the Income Tax Act, 1961. Section 90 has been quoted in para 48 above.***

51. ***It is note worthy that Sub-Section (2) of Section 90 provides for application of beneficial provisions of the agreement in contrast to the contrary provisions of the Income Tax Act, 1961. It has, however, to be borne in mind that in the event of there being no conflict between the provisions of the DTAA and the Income Tax Act, 1961, the effect shall have to be given to the provisions of the Income Tax Act, 1961. It is only when there is a conflict between the provisions of the agreements in contrast with the provisions of the Income Tax Act, 1961 that the beneficial treatment is to be given as per Section 90(2) of the Income Tax Act, 1961. In this connection circular of the CBDT being No. 333 dated 02.04.1982*** *also clarifies the position of law, which is* ***quoted hereunder :-***

"Subject: Conflict between the provisions of the Income Tax Act, 1961 and the provisions of the Double Taxation Avoidance Agreement - Clarification.

It has come to the notice of the Board that sometimes effect to the provisions of double taxation avoidance agreement is not given by the assessing officers when they find that the portions of the *agreement are not in conformity with the provisions of the Income Tax Act, 1961.*

2. The correct legal position is that ***where a specific provision is made in the double taxation avoidance agreement, that provision will prevail over the general provisions contained in the Income Tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under Section 90 of the Income-tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the Agreement.***

3. Thus, where a Double Taxation Avoidance Agreement provides for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income Tax Act. ***Where there is no specific provision in the agreement, it is the basic law, i.e. the Income Tax Act, that will govern the taxation of income."***

52. As ____ pointed out an ***agreement for avoidance of double taxation*** *and prevention of fiscal evasion with Nederland was executed between the Republic of India and the Kingdom of Nederland* ***which was notified vide Notification No. 382(E) dated 27.3.1989 and amended by Notification No. SO-693(E) dated 30.8.1999.*** *This agreement is available in I.T.R. (St.) 72.* ***The Notification gives the source of the agreement, i.e. Section 90 of the I.T. Act, 1961*** *and similar provision under the Companies Profits (Sur-tax) Act and Wealth-tax Act.* ***Thus, it is evident that the DTAA derives its source from the Income-tax Act, 1961 itself, overrides the provisions of the Income-Tax Act, 1961 within the limits provided under the said Act.*** *The limit provided under the Act, as pointed out earlier, is that in the event of conflict between the provisions of the DTAA and the provision of the Income Tax Act, the beneficiary provision of the Act shall prevail in regard to the taxation of the subjects.* ***It thus become abundantly clear that when there is no conflict between DTAA and the Income Tax Act, 1961 in regard to any aspect of the matter, the provisions of the Income Tax Act, 1961 shall have to be implemented with full***

force. *Section 90 was amended as pointed out earlier, by the Finance Act, 2001 w.r.e.f. 1.4.1962 incorporation the Explanation which has been quoted in para 48 above.*

At this stage it will be relevant to refer to ***Article 24 of the DTAA****, which reads as under :-*

> *"ARTICLE 24 - Non-discrimination 1. Nationals of one of the states shall not be subjected the other State to any taxation or any requirement connected therewith, which is other or more burden some than the taxation and connected requirements to which nationals of that other State the same circumstances are or may be subjected. These provisions shall notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the States.*
>
> *2. Except where the provisions of paragraph 3 of Article 7 apply, the taxation on a permanent establishment which an enterprise of one of the States has in the other State* ***shall not be less favourably levied*** *in that other State than the taxation levied on enterprises of that other State carrying on the same activities.*
>
> *3. The provisions of paragraph 2 shall not be construed as obliging one of the States to grant residents of the other State any personal allowances, reliefs and reductions for taxation purposes account of civil status or family responsibilities which it grants to its own residents.*
>
> *4. Except where the provisions of paragraph 1 of Article 9 paragraph 9 of Article 11 paragraph 9 of Article 12 apply, interest, royalties and other disbursements paid by an enterprise one of the States to a resident of the other State shall for the purpose of determining the marginal profits of such enterprise, be deductible under the same conditions as if they had been paid to resident of the first mentioned State. Similarly, any debts of an enterprise of one of the States resident of the other State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident the first mentioned State.*

5. Enterprises of one of the States, the capital of which is wholly or partly owned or controlled directly or indirectly, by one or more residents of the other State shall not be subjected in the first mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprise of the first mentioned State are or may be subjected."

53. The Tribunal in the assessee's own case the assessment year 1996-97 (supra) has held that Article 24, para-1 is not applicable in any case of the appellant. However, the Tribunal has expressed the view that Article 24 applied in the case of the appellant. However Explanation to Section 90 specifically provides that the charge of tax in respect of the foreign company at the rate higher than the rate at which a domestic company is chargeable shall not be regarded as less favourable charge. ***In the DTAA, there is no*** *(illegible)* ***of "less favourable charge". Therefore, the Explanation to Section 90 cannot be said to be in conflict with the provisions of the DTAA****. On the facts and in the circumstances of this case,* ***there is no escape from the conclusion that there is no conflict between the provisions of the DTAA and the Income Tax Act, 1961 in regard to the non-discrimination.***

54. As has been pointed out earlier, the provisions of DTAA incorporation specific provisions contrary to the provisions of the Income Tax Act, 1961 are to prevail in so far as such incorporation is authorised under the Income Tax Act, 1961 itself. However, in regard to the subsequent amendments, the only requirement is to notify the amendments to the respective countries and in the event of there being no conflict, the amended provisions shall have to be given effect to. In this connection, it will be relevant to refer to ***Article 2, para-4 of the DTAA which reads as under:***

"4. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to or in place of, the existing taxes. ***The competent authorities of the States shall notify to each other any substantial changes which have been made in their respective taxation laws."*** *[Emphasis supplied].*

55. It is thus evident that even the DTAA recognizes the fact that the amendments effected by the respective Legislatures after the execution of the DTAA are not affected in so far as they are not repugnant to the specific provisions of the DTAA. ***In this view of the matter, the amendment in Section 90 is applicable in this case with retrospective effect in so far as it is not in conflict with the provisions of DTAA.***

56. The contention advanced on behalf of the assessee that the said Explanation to Section 90 is unimplementable because of inappropriate language, does not appeal to us. ***The Explanation in our view provides for two eventualities.*** *One is the charge of tax in respect of a foreign company vis-a-vis an Indian Company (i.e. a Domestic Company).* ***the second category as per Explanation is the foreign Company vis-a-vis the domestic company other than Indian company.*** *It is non note worthy that the* ***Domestic Company is defined under the Finance Act.*** *For the sake of reference we may quote the definition of the domestic company as per the* ***Finance (No. 2) Act, 1996.***

> *"domestic company" means an Indian Company, or any other company which in respect of its income liable to income-tax under the Income-tax Act for the assessment year commencing on the 1st day of April, 1996, has made the prescribed arrangements for the declaration and payment within India of the dividends (including dividends on preference shares) payable out of such income in accordance with the provisions of Section 194 of the Act." [Emphasis supplied].*

This even under the Finance Act the domestic company is recognized as Indian company and any other company having made arrangement for declaration of dividends payable on such income. We, therefore, do not find the language of the Explanation to Section 90 as inappropriate. *Moreover, in so far as there is no doubt about the category of the Foreign company vis-a-vis the Indian company having been specified in the explanation, one need not ascertain as to whether in any case the second category of the companies would at all exist. We, therefore, do not find merit in the contentions advanced on behalf of the assesse in this regard.*

