IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.06.2022

CORAM :

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

Writ Appeal No. 1903 of 2021

M/s. Virtusa Consulting Services Private Limited
No.34, IT Highway
Navalur, Chennai - 600 130
(cause title amended vide order dated 11.01.2021
passed in WMP No. 16418 of 2020 in WP No.
22901 of 2010) .. Appellant

Versus

1. The Dispute Resolution Panel (DRP)
   Income Tax Department
   Room No.217, II Floor, Aayakar Bhawan
   No.121, Nungambakkam High Road
   Nungambakkam, Chennai - 600 034

2. The Joint Commissioner of Income Tax
   Transfer Pricing Officer-II
   Room No.420, IV Floor, Aayakar Bhawan
   No.121, Nungambakkam High Road
   Nungambakkam, Chennai - 600 034

3. The Additional Commissioner of Income Tax
   Office of the Additional Commissioner of Income Tax
   Company Range-V
   No.121, Nungambakkam High Road
   Nungambakkam, Chennai - 600 034 .. Respondents

Appeal filed under Clause 15 of Letters Patent against the order dated 11.06.2021 passed in WP No. 22901 of 2010 on the file of this Court.

For Appellant : Mr. Ajay Vohra, Senior Counsel
for Mr. Srinath Sridevan

For Respondents : Mr. Prabhu Mukunth Arunkumar
Standing Counsel for Income Tax

JUDGMENT

R. MAHADEVAN, J.

Aggrieved by the order of dismissal dated 11.06.2021 passed by the learned Judge in WP.No. 22901 of 2010, the present intra-court appeal has been filed by the appellant / writ petitioner.

Facts.

2. The case projected by the appellant in the writ petition would run thus:

2.1. The appellant is engaged in the business of software development and they render services to its wholly owned subsidiaries outside India, City Group entities and also unrelated third party customers. For the assessment year 2006-2007, they submitted their return on 30.11.2006 declaring the total income of Rs.9,26,58,233/-, which was assessed by the Assessing Officer under Section 143 (1) of The Income Tax Act (in short, "the Act") on 14.03.2008 and a refund of Rs.4,86,96,384/- was issued on 28.03.2008.

2.2. Subsequently, pursuant to the proceedings of the Commissioner of Income Tax, Chennai, dated 25.08.2008, the third respondent issued a fresh notice under Section 143 (2) on 04.09.2008 to the appellant. In response to the same, the representative of the appellant appeared before the third respondent and furnished the books of accounts, including Form 3CA and 3CD as per Section 44AB of the Act.

2.3. On scrutiny of the documents filed by the appellant, it was found that the appellant had entered into international transactions with its sister concerns and the total value of such transactions exceeds Rs.15 crores. Therefore, as per Sub-Section 1 of Section 92CA of the Act, the third respondent sent a communication dated 11.11.2008 to the Commissioner of Income Tax, Chennai seeking approval to refer the matter to the Transfer Pricing Officer (in short, "the TPO"). The Commissioner of Income Tax, by a communication dated 18.11.2008 granted approval under Section 92 CA of the Act for computation of arm's length price of the appellant. Accordingly, a reference was made to the TPO under Section 92CA of the Act.

2.4. On such reference, a communication dated 27.02.2009 was sent by the second respondent informing about the reference made under Section 92CA of the Act and requested the appellant to furnish the annual reports for the last 3 years as also the copy of computation of total income. Following the

same, another communication dated 28.04.2009 was sent to the appellant calling upon them to furnish the documents as sought for in the communication dated 27.02.2009, to which, the appellant sent a reply dated 12.05.2009 along with the documents sought for by the second respondent. On receipt of the same, enquiry was conducted on various dates and ultimately, a draft assessment order was passed by the third respondent on 31.12.2009. Thereafter, the appellant filed their objections before the first respondent / Dispute Resolution Panel (in short, "the DRP") and the Assessing Officer. Before the DRP, an objection with regard to limitation was also raised. However, the DRP dismissed the said objections, by order dated 24.09.2010. Challenging both the orders of the third respondent and the first respondent, the appellant company filed writ petition No.22901 of 2010, invoking Article 226 of the Constitution of India.

3.Before the learned Judge, the following contentions were raised on behalf of the appellant:

3.1. The reference made by the third respondent to the second respondent is contrary to the mandate as contained under Section 153 of the Act. Section 153 of the Act prescribes time limit of 21 months from the end of the assessment year in which the return was filed, in case of regular assessment. For matters relating to 'transfer pricing' a discretion is vested with

the third respondent either to complete the assessment on his own within 21 months or alternatively refer the matter to the second respondent, after getting previous approval from the first respondent. When once the matter is referred, the second respondent should initiate further action in terms of Section 92CA of the Act and pass orders before 60 days prior to the date on which the period of limitation referred under Section 153 of the Act expires and communicate the same to the third respondent. The assessment proceedings, involving transfer pricing determination have to be finalised within the time limit of 33 months provided under Section 153 of the Act viz., extending the 21 months' time limit by way of additional 12 months for completing the assessment proceedings in such case. Further, Section 153 of the Act requires the third respondent to refer the matter under sub-section (1) of section 92CA of the Act and the same has to be referred during the course of the proceedings in which the third respondent is entitled to pass an order of assessment within 21 months.