59. It is evident from the letter dated 24.11.1994 that the CBDT was of the view that the tax rate applicable in the case of the appellants would be the same as applicable to India companies. ***However, this opinion was changed before the law was amended vide letter dated 24.3.2000 referred to above****. We have referred to the contentions advanced on behalf of the assessee in regard to these two letters issued by the CBDT. It is evident from the content the letters that the opinion of the Board is expressed in the aforementioned letters. If the how were not amended, perhaps we would have no difficulty in holding that the A.O. could not have overlooked the opinion of the Board in regard to the taxation of the appellants. So, however, the law has been amended retrospectively. Therefore, the only issue that requires to be considered is as to whether the circular of the CBDT prevails over the statutory law passed by the supreme legislature. The CBDT is the creation of Statute. The instructions issued u/s. 119 of the I.T. Act, 1961 is under the delegated power by the Parliament.* ***Therefore, it is futile to suggest that the CBDT circulars would prevail over the conscious amendment of the law by the legislature which overrides the law prevalent before the amendment including the CBDT circulars.*** *Their Lordships of the Supreme Court in the case of* ***State Bank of Travancore -Vs- CIT (1986) 158 ITR 102 (SC)*** *held that the circulars issued by the Board would be binding on all officers and persons employed in the execution of the Act,* ***but no instructions or circular can go against the provisions of the Act.*** *In the case of* ***State of Madhya Pradesh -Vs- G.S. Dall & Flour Mills [(1991) 187 I.T.R. 478, 499 (SC),*** *their Lordships of the Supreme Court held that* ***executive instructions can supplement a statute or cover area to which the statute does not extend. But they cannot run contrary to the statutory provisions or while down their effect.*** *In the case of* ***Kerala Financial Corpn. -Vs- CIT [(1994) 210 I.T.R. 129 at page 135 (SC)],*** *their Lordships of the* ***Supreme Court held that the circular offshore Board issued u/s. 119 cannot override or be detracted from the Act, inasmuch as what Section 119 has empowered is to issue orders, instructions or directions for the proper administration of the Act or for such other purposes specified in sub-section (2) of that section.*** *(Illegible) Order, instruction or direction cannot override the provision of the Act, that* *would be destructive of all the known principles of law as the same would really amount to giving power to a delegated authority to even amend the provision of law enacted by Parliament.* ***This principle has been further reiterated in the case of Shanmuga Traders -Vs- State of Tamil Nadu [(1998) 5 SCC 349 at page 354]****. In the case of* ***Union of India -Vs- M. Bhaskar, JT [1996 (5) SC 500 at page 503],*** *their Lordships held that there is no dispute in law that* ***statutory provision cannot be changed by administrative instructions.***

60. Thus, from the decisions of the Supreme Court referred to above, it becomes abundantly clear that when the law is amended, any circular issued earlier automatically gets superseded. Since in this case the law was amended retrospectively, the letters issued by the Board, even assuming that they have the effect of circular issued u/s. 419 of the I.T. Act, 1961, are ineffective and they have to give way to the law passed by the supreme legislature. It may be pertinent to mention that their Lordships of the Delhi High Court in the case of National Thermal Power Corpn. of India Ltd. -Vs- Union of India [192 I.T.R. 187 at page 189] held that the opinion of the Board expressed in its administrative capacity can under no circumstances be binding on the appellate authorities or the High Courts on a reference.

61. In the case of ***C.I.T. -Vs- Swedish Enst. Asia Co. Ltd. [(1981) 127 1.T.R. 148,*** *at page 165], their Lordships of the* ***Calcutta High Court held that when the section is clear, one cannot take aid of the circulars to interpret the law.*** *This view is in consonance with the view expressed by their Lordships of the Supreme Court in the case of State Bank of Travancore (Supra).*

62. We may further refer to the observations of Sri K. Srinivasan, author of the book on Double Taxation Avoidance Agreements conained in para 7.2 of the book as under :-

> *"7.2. While a treaty may supersede the existing law in so far as its specific terms are concerned, its scope cannot be obviously be widened by provisions covering future enactments, for no sovereign Legislature will ever agree to be eternally bound by such executive stipulations. There is nothing in law preventing the Legislature from revising its own views and amending the existing enactments. A treaty cannot afford protection against*

such subsequent charges in law. However, all that is required for revision of a treaty is the prescribed notice. Whenever the law undergoes any modification that may affect the terms of a treaty. The administration may have to give due notice to the concerned countries immediately to avoid giving any cause for a grievance. Courts have held in the UK that any unilateral legislation enacted after a treaty has come into force will override the treaty, whereas if it had been enacted earlier, its effect would have been limited by the treaty provisions - CIR -Vs- Collco Dealings Ltd. [1960] 39 TC 509, concerning, UK anti-avoidance legislation conflicting with the earlier lish double tax avoidance agreement and Woodend Rubber Co. -Vs- CIR [1970] 2 WIR 10, concerning discriminatory legislation in Ceylon (Sri Lanka) conflicting with the earlier UK - Ceylon treaty."

63. ***In the light of the above position of law, we are of the view that the Explanation to Section 90 is attracted in this case and the letters issued by the CBDT have been superseded by the said Explanation w.e.f. 1.4.1962. We, accordingly, uphold the decision of the C.I.T. (A) in regard to the applicability of the rate of tax as applicable in the case of foreign companies in the case of the appellant***. *Before parting with this issue we would like to point out that Article 25 of the DDTA is not attracted in this. The said Article is reproduced hereunder :-*

"ARTICLE 25 - Mutual agreement procedure-1. Where a person considers that the actions of one or both of the States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those states present his case to the competent authority of the State of which he is a resident or, if his Case comes under paragraph 1 of Article 24 to that of the State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is in itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement *with the competent authority of the other State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the context of Law of the States.*

3. The competent authority of the States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases and provided for in that Convention.

4. The competent authorities of the States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceeding paragraphs. When it seems advisable in order to reach agreement to have an oral exchange of opinions, such exchange may take place through a Commission consisting of representatives of the competent authorities of the two States."

We admit our failure to appreciate as to how a letter written to the CBDT seeking opinion about the rate of tax chargeable in the case of the appellant fits in within the framework of reference under Article 25 of the DTAA. We find no merit in the contention in this regard advanced on behalf of the appellants.

65. Our decision is regard to the issue of rate of tax for assessment years 1992-93 and 1994-95 shall apply to assessment years 1997-98 mutatis inulandis. Assessment year 1994-95:"

Submissions:-

8. During the course of hearing learned counsel for the appellant has **filed a written argument dated 18.04.2024 stating that "therefore what survives for adjudication is the first issue viz., at what rate should be Appellant be assessed on the profits attributable to the permanent establishments it had**

in India.” In oral submissions also learned counsel for the Appellant argued only on the question of rate of Tax. The arguments contained in the **written argument dated 18.04.2024** submitted by learned counsel for the appellant, are reproduced below;-

> *“1. In terms of section 4 of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), tax has to be levied on the total income of an assessee in accordance with the rates provided for in the annual Finance Act. The Finance Act of each year in Part A of the First Schedule provides for the rates at which different categories of persons are liable to pay tax. There is a separate rate provided for individuals, Hindu Undivided Families, association of persons, body of individuals and artificial juridical persons in Para A. Para B deals with rates applicable to cooperative societies and provides for a slab rate taxation. Para C provides for rates applicable to firms and para D for local authorities.* ***Finally para E. provides for rates at which domestic companies and companies other than domestic companies are taxable.*** *Section 5 of the Act delineates the scope of total income. However, both section 4 and section 5 of the Act have been made subject to the other provisions of the Act, which would also include section 90 of the Act. Reliance in this behalf is placed on the following judgment-*
>
> *a.Union of India & Anr. v. Azadi Bachao Andolan & Anr. reported in (2003) 263 ITR 706 (Supreme Court) at Pgs. 724-725 of the Report.*
>
> *2.* ***Undisputedly in accordance with the provisions of the Act the Appellant would be assessed at the rate provided for in paragraph E as applicable to a company other than a domestic company.*** *However, in view of the undisputed fact that the Appellant is a resident of the Netherlands in terms of the Double Taxation Avoidance Agreement entered into between the Governments of India and the Netherlands it would be liable to tax at the rates applicable to either a domestic company or cooperative society as elaborated herein. Section 90 of the Act empowers the Central Government to enter into*

Double Taxation Avoidance Agreements (hereinafter referred to as "DTAA/DTAAS"). Sub-Section (2) to Section 90 lays down as under-

> *"(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.*

[Emphasis added]

It is well settled that the provisions in the DTAAs prevail over the provisions of the Act. This principle is recognised by the Central Board of Direct Taxes ("CBDT") as far back as in 1982 in Circular No. 333 dated April 2, 1982 (set out at Pgs. 90- 91 of the paper book) as well as by the following judgments-

a. Bank of Tokyo Mitsubishi Ltd. v. Commissioner of Income Tax, reported in 108 taxmann.com 242 (Calcutta High Court) at Paragraphs 2-9.

b. Union of India & Anr. v. Azadi Bachao Andolan & Anr. (supra) at Pgs. 720- 726 of the Report affirming the views taken earlier by the Andhra Pradesh, Calcutta, Madras and Gujarat High Courts.

c. It is further well settled that a unilateral amendment to the domestic law cannot override the provisions of the DTAA unless the DTAA is amended by way of a bilateral negotiation. In this regard see:-

d. Director of Income Tax v. New Skies Satellite BV, reported in [2016] 382 ITR 114 (Delhi High Court) at Para 40 Pg. 139 to Para 47 Pg. 142, Para 51 Pg. 144 to Para 53 Pg. 146 and Para 59 Pg. 151 of the Reports.

e. Engineering Analysis Centre of Excellence (P) Ltd. v. Commissioner of Income Tax, reported in [2021] 125 taxmann.com 42 (Supreme Court) from Para 145 Pg. 101 onwards at Para 155 Pg. 110 to Para 165 Pg. 113. (This case is also reported in [2021] 432 ITR 471 (SC)).

f. Sanofi Pasteur Holding SA v. Department of Revenue & Ors., reported in (2013) 354 ITR 316 (Andhra Pradesh High Court) at Para 34 Pg. 354, Para 96 Pg. 420 @ Para 103 Pg. 424 to Para 107 Pg. 428, Para 119 Pg. 432 to Para 121 Pg. 433 of the Reports.

3. The Vienna Convention on the Law of Treaties, 1969 encapsulates the customary rules for interpretation of treaties. Article 31 thereof lays down that a treaty shall 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. Article 39 postulates that a multi-lateral treaty cannot be amended unilaterally. Thus, unilaterally overriding a DTAA by merely amending the domestic law without a corresponding amendment in the DTAA would be a direct violation of the said customary principle.

4. By virtue of Article 24(2) of the DTAA between India and Netherlands (Pg. 495 of the Paper Book), it is clear that if a permanent establishment of a Netherlands' entity is subjected to a tax treatment that is less favourable enterprise that is carrying on similar activities, the same would than an Indian tantamount to prohibited. The levy discrimination of the Netherlands' entity, an action which is prohibited of tax on the profits of the Appellant's banking activities at a rate higher than the rate applicable to domestic companies is, thus, impermissible. Reliance in this behalf is placed on the following-

i. Circular of the Central Board of Direct Taxes dated November 21, 1994 (Pg. 222/509A of the Paper Book).

ii. Decision of the Income Tax Appellate Tribunal, Kolkata (hereinafter referred to as "the Tribunal") dated March 30, 2001 in the appellant's own case for the assessment year 1996-97 (Pg. 397 @ Pgs. 426 to 441 of the Paper Book). The said order has become final since the appeal of the Department against the said order, being ITA 217 of 2001, has been dismissed on June 2, 2014 as would appear from the case status records on the website of the Calcutta High Court.

iii. Bank of Tokyo Mitsubishi vs. CIT (supra).

iv. The Tribunal in para 47 of the impugned order at page 87 notes that it would normally have followed the earlier order for the assessment year 1996/97 but for the amendment to the *domestic law by insertion of the Explanation below section 90 with retrospective effect.*

5. In light of the above, it is stated that ***the Explanation inserted below section 90*** *of the Act by the Finance Act, 2001 with retrospective effect from April 1, 1962 as amended by the Finance Act, 2004 (hereinafter referred to as "the said Explanation"), which is set out below, especially in light of the language used therein* ***cannot override the provisions of the DTAA.***

> *"For the removal of doubts, it is hereby declared that the charge of tax in respect 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."*

6. The India-Netherlands DTAA was amended twice, firstly by Notification No. S. O. 693(E) [No. 11050(F. NO. 501/2/83-FTD)] dated August 30, 1999 and secondly by Notification No. 2/2013 [F. No. 501/02/1983-FTD-1/SO 163 (E) dated January 14, 2013. The first amendment was made even after India had negotiated DTAAs with other countries wherein the non excluded from its ambit the rate of tax. The second amendment was even after discrimination article the insertion of the Explanation but no amendment corresponding to the said Explanation was made to Article 24 of the DTAA.

7. ***Further and in any event, the said Explanation is not clarificatory in nature*** *as it seeks to enlarge the levy of tax by effectively taking away the benefit provided to the appellant by way of section 90(2) of the Act read with para (2) of Article 24 of the India-Netherlands DTAA. This would be evident from the stand taken by the Central Government on November 21, 1994 that the rate of tax applicable in the case of the appellant would be the same as for an Indian company (Pg. 222/509A of the Paper Book). Further, on March 30, 2001, when the decision of the Tribunal in the appellant's own case for the assessment year 1996-97 (supra) was rendered in favour of the appellant, the Finance Bill, 2001 was pending consideration before the Parliament. As on the said date, the Finance Bill, 2001 as originally introduced did not contain a proposal for insertion of the said Explanation. It would thus be evident that the insertion of the said Explanation below section 90 of the Act was thus effected by the Finance Act, 2001 (which was passed subsequently) only with a view* *to reverse the decision of the Tribunal in the appellant's own case for the assessment year 1996-97 with retrospective effect. Such an action is impermissible in law as held in the following judgment-*

a. Director of Income Tax v. New Skies Satellite BV (supra), at Para 29 Pg. 134 to Para 38 Pg. 138 of the Reports.

8. It is submitted that where the Legislature wanted to enact a provision that would override a treaty provision specific language to that effect was used. Attention is invited to sub-section (2A) of section 90 of the Act which reads thus:-

"(2A) Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions not beneficial to him."

9. In the absence of a similar non-obstante clause in the Explanation below section 90, the said Explanation cannot override the provisions of the DTAA. Reliance in this behalf is placed on the following judgment-

a. Sanofi Pasteur Holding SA v. Department of Revenue & Ors. (supra) at Para 105 Pgs. 427-428 of the Reports.

10. The term levy' as appearing in the said Explanation as well as in Article 24(2) of the India-Netherlands DTAA includes the applicability of the appropriate rate of tax. The rate of tax imposes a substantive liability and is an essential component for any valid levy of tax. Reliance in this behalf is placed on the following judgment-

a. Govind Saran Ganga Saran v. Commissioner of Sales Tax & Ors., reported in (1985) 155 ITR 144 (Supreme Court) at Pg. 148 of the Reports.