3.2. According to the appellant, the aforesaid mandatory procedures have not been followed in the present case. The appellant filed their return of income under section 139 of the Act on 30.11.2006 and the time limit under the first proviso to Section 153 expired on 31.12.2008. During the course of such proceedings, the third respondent should refer the transfer pricing issues

under sub-section (1) of section 92CA of the Act to the second respondent and complete the entire assessment proceedings, including the matter of reference, within 31.12.2008. Whereas, in the present case, instead of referring the matter to the Transfer Pricing Officer during the course of assessment proceedings, the third respondent has chosen to refer the matter only on 17.02.2009, thereby rendering the entire assessment proceedings as invalid and barred by limitation.

3.3. That apart, the second respondent passed an order under Section 92CA (3) on 30.10.2009 and thereafter, the third respondent passed a draft assessment order on 31.12.2009. Feeling aggrieved, the appellant referred the matter to the first respondent under Section 144C of the Act specifically raising the plea of limitation. The first respondent, instead of holding that the reference by the third respondent to the second respondent is barred by limitation, upheld the draft assessment order dated 31.12.2009 on the ground that previous approval was obtained by the third respondent before 31.12.2008 and it is sufficient compliance of the procedures as contemplated under Section 153 of the Act. It is the specific plea of the appellant that the first respondent acted contrary to Section 144C (8) of the Act which provides power to the first respondent to confirm, reduce or enhance the variations proposed in the draft assessment order. However, the first respondent, in complete derogation of the

provisions as contained under Section 144C of the Act, proceeded to issue a notice under Section 144C (8) of the Äct on 24.08.2010 and called upon the appellant to show cause on issues relating to remission of liability, disallowance under sec.40 (a) (iii) and 40 (a) (i) of the Act which were not part of the variations proposed by the third respondent. The appellant also filed their objections on 30.08.2010 questioning the jurisdiction and authority of the first respondent to issue one such notice dated 24.08.2010. However, the first respondent overlooked the objections of the appellant and passed the order dated 24.09.2010 holding that under Section 144C (8) the Dispute Resolution Panel (DRP) is empowered to enhance the variations proposed in the draft order. The operative portion of the said order of the first respondent dated 24.09.2010 is quoted below for ready reference:

> *"11.3. .....In the result, the following directions are issued to the A.O.*
>
> *(i) Remission of liability - Amount of Rs.56,86,687/-, taxable u/s. 41 (1).*
>
> *Since M/s. Maverick Systems Limited, have claimed bad debts written off to the extent of Rs.56,86,687/- for A.Ys.2005-2006, 2006-07 and 2007-08 on account of refusal of payment by the assessee, the said amount is to be assessed in the hands of the assessee u/s.41 (1) of the I.T. Act*
>
> *(ii) Disallowance u/s.40(a) (iii) :- An amount of Rs.39060.78 lacs under Software Development Expense and Rs.386.15 lacs under selling, Administrative and other expenses have been claimed as expenditure under "salary and bonus including overseas staff expenses". Therefore, it is apparent that the assessee company has employees working overseas apart from employees working in India. Since the assessee has not given complete break up of the deduction of tax at source (TDS), the expenses towards salaries are disallowed u/s.40 (a) (iii).*

We direct the A.O.accordingly.

(iii) Disallowance u/s. 40 (a) (i):- Amount of Rs.19,68,40,215/- The assessee has not submitted complete particulars in respect of TDS on the expenditure of Rs.19,68,40,215/- incurred under the head 'technical services outside India' in foreign currency towards travel and other project expenses, the entire amount is hit by the provisions of section 40 (a) (i) r.w.s. 195. We direct the A.O. Accordingly."

4.1. A counter affidavit was filed by the third respondent denying the averments made in the writ petition. According to the third respondent, the plea of limitation has not been raised by the appellant at any time, either before the third respondent/assessing officer or before the second respondent/Transfer Pricing Officer and hence, they are legally precluded from raising the same in the writ petition. Further, the third respondent had obtained approval from the Commissioner of Income Tax for making reference to the second respondent on 18.11.2008 and hence, the reference by the third respondent to the second respondent is nothing but a procedural in nature and the date of reference by the third respondent to the second respondent cannot have any bearing on the order of assessment or the plea of limitation raised by the appellant. Even assuming that there is any procedural lapse, it will not vitiate the assessment proceedings.

4.2. The counter affidavit further proceeded to state that the appellant was aware of the date of reference made by the third respondent to the second respondent during October 2009 itself. After making such a reference, the third

respondent also issued a show cause notice to the appellant with respect to the order passed by the second respondent in the reference and before proceeding to make additions. The appellant also participated in the draft scrutiny proceedings. However, at that time, the plea of limitation was never raised. The appellant, for the reasons best known to them, has raised the plea of limitation for the first time before the first respondent and the same was rejected on 24.09.2010. There was also no explanation forthcoming from the appellant as to why they have not raised such a plea either before the third respondent or before the second respondent at the time of making reference. Therefore, the plea of limitation raised by the appellant is an after thought and it cannot be sustained.

4.3. Further, as per Section 124 (3) of the Act, the appellant cannot question the jurisdiction of the third respondent after completion of the assessment proceedings. Therefore, the respondents prayed for dismissal of the writ petition.

5. The learned Judge, on appreciation of rival submissions made, dismissed the writ petition with the below mentioned observations:-

> *"36. Admittedly in the present case, the proceedings for making a reference under Section 92CA(1) of the Income Tax Act, 1961 by the 3rd respondent/Additional Commissioner of Income Tax to the Jurisdictional Commissioner of Income Tax started prior to expiry of normal period of limitation under the 1st proviso to Section 153(1) of the Income Tax Act, 1961 and during the course of assessment.*

37. The permission was also granted by the Commissioner of Income Tax on 18.11.2008 to make a reference under Section 92CA(1) of the Income Tax Act, 1961 though the actual reference was made only on 17.02.2009. Since the case of the petitioner falls under Chapter X of the Income Tax Act, 1961, special period of limitation under the 2nd proviso to Section 153(1) of the Income Tax Act, 1961 was attracted for completing the assessment.

38. On perusing the records, it is noticed that the petitioner has wholeheartedly participated in the proceedings before the 2nd respondent/Transfer Pricing Officer pursuant to the reference made on 17.02.2009 by the 3rd respondent/Additional Commissioner of Income Tax. Before the 2nd respondent/Transfer Pricing Officer also no objection was raised by the petitioner regarding limitation.

39. After, the 2nd respondent/Transfer Pricing Officer passed a Transfer Pricing Order dated 30.10.2009 under Section 92CA (2) of the Income Tax Act, 1961, the petitioner was also issued with a Show Cause Notice dated 23.11.2009 by the 3rd respondent/Additional Commissioner of Income Tax.

40. Even before the 3rd respondent, before the Draft Assessment Order was passed on 31.12.2009, the petitioner did not raise any objection regarding limitation.

41. It is for the first time before the 1st respondent/Dispute Resolution Panel, the Petitioner raised the objection regarding the limitation to proceed with the assessment for the first time which has been rightly overruled by the 1st respondent/Dispute Resolution Panel.

42. Therefore, it is not open for the petitioner to challenge the jurisdiction of the 3rd respondent/Additional Commissioner of Income Tax to refer to the 2nd respondent/Transfer Pricing Officer to pass a Transfer Pricing Order after 31.12.2008. Since the petitioner had also not questioned the jurisdiction of the 2nd respondent/Transfer Pricing Officer when the reference was made on 17.02.2009, there was also acquisence by the petitioner to the reference to the 2nd respondent/Transfer Pricing Officer. The petitioner is therefore estopped form questioning the aforesaid reference made to the 2nd respondent/Transfer Pricing Officer.

43. As mentioned above, both 1st and the 2nd proviso to Section 153(1) of the Income Tax Act, 1961 only specify the time-limit within which assessment has to be completed. Both operate under different circumstances. Former applies in the case of normal assessment while the later applies where Chapter X is attracted. The 2nd proviso to Section 153(1) of the Income Tax Act, 1961 does not state that the reference also should be made before the expiry of 21 months where chapter X of the Income Tax Act, 1961 are attracted for completing the assessment. Therefore, there is no merits in the present writ petition."

Therefore, this intra-court appeal by the appellant / writ petitioner.

Contentions:

6.1. Mr.Ajay Vohra, learned Senior counsel for the appellant, at the outset, would submit that the entire assessment proceedings are time barred, which fact was not properly considered by the learned Judge. Adding further, he submitted that Section 153 of the Act prescribes time limit for completion of assessment or re-assessment. As per Section 153, no order of assessment shall be passed under Section 143 or 144 at any time after expiry of two years from the end of the assessment year in which the income was first assessable. The first proviso to Section 153 of the Act provides that in case the assessment year in which the income was first assessable is the assessment year commencing on 1st day of April 2004 or any subsequent year, the provisions of clause (a) shall have the effect as if for the words "two years" the words "twenty one" had been substituted. The second proviso to Section 153 provides that in case the assessment year in which the income assessable is the assessment year commencing on the 1st day of April 2005, or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference is made under sub-section (1) of section 92CA of the Act before 1st day of June 2007, but an order under sub-section (3) of that section has not been made before such date or if any order is made on or after the 1st day of

June 2007, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years" the words "thirty three months" had been substituted.