11. Even assuming the Explanation permits a discrimination qua the rate of tax to be applied, contrary to the provisions of Article 24(2), the language thereof does not permit the levy of a tax on the profits of the Appellant's permanent establishment at a rate higher than that levied on a cooperative bank. The said Explanation only refers to domestic companies and not to co-operative societies. Thus, the appellant cannot be taxed at a rate that is less favourable than the one at which a co-operative society engaged in the business of banking is subject to. The Second Schedule to the Reserve Bank of India, 1934 contains a list of Scheduled Banks. The appellant also features in the said

Second Schedule along with various public sector banks, private banks as well as co-operative banks. Section 56 of the Banking Regulation Act, 1949 lays down, inter-alia, that the provisions of that Act shall apply to co-operative societies as they apply to banking companies. On a conjoint reading of the aforesaid legislations, indisputable that the appellant and co-operative banks both carry on similar activities and are subject to similar regulations, and thus, taxing the Appellant at a rate applicable to a company other than a domestic company will be breach of article 24(2).

12. DTAAs are entered into between two sovereign states after elaborate negotiations (a fact of which judicial recognition is taken in the case of Azadi Bachao (supra) and Sanofi Pasteur SA (supra)). Hence, the use of a varied phraseology in the various Articles of the different DTAAs which India has entered into is reflective of the singularity each such DTAA possesses which flows from the economic and political relations as well the bargains made between India and each of its treaty partners in order to arrive at a compromise regarding their concurrent tax jurisdiction. While on the one hand, India did not re-negotiate with Netherlands for the purposes of amending Article 24 of the DTAA to bring it in consonance with the said Explanation, on the other hand, India incorporated a clause similar to the said Explanation in its DTAAS with other countries, in varied phraseology and methodology, both before as well as after the insertion of the said Explanation. The fact that such amendments in the DTAAS were made even after the insertion of the said Explanation in the Act leads to the inescapable conclusion that even the Government admits that it cannot unilaterally amend the DTAAS by merely amending the Act. Otherwise, negotiations and renegotiations, as the case may be, for incorporation of the said Explanation in other DTAAS would be otiose. On a perusal of the list of dates showing the DTAAS entered into by India, it would be evident that India has taken different stands with different countries with respect to the Article on non-discrimination and the same is illustratively summarised as under-

a. DTAAS with non-discrimination clause similar to the India-Netherlands DTAA- Libya (Pg. 42), Zambia (Pg. 44), Japan (Pg. 92-93), Denmark (Pg. 95-96), France (Pg. 137), Italy (Pg. 147-148) etc.

b. DTAAS with non-discrimination clause similar to the India-Netherlands DTAA amended later to state that charging a higher rate of tax will not amount to discrimination- Tanzania (Pg. 40, 351), Sri Lanka (Pg. 46-47, 380-381), New Zealand (Pg. 68-69, 248), Swiss Federation (Pg. 172, 255) etc.

c. DTAAs giving power to tax at a higher rate to only one country initially and/or by amendment- Belgium (Pg. 37-38), Kenya (Pg. 59-60), Sweden (Pg. 219), Korea (Pg. 410-411), Canada (Pg. 180-181) etc.

d. DTAAS laying down a variation of a certain percentage in the rate of tax as not amounting to discrimination- Russia: 12% (Pg. 198), South Africa: 10% (Pg. 186), Austria: 15% (Pg. 252), Hungary: 13% (Pg. 276-277), Latvia: 1% (Pg. 396-397) etc.

e. DTAAS entered into prior to 2001 laying down that charging a higher rate of tax does not amount to discrimination- Finland (Pg. 51-52), United Kingdom and Northern Ireland (Pg. 140), Singapore (Pg. 156-157), Bulgaria (Pg. 161), Qatar (Pg. 238-239) etc.

13. It is submitted a conspectus of the mode in which the non discrimination article is worded in various DTAAS reveals that absent any such provision permitting India to levy a tax at a higher rate either with a limit or without, the relevant article must be construed as specifically imposing a bar on either of the two contracting states from levying tax at a rate higher than that which they levy on a domestic enterprise. This is the view accepted by this Hon'ble Court in Bank of Tokyo Mitsubishi (supra) and, hence, the unilateral amendment of the domestic law cannot set at naught an express provision in the relevant DTAA.

14. It is submitted that in interpreting the provisions of a DTAA it would be permissible to have regard to the language used in DTAAS with other countries that India has entered into. The Supreme Court has also placed reliance on the different language employed in the different treaties while interpreting the DTAAS they were called upon to consider in the case of Engineering Analysis (supra). [Para 156 Pg. 110 to Para 158 Pg. 111].

15. The observation of the Supreme Court in the case of Gramophone Company of India Ltd. v. Birendra Bahadur Pandey, reported in AIR 1984 SC 667, that in case of a conflict between domestic law and international law, the latter must yield, which judgment has been relied upon by the Tribunal in the impugned order (Pg. 87 of the Paper Book), has no application to the facts of the instant case. Such observation was given with respect to a situation in which an international convention and a bilateral treaty was being given effect to in the absence of any enabling provisions for such convention and bilateral treaty to override the domestic legislation. These observations only lay down the principle that international law may be incorporated in the domestic law even without an express legislative sanction provided they are not in conflict with domestic law but such an accommodation/ incorporation does not extend to a scenario in which the provisions of domestic law are clearly contrary to the international law. In the instant case however, it is the Act itself that provides that the provisions of a duly notified DTAA under the scheme of section 90 will override the provisions of the Act. In other words, it is by operation of section 90(2) of Act and not due to the general principles of extending respect to international conventions and treaties, that the provisions of the DTAA override the provisions of the Act.

16. For the reasons aforesaid, it is respectfully submitted that questions (a) and (b) on which the said appeal was admitted be decided in the negative and against the Revenue and in favour of the appellant."

9. Learned counsel for the respondent merely stated that she supports the impugned order of the Tribunal and the impugned order is correct and does not required interference.

Discussion and Findings:-

10. We have carefully considered the submissions of the learned counsels for the parties and perused the paper book. Before we

proceed to examine the rival submissions, it is appropriate to reproduce Sections 2(17), 2(22A), 2(23A) 2(26), 4, 5 and 90 of the Income Tax Act, 1961 explanatory notes No. 54, 54.1 and 54.2 as given in **'Explanatory Notes on the provisions of Finance Act of 2001** F. No.153/88/2001/-TPL, Government of India Ministry of Finance Department of Revenue Central Board of Direct Taxes (New Delhi) **with regard to the amendment in Section 90 of the Act, 1961,** sub-section 1 and Clause (a) of sub-section 12 of Section 2 of the **Finance (No. 2) Act 2004 and Paragraph E of the First Schedule** to the Finance (No. 2) Act, 2004 as under;-

(i) Section 2 (17) of the Income Tax Act, 1961

*"(17)"**company**" means—*

*(i)**any Indian company**, or*

*(ii)**any body corporate incorporated by or under the laws of a country outside India**, or*

(iii)any institution, association or body which is or was assessable or was assessed as a company for any assessment year under the Indian Income-tax Act, 1922 (11 of 1922) or which is or was assessable or was assessed under this Act as a company for any assessment year commencing on or before the 1st day of April, 1970, or

(iv)any institution, association or body, whether incorporated or not and whether Indian or non-Indian, which is declared by general or special order of the Board to be a company :

Provided that such institution, association or body shall be deemed to be a company only for such assessment year or assessment years (whether commencing before the 1st day of April, 1971 or on or after that date) as may be specified in the declaration ;"

(ii) Section 2 (22A) of the Income Tax Act, 1961

"Section 2 (22A) ***"domestic company"*** *means an* ***Indian company, or any other company which****, in respect of its income liable to tax under this Act, has made the prescribed arrangements for the declaration and payment, within India, of the dividends (including dividends on preference shares) payable out of such income;"*

[Inserted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989.]