6.2. Elaborating on Section 92CA of the Act, which provides for a Reference to the Transfer Pricing Officer, the learned Senior counsel submitted that if an assessee had entered into international transaction in any previous year and the assessing officer considers it necessary to assess such transaction, he may, with the previous approval of the Commissioner, refer the computation of arm's length price in relation to such international transaction under Section 92C of the Act to the Transfer Pricing Officer. The learned Senior counsel for the appellant further proceeded to contend that the first proviso to section 153 (1) merely says "during the course of proceedings" which means that reference must be made during the course of proceedings. In this regard, strong reliance was placed on the decision in ***State of Punjab v. Shreyans Industries [2016 (4) Supreme Court Cases 769]*** in which the Hon'ble Supreme Court had an occasion to consider, as to whether the power to extend time is to be necessarily exercised before the normal expiry of the period of three years provided under the Punjab General Sales Tax Act, 1948. It was pointed out that the extension of time for assessment will have the effect of enlarging the period of limitation. When once the period of limitation expires, the immunity

against being subject to assessment sets in and the right to make assessment gets extinguished. Therefore, it was held that there would be no question of extending time for assessment when the assessment has already become time barred.

6.3. Adding further, the learned Senior counsel for the appellant submitted that for the assessment year in question viz., 2006-2007 ended on 31.03.2007, 21 months from the end of the assessment year expired on 31.12.2008. After 31.12.2008, no assessment can be made by the Assessing Officer as he becomes *functus officio* beyond that date. The *non-obstante* clause under the second proviso to section 153 (1) of the Act extending the period from 21 months to 33 months is circumscribed by two jurisdictional pre-conditions and they need to be satisfied by the respondents namely (i) reference under Section 92CA (1) is made by the Assessing Officer to the Transfer Pricing Officer and (ii) reference must be made during the course of assessment proceedings. In the present case, the limitation to finalise the assessment expired on 31.12.2008 and there is no question of extending the period by making reference on 17.02.2009. Thus, the reference made on 17.02.2009 after the expiration of the original limitation period of 21 months i.e., on 31.12.2008, is legally not sustainable. When the reference was not made during the course of assessment as required, jurisdictional pre-conditions

under the second proviso necessary to extend limitation were not satisfied and the limitation period cannot be extended beyond 31.12.2008.

6.4. It is also submitted by the learned Senior counsel for the appellant that the applicability of extended time limit is contingent upon a valid reference made during the course of proceedings for assessment of total income of that year, as provided under Section 92CA of the Act. When a limitation is prescribed for completing the assessment expires without a valid reference having been made to the TPO, the Assessing Officer becomes *functus officio* and thereafter is not empowered to make a reference to the TPO. Thus, any reference received after the expiration of the time limit would be void-ab-initio. In such circumstances, the extended time limit in terms of second proviso to section 153 (1) of the Act would not be available to the Assessing Officer to complete the assessment.

6.5. The learned Senior counsel for the appellant further contended that the order of the Assessing Officer refers to assessment of multiple issues relating to corporate tax, transfer pricing, etc. Even if an assessee had international transactions, which are subject matter of transfer pricing provisions, it will not entitle the Assessing Officer to assess such income beyond 33 months as provided under Section 153 (1) of the Act. There is no mandate for the Assessing Officer to make a reference in all cases where there

are international transactions to be subjected to transfer pricing.

6.6. The learned Senior counsel for the appellant also placed reliance on the decision of the Hon'ble Supreme Court in ***Sulthana Begum v. Prem Chand Jain [AIR 1997 Supreme Court 1006]*** wherein, while interpreting the first and second provisos to Section 153 (1) of the Act, it was held that the two provisos have to be construed harmoniously so that none of the two provisos become redundant.

6.7. Referring to the averments made in the counter affidavit filed in the writ petition, the learned Senior counsel for the appellant would contend that the question of jurisdiction can be raised at any stage when it goes to the root of the matter. Therefore, the fact that the appellant subjected themselves to the assessment proceedings without raising the plea of limitation either before the Assessing Officer or the TPO, cannot be a ground to disentitle them from raising it before the Writ Court. In this context, the learned Senior counsel placed reliance on the decision of the Hon'ble Supreme Court in ***Kiran Singh v. Chaman Paswan [AIR 1954 Supreme Court 340],*** wherein, it was observed thus:

> *"6. The answer to these contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no jurisdiction and what the effect of section 11 of the Suit Valuation Act is on that position. It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its validity could be set up whenever and wherever it is*

sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position."

6.8. The learned Senior counsel for the appellant also placed reliance on the Judgment of the Hon'ble Supreme Court dated 07.10.2021 rendered in Civil Appeal No. 6204 of 2021 **[*The Commissioner of Income Tax, Chennai v. Mohammed Meeran Shahul Hameed]*** wherein, the issue involved was relating to limitation arising out of Section 263 in which the word "made" is employed; and the following ruling was made by the Hon'ble Supreme Court:

"4.3 On a fair reading of subsection (2) of Section 263 it can be seen that as mandated by subsection (2) of Section 263 no order under Section 263 of the Act shall be "made" after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. Therefore the word used is "made" and not the order "received" by the assessee. Even the word "dispatch" is not mentioned in Section 263 (2).

Therefore, once it is established that the order under Section 263 was made/passed within the period of two years from the end of the financial year in which the order sought to be revised was passed, such an order cannot be said to be beyond the period of limitation prescribed under Section 263 (2) of the Act. Receipt of the order passed under Section 263 by the assessee has no relevance for the purpose of counting the period of limitation provided under Section 263 of the Income Tax Act.

In the present case, the order was made/passed by the learned Commissioner on 26.03.2012 and according to the department it was dispatched on 28.03.2012. The relevant last date for the purpose of passing the order under Section 263 considering the fact that the assessment was for the financial year 2008-09 would be 31.03.2012 and the order might have been received as per the case of the assessee - respondent herein on 29.11.2012.

However as observed hereinabove, the date on which the order under Section 263 has been received by the assessee is not relevant for the purpose of calculating/considering the period of limitation provided under Section 263 (2) of the Act. Therefore the High Court as such has misconstrued and has misinterpreted the provision of subsection (2) of Section 263 of the Act. If the interpretation made by the High Court and the learned ITAT is accepted in that case it will be violating the provision of Section 263 (2) of the Act and to add something which is not there in the section.

As observed hereinabove, the word used is "made" and not the "receipt of the order". As per the cardinal principle of law the provision of the statue/act is to be read as it is and nothing is to be added or taken away from the provision of the statue. Therefore, the High Court has erred in holding that the order under Section 263 of the Act passed by the learned Commissioner was barred by period of limitation, as provided under subsection (2) of Section 263 of the Act.

5. In view of the above and for the reasons stated above the question of law framed is answered in favour of the revenue - appellant and against the assessee - respondent herein and it is held that the order passed by the learned Commissioner under Section 263 of the Income Tax Act was within the period of limitation prescribed under subsection (2) of Section 263 of the Act. The present appeal is allowed accordingly. No costs."

6.9. Thus, the learned senior counsel appearing for the appellant submitted that the entire assessment proceedings are barred by limitation. Once it is held that the reference to the TPO was invalid and the order passed by the TPO is *void-ab-initio*, the appellant would cease to be an eligible assessee as contemplated under Section 144C (15) of the Act. In such an event, no draft order at all is required to be passed against the appellant and therefore the draft assessment order passed by the third respondent required to be quashed. However, the learned Judge, overlooked the above aspects and dismissed the writ petition filed by the appellant. Therefore, the learned senior counsel sought to allow this appeal by quashing the order impugned herein.

7.1. On the other hand, the learned Standing Counsel appearing for the respondents would justify the order passed by the learned Judge and submit that an order of assessment, as per Section 153 (1) (a) has to be made two years from the end of the assessment year in which income was first assessable. As per first proviso to section 153 (1), two years in clause (a) of sec.153 (1) has to be read as twenty one months. As per the second proviso, a reference under sub-section 1 of Section 92CA is to be made for assessment of total income on or after 01.06.2007, then the two years in clause (a) of section 153 (1) of the Act have to be read as thirty three months notwithstanding anything contained in the first proviso.

7.2. According to the learned Standing Counsel appearing for the respondents, the question of time limit within which the Assessing Officer can make a reference to the TPO under Section 92CA (1) of the Act is clearly spelt out in Section 153 (1) of the Act and its proviso. The second proviso to Section 153 (1) of the Act specifically states that notwithstanding anything contained in the first proviso, the course of proceedings for assessment and passing an order of assessment will be only two years and not twenty one months since the second proviso stands independent of the first proviso. Therefore, the reference made by the Assessing Officer in this case on 17.02.2009 is well within the period of limitation prescribed for passing an order of assessment

viz., two years and not twenty one months as mentioned in the first proviso.

7.3. Elaborating as to how the scheme of limitation under Section 153(1) has to be reckoned, it is submitted on the side of the respondents that if the assessing officer made a reference to the TPO within a period of two years from the end of the relevant assessment year in which the income was first assessable, the reference is not time barred. The time limit to complete the assessment by the assessing officer after the reference within two years is 33 months from the end of the relevant assessment year in which the income was first assessable, which in effect, is an additional 9 months after 24 months. Such a proviso was brought in, to carry out an assessment within 21 months when the normal assessment has to be completed after 01.04.2004. If the assessing officer finds that a reference has to be made in terms of Section 92CA (1), such reference should be made within two years. If reference is not made within two years, then the question of time limit for completing assessment within 33 months, does not arise. This is the true intention of enacting Section 153 (1) read with Section 92 CA (1) and (2) of the Act and its proviso; and no other meaningful and purposeful interpretation can be given to it.