(ii) Section 2 (23A) of the Income Tax Act, 1961

*"(23A) "****foreign company"*** *means a company which is not a domestic company"*

[Inserted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989]

(iii) Section 2 (26) of the Income Tax Act, 1961

*"(26) "****Indian company****" means a company formed and registered under the Companies Act, 1956 (1 of 1956), and includes—*

(i)a company formed and registered under any law relating to companies formerly in force in any part of India (other than the State of Jammu and Kashmir [and the Union territories specified in sub-clause (iii) of this clause]);

[(ia)a corporation established by or under a Central, State or Provincial Act ;

(ib)any institution, association or body which is declared by the Board to be a company under clause (17) ;]

(ii)in the case of the State of Jammu and Kashmir, a company formed and registered under any law for the time being in force in that State ;

[(iii)in the case of any of the Union territories of Dadra and Nagar Haveli, Goa†, Daman and Diu, and Pondicherry, a company formed and registered under any law for the time being in force in that Union territory:]

***Provided** that the registered or, as the case may be, principal office of the company, corporation, institution, association or body in all cases is in India ;*

(iv) Section 4 of the Income Tax Act, 1961

"Charge of income-tax.

*4. (1)Where any Central Act enacts that **income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with,** and * [subject to the provisions (including provisions for the levy of additional income-tax) of, this Act] **in respect of the total income of the previous year of every person:***

***Provided** that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.*

(2)In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.

[Substituted for "subject to the provisions of the Act" by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989"

(v) Section 5 of the Income Tax Act, 1961

"Scope of total income.

5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which-

(a)is received or is deemed to be received in India in such year by or on behalf of such person; or

(b)accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c)accrues or arises to him outside India during such year:

***Provided** that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.*

*(2)**Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which**-*

(a)is received or is deemed to be received in India in such year by or on behalf of such person; or

(b)accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1. - Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2. - For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

(vi) Section 90 of the Income Tax Act, 1961

"90. [Agreement with foreign countries.

(1)The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,-

[(a)for the granting of relief in respect of-

(i)income on which have been paid both income-tax under this Act and income-tax in that country or

(ii)income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or]

[substituted by the Finance Act, 2003, w.e.f. 1.4.2004. Prior to its substitution, clause (a) read as under:
"(a) for the granting of relief in respect of income on which have been paid both income- tax under this Act and income-tax in that country, or"]

(b)for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or

(c)for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d)for recovery of income-tax under this Act and under the corresponding law in force in that country,

And may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.]

[(2)Where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, ***the provisions of this Act shall apply to the extent they are more beneficial to that assesse.****]*

[inserted by the Finance (No. 2) Act, 1991, w.r.e.f. 1-4-1972.]

[(3)Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.]

[inserted by the Finance Act, 2003, w.r.e.f. 1-4-2004.]

[Explanation 1**. - For the removal of doubts, **it is hereby declared** 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.]*

**[Inserted by the Finance Act, 2001, w.r.e.f. 1-4-1962.]*

(vii) Explanatory notes number 54, 54.1 and 54.2 in 'Explanatory Notes on the provisions of Finance Act of 2001 F. No.153/88/2001/-TPL, Government of India Ministry of Finance Department of Revenue Central Board of Direct Taxes;-

"54. Amendment in Section 90 relating to agreement with foreign countries

*54.1 Though Finance Act, 2001 an **Explanation has been inserted in Section 90** of the Income Tax Act **to clarify** that the **charge of the 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, where such foreign company has not made the prescribed arrangement for declaration and payment within India, of the dividends, (including dividends on preference shares) payable out of its income in India.*

54.2 This amendment takes effect retrospectively from 1st April, 1962 and accordingly, applies in relation to the assessment year 1962-1963 and subsequent assessment years."

(viii) Section 2(1) of The Finance (No.2) Act, 2004

"2.(1). Subject to the provisions of sub-sections (2) and (3), for the assessment year commencing on the 1st day of April, 2004, ***income-tax shall be charged at the rates specified in Part I of the First Schedule*** *and such tax as reduced by the rebate of income-tax calculated under Chapter VIII-A of the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income-tax Act) shall be increased by a surcharge for purposes of the Union calculated in each case in the manner provided therein."*

(ix) Sub-section 12(a) of Section 2 of the Finance (No.2) Act, 2004

" (12) ***for the purpose of this section and the First Schedule,-***

(a) ***"domestic company" means an Indian company or any other company which, in respect of its income liable to income-tax under the Income-tax Act*** *for the assessment year commencing on the 1st day of April, 2004, has made the prescribed arrangements for the declaration and payment within India of the dividends (including dividends on preference shares) payable out of such income."*

(X) Paragraph E of the First Schedule to the Finance (No.2) Act, 2004

"Paragraph E

In the case of a company,-

Rates of income-tax

I. ***In the case of a domestic company*** *35 per cent of the total income;*

II. In the case of a ***company other than a domestic company-***

(i) On so much of the total income as consists of-

(a) Royalties received from Government or an indian concern in pursuance of an agreement made by it with the government or

the Indian concern after the 31st day of March, 1961 but before the 1st day of April, 1976; or

(b) Fees for rendering technices received from Government or an indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 29th day of February, 1964 but before the 1st day of April 1976,

And where such agreement has, in either case, been approved by the Central Government 50 per cent;

(ii) On the balance, if any, of the total income. 40 per cent."

Note*** Meaning of "Domestic Company" and the rate of tax as given in Paragraph E of Schedule I to the Finance Act 2004 are similar in Finance Act of other years involved in the present appeals except with the change of effective date and applicable rate of tax. Therefore, the aforesaid provisions of the Finance Act 2004 have been reproduced for considering whether rate of tax provided in Clause (a) shall be applicable **or** the rate of tax as provided in clause (b) shall be applicable to the appellant/assesse?

11. In the **memorandum of appeal**, **the appellant had taken only five grounds with regard to the applicable rate of Income Tax, as under;-**

"GROUNDS

(1) The Learned Tribunal erred in holding that your petitioner is chargeable at the Income tax rate applicable to a foreign company as against the rate of tax applicable to a domestic company.

(II) The Learned Tribunal erred in confirming the applicability of a higher rate of tax based on the Explanation to section 90 of the Income-tax Act, 1961 ("the Act") (inserted by the Finance Act, 2001 with retrospective effect from 1 April 1962), disregarding the express provisions of Article 24(2) of the Double Tax Avoidance Agreement between India and Netherlands dated 27 March 1989 (hereinafter referred to as "the DTAA") read with section 90(2) of the Act and the Central Board of Direct Taxes ("CBDT") Circular No. 333 dated 2 April 1982.

(III) The Learned Tribunal's action of not applying Article 24(2) of the DTAA on account of the reasoning that there is no conflict between the provisions of the Act and the DTAA is erroneous and vitiated in law.

(IV) The Learned Tribunal erred in not appreciating that there is a conflict in section 90 read with section 2(22A) of the Act which requires a foreign company to fulfil the requirement of prescribed arrangements for the declaration payment of dividends within India to entitle it for the lower rate of tax applicable to domestic company as it is impossible for any foreign company to fulfil the conditions prescribed under rule 27 of the Income-tax Rules, 1962 ("the Rules").

(V) The Learned Tribunal erred in overlooking the fact that the CBDT instructed the Chief Commissioner of Income-Tax -II (CCIT) vide its letter dated 21 November 1994 that "the Board is of the opinion that the tax applicable in case of ABN AMRO Bank would be the same as for an Indian company, at the relevant tax rates applicable for the concerned assessment years"

Whether appellant is a domestic company;-

12. The word 'domestic company' has been defined in Section 2(22A) of the Act, 1961 which has been reproduced above. As per definition, an Indian company or any other company fulfilling specified conditions, is a domestic company. The word "company" has been defined in Section 2(17) of the Act, 1961 which means (i) an Indian Company, (ii) any body corporate

incorporated by or under the laws of a country outside India, (iii) … (iv)…. Thus, the Appellant is a company falling under Clause (ii) of Section 2 (17) of the Act, 1961. As per the Act, 1961 there are two class of companies, namely –"Domestic Company" defined under Section 2(22A) and "Company other than Domestic Company". It is admitted case of the appellant that it is not a "Domestic Company" rather it is a "foreign company" i.e. "Company other than Domestic Company" as defined in Section 2(23A) of the Act 1961. Thus, **the appellant company is not a domestic company but it is company other than a domestic company**.