7.4. Thus, according to the learned Standing Counsel appearing for the

respondents, it is futile on the part of the appellant to canvass the point of limitation in the writ petition and the same was rightly rejected by the learned Judge. It is also submitted that as against the order of the first respondent dated 24.09.2010, which was impugned in the writ petition, a remedy is available to the appellant to file an appeal before the Appellate Tribunal under Section 253 (1) (d) of the Act. However, without availing such remedy, the appellant filed the writ petition under Article 226 of The Constitution of India, which is not maintainable. In this context, the learned Standing counsel placed reliance on the decision of this Court in ***Hyundai Motor India Limited v. Deputy Commissioner of Income Tax [2020 (119) Taxmann.com 302 (Madras)]*** wherein it was held that in a fiscal statute, hierarchy of remedy of appeals are provided and the aggrieved person has to exhaust such statutorily inbuilt remedy instead of seeking relief by invoking the jurisdiction of this Court under Article 226 of The Constitution of India. It was further held that it is not as if the alternative remedy available under law is neither efficacious nor effective and therefore, availing such remedy is proper. By pointing out the said decision, the learned Standing counsel would submit that the dismissal of the writ petition by the learned Judge is perfectly correct and hence, the same warrants no interference by this court.

Analysis:

8. We have heard the learned counsel for both sides and also perused the materials available on record.

9. The sum and substance of the dispute in the case before us, can be summarised, as follows:

"Whether the reference to TPO is barred by limitation or not?"

10. At the outset, the respondent has raised a preliminary objection as to the maintainability of the writ petition and then the appeal on the ground of availability of the alternative remedy provided under the statute. It is settled law that the refusal to exercise the discretionary relief under Article 226 of the Constitution of India is a self-imposed restriction. We feel it unnecessary to refer to the plethora of judgments available on the subject, but we feel it necessary to reiterate the circumstances under which the writ petitions would be maintainable under Article 226 of the Constitution of India, *dehors* the availability of alternative remedy, as follows:

a.when the order is against the express statutory provisions or offends the constitutional safeguards,

b.when the order passed is without authority/jurisdiction,

c.when the order passed is against the principles of natural justice,

d.when the order passed is irrational, arbitrary and shocks the human

conscience,

i.e. when irrelevant materials are considered ignoring the relevant materials.

11. In the case before us, the orders impugned in the writ petition, have been challenged on the ground that when the reference to TPO is barred by limitation, all further proceedings following the same are not maintainable. The question of limitation undoubtedly is a legal plea and it goes to the root of authority/jurisdiction. There is no dispute on facts about the date on which the reference was made or when the order was passed. What we are called upon to be adjudicated, is the interpretation of the provision, which is a pure question of law in the present case. Therefore, this court is of the view that the writ petitions were maintainable and that alternative remedy will not operate as a bar.

12. Before deciding the question of dispute, it is but necessary to refer to the relevant provisions of the Income Tax Act and the timelines under the Transfer Pricing.

(A) Provisions of law

Section 92CA – Reference to the Transfer Pricing Officer

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

(2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction or specified domestic transaction referred to in sub-section (1).

2A. Where any other international transaction other than an international transaction referred under sub-section (1) comes to the notice of the Transfer Pricing Officer during the course of the proceedings before him, the provisions of this Chapter shall apply, as if such other international transaction is an international transaction referred to him under sub-section (1).

2B. Where in respect of an international transaction the assessee has not furnished the report under Section 92E and such transaction comes to the notice of the Transfer Pricing Officer during the course of the proceeding before him, the provisions of this Chapter shall apply as if such transaction is an international transaction referred to him under sub-section (1)

2C. Nothing contained in sub-section (2B) shall empower the Assessing Officer either to assess or reassess under Section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year, proceedings for which have been completed before the 1st day of July 2012.

(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction or specified domestic transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.

3A. Where a reference was made under sub-section (1) before the

1st day of June 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation, referred to in section 153 or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires.

Provided that in the circumstances referred to in clause (ii) or clause (x) of Explanation 1 to Section 153, if the period of limitation available to the Transfer Pricing Officer for making an order is less than sixty days, such remaining period shall be extended by sixty days and the aforesaid period of limitation shall be deemed to have been extended accordingly

(4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of Section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer

(5) With a view to rectifying any mistake apparent from the record, the Transfer Pricing Officer may amend any order passed by him under sub-section (3), and the provisions of section 154 shall, so far as may be, apply accordingly

(6) Where any amendments is made by the Transfer Pricing Officer under sub-section (5), he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer

(7) The Transfer Pricing Officer may, for the purpose of determining the arm's length price under this section, exercise all or any of the powers specified in clauses (a) to (d) of sub-section (1) of section 131 or sub-section (6) of section 133 or section 133A

Explanation:- For the purposes of this section, Transfer Pricing Officer means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorised by the Board to perform all or any of the functions of the Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons."

Section 144C. Reference to dispute resolution panel.—

(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,—

(i)the Dispute Resolution Panel; and

(ii)the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if—

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153, pass the assessment order under sub-section (3) within one month from the end of the month in which,—

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—

(a)draft order;

(b)objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it; and

(g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

(9) If the members of the Dispute Resolution Panel differ in opinion

on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

(15) For the purposes of this section,—

(a) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income-tax constituted by the Board for this purpose;

(b)"eligible assessee" means,—

(i)any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any foreign company."

Relevant Provisions of Section 153 prior to amendment:

"153. (1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of—

(a) two years from the end of the assessment year in which the income was first assessable ; or

(b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of section 139, whichever is later.

Provided that in case the assessment year in which the income was first assessable is the assessment year commencing on or after the 1st day of

April, 2004 but before the 1st day of April, 2010, the provisions of clause (a) shall have effect as if for the words "two years", the words "twenty-one months" had been substituted :

Provided further that in case the assessment year in which the income was first assessable is the assessment year commencing on or after the 1st day of April, 2005 but before the 1st day of April, 2009 and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA—

1. (i) Was made before the 1st day of June, 2007 but an order under sub-section (3) of that section has not been made before such date; or

2. (ii) Is made on or after the 1st day of June, 2007, The provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "thirty-three months" had been substituted:

Provided also that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2009 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA is made, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "three years" had been substituted.

(1A) No order of assessment shall be made under section 115WE or section 115WF at any time after the expiry of twenty-one months from the end of the assessment year in which the fringe benefits were first assessable.

(1B) No order of assessment or reassessment shall be made under section 115WG after the expiry of nine months from the end of the financial year in which the notice under section 115WH was served.

(2) No order of assessment, reassessment or recomputation shall be made under section 147 after the expiry of one year from the end of the financial year in which the notice under section 148 was served :

Provided that where the notice under section 148 was served on or after the 1st day of April, 1999 but before the 1st day of April, 2000, such assessment, reassessment or recomputation may be made at any time up to the 31st day of March, 2002:

Provided further that where the notice under section 148 was served on or after the 1st day of April, 2005 but before the 1st day of April, 2011, the provisions of this sub-section shall have effect as if for the words "one year", the words "nine months" had been substituted

Provided also that where the notice under section 148 was served on or after the 1st day of April, 2006 but before the 1st day of April, 2010 and

during the course of the proceedings for the assessment or reassessment or recomputation of total income, a reference under sub-section (1) of section 92CA—

(i) Was made before the 1st day of June, 2007 but an order under sub-section (3) of that section has not been made before such date; or (ii) Is made on or after the 1st day of June, 2007,

The provisions of this sub-section shall, notwithstanding anything contained in the second proviso, have effect as if for the words "one year", the words "twenty one months" had been substituted:

Provided also that where the notice under section 148 was served on or after the 1st day of April, 2010 and during the course of the proceeding for the assessment or reassessment or recomputation of total income, a reference under sub-section (1) of section 92CA is made, the provisions of this sub-section shall, notwithstanding anything contained in the second proviso, have effect as if for the words "one year", the words "two years" had been substituted

(2A) Notwithstanding anything contained in sub-sections (1) , (1A), (1B) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order under section 250 or section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order under section 250 or section 254 is received by the [Principal Chief Commissioner orChief Commissioner or [Principal Commissioner or]Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the [Principal Chief Commissioner or]Chief Commissioner or [Principal Commissioner or]Commissioner:"

Section 153 after 01.06.2016.

"153.Time limit for completion of assessment, reassessment and recomputation.—(1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of twenty-one months from the end of the assessment year in which the income was first assessable.

(2) No order of assessment, reassessment or recomputation shall be made under section 147 after the expiry of nine months from the end of the financial year in which the notice under section 148 was served.

(3) Notwithstanding anything contained in sub-sections (1) and (2), an order of fresh assessment in pursuance of an order under section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of nine months from the end of the financial year in which the order under section 254 is received by the

Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner.

Provided that where the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of April 2019, the provisions of this sub-section shall have effect, as if for the words "nine months", the words "twelve months" had been substituted

(4) Notwithstanding anything contained in sub-sections (1), (2) and (3), where a reference under sub-section (1) of section 92CA is made during the course of the proceeding for the assessment or reassessment, the period available for completion of assessment or reassessment, as the case may be, under the said sub-sections (1), (2) and (3) shall be extended by twelve months.