<u>Applicable rate of Income Tax And Classification of Companies for rate of Tax:-</u>

13. Section 4 of the Act, 1961 is the charging provision which provides that where any Central Act enacts that income tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act in respect of the total income of the previous year of every person. Thus, every year parliament enacts Finance Act which provides for rate of Income Tax to be charged in respect of the total income of the previous year. The Finance Act enacted by

parliament relevant for the assessment year involved in these appeals are similar with change of assessment year and rate of income tax. We have reproduced above the relevant portion of the Finance (No.2) Act, 2004. As per Section 2 (1) of the Finance Act, income tax shall be charged at the rates specified in Part I of the **First Schedule.** Clause (a) of the Sub-section 12 of Section 2 of the Finance Act also defines the words "domestic company" similar to the definition given in Section 2 (22A) of the Act, 1961. Paragraph (**E)** of the First Schedule to the Finance Act prescribes rates of income tax for companies. **It has classified "companies" in two categories.** The **first category** is **"domestic company".** The **second category** is **"Company other than a domestic Company"**. Undisputedly the appellant's company is not a domestic company. Therefore, the appellant's company falls under the other class i.e. "a company other than a domestic company" as classified in paragraph E of the Finance Act. In ground no. (IV) of the Memorandum of Appeal (afore-quoted) the appellants have admitted themselves to be a foreign company i.e. "company other than a domestic company". Thus, it is admitted case of the appellant that it is not a domestic company as **it is neither an "Indian Company"** nor **"any other Company**" as it has not made prescribed arrangement in respect of its income liable to income tax under the Income Tax Act for declaration and payment within India of the dividends including dividend on preference shares payable out of such income. **The classification made in paragraph E of the First Part of the First Schedule to the Finance Act, has not been questioned by the appellants. The classification so made is a valid classification.**

14. In *Amalgamated Tea Estates Co. Ltd. v. State of Kerala,* ***(1974) 4 SCC 415*** (para 15 and 16) **a Constitution Bench** of the **Hon'ble Supreme Court considered the challenge to the validity of classification of a domestic company and of a foreign company** for rate of tax under the Kerala Agricultural Income Tax Act **and held that the classification of a domestic company and foreign company for rate of tax is valid.**

<u>Interpretation of Taxing Statue and Treaty:-</u>

15. In *Commissioner of Customs (Import) Mumbai v. Dilip Kumar & Company & Ors.* ***(2018) 9 SCC 1*** *(*paras 21,22,25,29,34 and 53) a **Constitution Bench** of the Hon'ble Supreme Court considered various issues and aspects relating to interpretation of taxing statue and held as under;-

> *"21**.** The well-settled principle is that '**when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said meaning irrespective of consequences.** If the words in the statute are plain and unambiguous, it becomes necessary to expound those*

words in their natural and ordinary sense. The words used declare the intention of the legislature.

22. In Kanai Lal Sur v. Paramnidhi Sadhukhan [Kanai Lal Sur v. Paramnidhi Sadhukhan, ***AIR 1957 SC 907]*** *, it was held that* ***if the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.***

25. At the outset, we must clarify the position of "plain meaning rule or clear and unambiguous rule" with respect to tax law. ***"The plain meaning rule" suggests that when the language in the statute is plain and unambiguous, the court has to read and understand the plain language as such, and there is no scope for any interpretation.*** *This salutary maxim flows from the phrase "cum inverbis nulla ambiguitas est, non debet admitti voluntatis quaestio". Following such maxim, the courts sometimes have made strict interpretation subordinate to the plain meaning rule [Mangalore Chemicals and Fertilisers Ltd. v. CCT,* ***1992 Supp (1) SCC 21****] , though strict interpretation is used in the precise sense. To say that strict interpretation involves plain reading of the statute and to say that one has to utilise strict interpretation in the event of ambiguity is self-contradictory.*

29. We are not suggesting that literal rule dehors the strict interpretation nor one should ignore to ascertain the interplay between ***"strict interpretation" and "literal interpretation". We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test.*** *The other tools of interpretation, namely,* ***contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes****. Indeed,* ***it is well settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption.*** *Furthermore,* ***nothing***

has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.

34. The passages extracted above, were quoted with approval by this Court in at least two decisions being CIT v. Kasturi and Sons Ltd. [CIT v. Kasturi and Sons Ltd., ***(1999) 3 SCC 346]*** *and State of W.B. v. Kesoram Industries Ltd. [State of W.B. v. Kesoram Industries Ltd.,* ***(2004) 10 SCC 201]*** *(hereinafter referred to as "Kesoram Industries case", for brevity). In the later decision,* ***a Bench of five Judges, after citing the above passage from Justice G.P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute:***

"(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute 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 and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly."

53. After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that ***every statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State."***

16. In *V.O. Tractoro Export, Moscow vs. Tarapore & Company & Anr.* ***(1969) 3 SCC 562*** *(*Para 15 and 16) a Three Judges Bench of Hon'ble Supreme Court held, as under:-

> *"15. Now, as stated in Halsbury's Laws of England, Vol. 36, p. 414, there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International law.* ***But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International law.***
>
> *16. We may look at another well-recognised principle. In this country, as is the case in England,* ***the treaty or International Protocol or convention does not become effective or operative of its own force*** *as in some of the continental countries unless domestic legislation has been introduced to attain a specified result.* ***Once, Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way.*** *The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it,* ***the words employed in the Act had to be interpreted in the well-established sense which they had in municipal law.***

(See Barras v. Aberdeen Steam Trawling & Fishing Co. Ltd. [(1933) AC 402])"

(Emphasis supplied by us)

17. It is admitted case of the appellant that it is not a "Domestic Company" but "a Company other than a Domestic Company" Paragraph E of Part I of the First Schedule of the Finance Act, in clear terms, provides for separate rate of tax for company "other than a domestic company" and separate rate of tax for "domestic company,". Therefore, there being no ambiguity in classification and rates of tax, the appellant is liable to tax at the rates prescribed for a company "other than a domestic company". It is not the case of the appellant that it fall within the phrase "any other company……" used in Section 2 (22A) of the Act 1961 or in Clause (a) of Sub-section 12 of Section 2 of the Finance Act defining domestic company. Therefore, the appellant is liable to tax at the rate specified for a company other than a domestic company.

Whether Explanation to Section 90 of the Act, 1961 is in conflict with Article 24(2) of the DTAA:-

18. Undisputedly the DTAA between India and Netherland was entered into by the government of India in exercise of powers

conferred under Section 90 of the Act, 1961 Article 24(2) of the DTAA between India and Netherlands reproduced below;-

> *"2. Except where the provisions of paragraph 3 of Article 7 apply, the taxation on a permanent establishment which an enterprise of one of the States has in the other State* ***shall not be less favourably levied*** *in that other State than the taxation levied on enterprises of that other State carrying on the same activities."*

19. Explanation to Section 90 is part of Section 90. The Explanation itself starts with the words **"for the removal of doubts"**. "Explanatory notes on the provision of the Finance Act of 2001" afore-quoted, states that the explanation has been inserted in Section 90 of the Income Tax Act to **clarify** that the charge of tax in respect of 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, where such foreign company has not made the prescribed arrangement for declaration and payment within India of the dividends, (including dividend in preferential share) payable out of its income in India. It is admitted case of the appellant that it has not made the prescribed arrangements for declaration and payment within India of the dividends including dividends on preferential shares, payable out of its income in India so as to fall within phrase "any other company" used in Section 2 (22A) of the Act, 1961 defining the term

"domestic company". Had the appellant complied with the terms of "any other company" as used in Section 2 (22A), the appellant would have become a domestic company. This position of law regarding domestic company (Indian Company or any other company) has existed at all relevant point of time which is evident from the definition of Section 2(22A) of the Act, 1961, Clause (a) of Sub-section 12 of Section 2 of the Finance Act read with Paragraph E of First Part of the First Schedule to the Finance Act. The Explanation to Section 90 is in consonance with Section 2 (22A) of the Act, 1961, Section 2(12)(a) and Para E of Part I of the Finance Act. Thus, there is neither any ambiguity nor conflict in these provisions or the charging Section 4 of the Act, 1961. There is no ambiguity at all, in so far as the aforesaid statutory provisions are concerned with regard to rate of tax applicable to a "domestic company" and "company other than a domestic company". Explanation to Section 90 of the Act, 1961 is clarificatory in nature as is also evident from "Notes on clauses" afore-quoted.

20. In *Shyam Sunder and Ors. Vs. Ram Kumar and Anr.* ***2001 8 SCC 24*** (para 44) a **Constitution Bench** of the Hon'ble Supreme Court has laid down the law that function of a declaratory or explanatory Act is to supply an obvious omission or **to clear up doubts** as to meaning of the previous Act and such Act comes

into effect from the date of passing of the previous Act. In *Commissioner of Income Tax, Bombay and Ors. Vs. Podar Cement Pvt. Ltd and Ors.* ***(1997) 5 SCC 482*** (para 54) a Three Judges Bench of the Hon'ble Supreme Court **considered the clarificatory amendment along with notes of clauses and held that in the light of the clear exposition of the position of a declaratory/clarificatory Act**, we have no hesitation to hold that the amendment introduced by the Finance Bill, 1988 was declaratory/clarificatory in nature and consequently, these provisions are retrospective in operation. In *Keshawlal jethalal Shah vs. Mohanlal Bhagwandas and Anr.* ***AIR 1968 SC 1336*** a **Constitution Bench** of Hon'ble Supreme Court held that **"an Explanatory Act is generally passed** to supply an obvious omission or **to clear up doubts as to the meaning of the previous Act".**

21. Explanation to Section 90 of the Act, 1961 read with "explanatory notes" makes, it absolutely clear that the Explanation to Section 90 is clarificatory. The said Explanation has merely reiterated the clear statutory provision for rate of tax emerging from Section 2 (22A), 2 (23A) of the Act 1961 read with Section 2 (1) and Section 2 (12) (a) of the Finance Act and Paragraph E of Part I of the First Schedule to the Finance Act which we have discussed in earlier paragraphs. That apart **even**

without the said Explanation to Section 90 of the Act 1961, the statutory provision for rate of tax applicable to a company like the appellant which is not a domestic company, it remained clear at all relevant point of time that the appellant company being not a "domestic company" is liable to tax on its income in India at the rate specified for a "company other than a domestic company."

22. Article 24 (2) of the DTAA prevents from less favourable levy between two enterprises falling under one and the same class and not between one falling under one class and the other falling under another class. The phrase "shall not be less favourably levied" used in Article 24(2) of the DTAA simply means that taxation on a company falling under "any other company.... " under Section 2 (22A) of the Act, 1961 shall not be less favourably levied than an" Indian company" which both fall under one and the same class i.e. Domestic Company under Section 2(22A) of the Act, 1961 read with Section 2(1), Section 2(12)(a) and Paragraph "E' of Part I of the First Schedule of the Finance Act, which provisions existed even prior to the DTAA in question and the clarificatory retrospective insertion of the Explanation in Section 90 by the Finance Act, 2001. Thus, there

is no conflict between the Explanation to Section 90 of the Act, 1961 and Article 24 (2) of the DTAA.

23. Apart from the above, with regard to the question of conflict, the appellant has taken ground nos. (II) and (III) of the Memorandum of Appeal (reproduced above) in which it has been alleged that Section 90 read with Section 2(22A) requires a foreign company to fulfil requirement of prescribed arrangement for declaration and payment on dividend within India to entitle it for the rate of tax applicable to domestic company. We find that the aforesaid provisions do not use the words "foreign company". That apart, constitutional validity of the aforesaid provisions is not in issue in the present appeals.

24. The rate of tax has been provided by the Finance Act which also defines "domestic company". It classified companies in two categories for rate of tax, namely (I) domestic company and (II) a company other than a domestic company. Thus even without explanation appended to Section 90 of the Act 1961, the appellant company is liable to tax as a "company other than a domestic company" at the rate prescribed in paragraph E of Part I of the First Schedule to the Finance Act. The Explanation has merely clarified the existing position of law.

25. For all the reasons aforestated, we are of the considered view that there is no conflict between Section 90 or the Explanation read with Section 2 (22A) of the Act, 1961, the Finance Act and Article 24(2) of the DTAA in question. Thus we do not find any error of law in the findings recorded by the ITAT in the impugned order (in paragraph 52 to 56 of the impugned order) that explanation to Section 90 is not in conflict with the provision of DTAA and that there is no conflict between the provision of the DTAA and the Income Tax Act 1961 in regard to non-discrimination.

Effect of circular number 333 dated 02.04.1982 issued by CBDT and the letter of the CBDT dated 21.11.1945;-

26. The Circular No. 333 dated 02.04.1982 has been reproduced by the ITAT in paragraph 51 of the impugned order. We have perused the aforesaid circular of the CBDT. For ready reference para 2-3 of the aforesaid circular no. 333 dated 02.04.1982 issued by CBDT is reproduced below;-

> "*2. The correct legal position is that where a specific provision is made in the double taxation avoidance agreement, that provision will prevail over the general provisions contained in the Income Tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under* ***Section 90 of the Income-tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and***

taxation of income in the respective country except where provisions to the contrary have been made in the Agreement.

3. Thus, where a Double Taxation Avoidance Agreement provides for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income Tax Act. ***Where there is no specific provision in the agreement, it is the basic law, i.e. the Income Tax Act, that will govern the taxation of income."***

27. The aforesaid circular of the CBDT deals with the situation where there is a specific provision in the DTAA then that provision will prevail over the general provisions contained in the Income Tax Act, 1961. We find that there is no specific provision in the DTAA providing for rate of tax applicable to a "domestic company" or a "company other than domestic company" as defined under the Act, 1961 and as prescribed in and paragraph E of the First Part of the First Schedule to the Finance Act read with Section 2(1) and Section 2(12)(a) of the Finance Act. We further find that the aforesaid circular states that the DTAA also provides that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country **except** where provisions to the contrary have been made in the Agreement. We find that the DTAA in question including Article 24(2) does not contain any provision contrary to the provisions of Section 2 (22A) and Section 4 of the Act 1961 and Section 2(1), Section 2(12)(a) of the Finance Act and

rate of tax as provided in paragraph E of part one of the first schedule to the Finance Act. Therefore, circular no. 333 dated 02.04.1982 is of no help to the appellant.

28. We also find ourselves in agreement with the findings recorded in paragraph no. 51 and 52 of the impugned order of the ITAT.

29. So far as the **letter dated 21.11.1994** issued by Joint Secretary and addressed to Chief Commissioner of Income Tax II Kolkata is concerned, we find that it was written in response to a D.O. letter of the Chief Commissioner. The letter of the Joint Secretary merely informs that "the matter has been looked into and the board is of the opinion that the tax rate applicable in the case of **ABN AMRO BANK would be the same as for an Indian Company at the relevant tax rate applicable for the concerned assessment years". The said letter is a D.O. letter. It is not a circular issued in exercise of power conferred under Section 119 of the Income Tax Act, 1961.** That apart the said letter is in conflict with plain and unambiguous provisions of the Act 1961 and the Finance Act which we have discussed above. That apart the opinion expressed in the aforesaid letter was also changed even before the Explanation was inserted. We also find ourselves in agreement with the reasons recorded by the ITAT in paragraph

59 of the impugned order. **Accordingly we hold that the said letter cannot overwride the plain and unambiguous provision of the Act, 1961 and the Finance Act.**

Some Important judgements on DTAA and Section 90 of the Act of 1961:-

30. In *Union of India and Anr. Vs. Azadi Bachao Andolan and Anr.* ***2004 10 SCC 1*** Hon'ble Supreme Court considered various aspects relating to treaties/DTAA, (paragraph 28 & 32) held as under:-

> "*28. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that* ***Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement.*** *When that happens,* ***the provisions of such an agreement,*** *with respect to cases to which they apply,* ***would operate even if inconsistent with the provisions of the Income Tax Act****. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections "subject to the provisions of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of DTACs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC.*

32. The niceties of the OECD Model of tax treaties or the Report of the Joint Parliamentary Committee on the Stock Market Scam and Matters Relating Thereto, on which considerable time was spent by Mr Jha, who appeared in person, need not detain us for too long, though we shall advert to them later. This Court is not concerned with the manner in which tax treaties are negotiated or enunciated; nor is it concerned with the wisdom of any particular treaty. Whether the Indo-Mauritius DTAC ought to have been enunciated in the present form, or in any other particular form, is none of our concern. ***Whether Section 90 ought to have been placed on the statute-book, is also not our concern. Section 90, which delegates powers to the Central Government, has not been challenged before us, and, therefore, we must proceed on the footing that the section is constitutionally valid.*** *The challenge being only to the exercise of the power emanating from the section, we are of the view that Section 90 enables the Central Government to enter into a DTAC with a foreign Government. When the requisite notification has been issued thereunder, the provisions of sub-section (2) of Section 90 spring into operation and an assessee who is covered by the provisions of DTAC is entitled to seek benefits thereunder, even if the provisions of DTAC are inconsistent with the provisions of the Income Tax Act, 1961.*

(Emphasis supplied)

31. In *Assessing Officer Circle (International Taxation) New Delhi VS. Nestle SA* ***2023 SCC OnLine SC 1372*** (paragraph 42 and 49) held as under ;-

"*42. In the judgment reported as V.O. Tractoroexport v. Tarapore & Co this court underlined that-*

"16. We may look at another well-recognised principle. In this country, as is the case in England, ***the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result.***

Once, Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. *The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well-established sense which they had in municipal law. (See Barras v. Aberdeen Steam Trawling & Fishing Co. Ltd. [[1933] A.C. 402])"*

49. The legal position discernible from the previous discussion, therefore is that upon India entering into a treaty or protocol does not result in its automatic enforceability in courts and tribunals; the provisions of such treaties and protocols do not therefore, confer rights upon parties, till such time, as appropriate notifications are issued, in terms of Section 90(1)."

(Emphasis supplied)

32. In *Assistant Commissioner of Income Tax (Exemptions) vs. Ahmedabad Urban Development Authority* (***2023) 4 SCC 561*** (Para 136) Hon'ble Supreme Court considered the binding effect of circular, and after referring to its earlier judgements in *Navnit Lal C. Javeri Vs. K,K, Sen,* ***AIR 1965 SC 1375,*** *CCE Vs. Ratan Melting and Wire Industries* ***(2008) 13 SCC 1***, *Keshavji Ravi and*

Co. vs. CIT ***(1990) 2 SCC 231*** *and Commissioner of Customs vs. Indian Oil Corporation Ltd.,* ***(2004) 3 SCC 488*** explained the **binding effect of circular** and held, as under;-

> *"136.* ***In the opinion of this Court, the views expressed in*** *Keshavji Ravji [Keshavji Ravji & Co. v. CIT,* ***(1990) 2 SCC 231*** *: 1990 SCC (Tax) 268 : (1990) 183 ITR 1] , Indian Oil Corpn. [Commr. of Customs v. Indian Oil Corpn. Ltd.,* ***(2004) 3 SCC 488*** *: (2004) 2 SCR 511] and Ratan Melting & Wire Industries [CCE v. Ratan Melting & Wire Industries, (****2008) 13 SCC 1]*** *(though the last decision does not cite Navnit Lal Javeri [Navnit Lal C. Javeri v. K.K. Sen,* ***(1965) 1 SCR 909 :*** *AIR 1965 SC 1375]),* ***reflect the correct position i.e. that circulars are binding upon departmental authorities, if they advance a proposition within the framework of the statutory provision. However, if they are contrary to the plain words of a statute, they are not binding. Furthermore, they cannot bind the courts, which have to independently interpret the statute, in their own terms. At best, in such a task, they may be considered as departmental understanding on the subject and have limited persuasive value.*** *At the highest, they are binding on tax administrators and authorities, if they accord with and are not at odds with the statute; at the worst, if they cut down the plain meaning* ***of a statute, or fly on the face of their express terms, they are to be ignored****."*
>
> *(Emphasis supplied)*

33. We further find that Section 2(17) defining the word "Company", Section 2(22A) defining the word "Domestic Company", Section 2(23A) defining the word "Foreign Company" and Section 90 of the Act 1961 read with Explanation and Section 2(1), Section 2(12)(a), Paragraph 'E' of the First Schedule to the Finance Act are plain, unambiguous and leads only to one conclusion that

two class of companies namely "Domestic Company" and "Company other than a Domestic Company" are liable to tax at the prescribed rates. When the words used in aforesaid provisions are clear, plain and unambiguous and admits only one meaning, the court is bound to give effect to the words used in the aforesaid provisions, in their natural and ordinary sense. Since the words used are capable of one construction, therefore, it is not open for the court to adopt any other construction. It is well settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the provision. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute 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. Once, Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the

Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. Since the expressions used in the aforesaid provisions of the Act 1961 and the Finance Act are clear and capable of only one construction as discussed and there is no ambiguity or lack of clarity, therefore, the provision of the Act 1961 and the provision of the Finance Act, as discussed above, are bound to be given full effect. Accordingly it is held that the appellant is liable to tax at the rate applicable to a company other than a domestic company as provided in the Finance Act.

34. For all the reasons aforestated, we do not find any substance in the submission advanced by the learned counsel for the appellant. **The substantial question of law (a) afore-quoted, is answered in affirmative i.e.., in favour of the revenue and against the assessee**. It is relevant to mention at the cost of repetition that question No. (b) and question No. (c) have not been pressed before us. Therefore, in respect of those questions also the appeals deserve to be dismissed. Thus, all the above noted appeals deserve to be dismissed.

35. For all the reasons aforestated the substantial question of law No. (a) is answered in affirmative i.e. in favour of the revenue and against the assesse. **All the aforenoted Income Tax Appeals** i.e. **ITA** 155 of 2005, **ITA** 154 of 2005, **ITA** 19 of 2017, **ITA** 20 of 2017, **ITA** 21 of 2017 and **ITA** 22 of 2017 **are hereby dismissed**

<u>WPO No. 1585/ 2006:-</u>

36. Before us no argument has been advanced in the writ petition to press the reliefs prayed therein. Therefore, **Writ petition is dismissed**.

(SURYA PRAKASH KESARWANI, J.)

I agree

(RAJARSHI BHARADWAJ, J)