(5) Where effect to an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264 is to be given by the Assessing Officer, wholly or partly, otherwise than by making a fresh assessment or reassessment, such effect shall be given within a period of three months from the end of the month in which order under section 250 or section 254 or section 260 or section 262 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner:

***Provided** that where it is not possible for the Assessing Officer to give effect to such order within the aforesaid period, for reasons beyond his control, the Principal Commissioner or Commissioner on receipt of such request in writing from the Assessing Officer, if satisfied, may allow an additional period of six months to give effect to the order.*

(6) Nothing contained in sub-sections (1) and (2) shall apply to the following classes of assessments, reassessments and recomputation which may, subject to the provisions of sub-sections (3) and (5), be completed—

i. where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, section 254, section 260, section 262, section 263, or section 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act, on or before

the expiry of twelve months from the end of the month in which such order is received or passed by the Principal Commissioner or Commissioner, as the case may be; or

ii. where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147, on or before the expiry of twelve months from the end of the month in which the assessment order in the case of the firm is passed.

(7) Where effect to any order, finding or direction referred to in sub-section (5) or sub-section (6) is to be given by the Assessing Officer, within the time specified in the said sub-sections, and such order has been received or passed, as the case may be, by the income-tax authority specified therein before the 1st day of June, 2016, the Assessing Officer shall give effect to such order, finding or direction, or assess, reassess or recompute the income of the assessee, on or before the 31st day of March, 2017."

(B) Timelines under Sections 92CA, 144C and 153 the Act.

After an international transaction is noticed subject to satisfaction of section 92B, a reference is made to the TPO under sub-Section (1) of Section 92CA of the Act. Though, the provision does not state as to when a reference is to be made, a reading of Section 153 would explicit that the reference is to be made during the course of the assessment proceedings before the expiry of the period to pass an assessment order. The TPO after considering the documents submitted by the assessee is to pass an order under Section 92CA(3) of the Act. As per Section 92CA (3A), the order has to be passed before the expiry of 60 days prior to the date on which the period of limitation under Section 153 expires. As per Section 153, no order of assessment can be passed at any time after the expiry of 21 months. As per 92CA (4), the

assessing officer has to pass an order in conformity with the order of the TPO. After the receipt of the order from the TPO determining ALP, the assessing officer is to forward a draft assessment order to the assessee, who has an option either to file his acceptance of the variation of the assessment or file his objection to any such variation with the Dispute Resolution Panel and also the Assessing Officer under Section 144C(2). It goes without saying that if no objections are filed by the Assessee to the draft order, the assessing officer has to pass the final assessment order based on the draft order within one from the end of the month in which the period for filing the objection had expired as per Section 144C(4). Sub-Section (5) of Section 144C of the Act provides that if any objections are raised by the assessee before the Dispute Resolution Panel, the Panel consisting of top and expert functionaries of the department is empowered to issue such direction as it thinks fit for the guidance of the Assessing Officer after considering various details provided in Clauses (A) to (G) thereof. As per sub-section (12), the DRP has no authority to issue any directions under Sub-section (5) from the end of the month in which the draft order is forwarded to the eligible assessee and not from the date when the assessee submits the objections. Sub-Section (13) of Section 144C of the Act provides that upon receipt of directions issued under sub-Section (5) of Section 144C of the Act, the Assessing Officer shall in conformity with the directions

complete the assessment proceedings within one month from the end of the month in which the directions are received. As per the proviso to Section 92CA (3A), if the time limit for the TPO to pass an order is less than 60 days, then the remaining period shall be extended to 60 days. This implies that not only the time frame is mandatory but also the TPO has to pass an order within 60 days. Further, the extension in the proviso referred above, also automatically extends the period of assessment to 60 days as per the second proviso to Section 153. Further, but for the reference to the TPO, the time limit for completing the assessment would only be 21 months from the end of the assessment year. It is only if a reference has been made during the course of assessment and is pending, the department gets another 12 months as per second proviso to Section 153 (1) and under Section 153(4) after amendment.

Discussion and Findings.

13. The learned Judge has rejected the contentions of the appellant/writ petitioner, primarily on three grounds namely (i)there is nothing in the provisos to indicate that the reference must also be made within 21 months (ii)the concurrence in any case from the Commissioner of Income Tax, had been obtained in time and (ii)having participated in the proceedings, the appellant / petitioner is estopped from challenging the proceedings.

14. It is the case of the appellant that the language of the 2nd proviso is very clear by usage of the words "during the course of the proceedings for the assessment of the total income, a reference". Upon perusal of the provisions and the scheme of the Act, we find force in the contentions of the learned senior counsel for the appellant. Generally, when the time period of assessment is 21 months from the end of the assessment year, which in this case is 31.12.2008, reading the proviso to mean that a reference can be made after the expiry of the period of limitation to pass assessment order, would not only make the first proviso obsolete, but also would run contrary to the second proviso, which substitutes the period by granting an additional period of twelve months, thereby having the effect of extending the period, when the reference is made during the course of assessment proceedings. At this juncture, it is useful to refer to the judgment relied upon by the learned senior counsel for the appellant in ***State of Punjab v. Shreyans Industries [2016 (4) Supreme Court Cases 769]***, in which, it was held as under:

> *"8. A mere reading of the aforesaid provision would reflect that wherever return is filed by the assessee, assessment is to be made within a period of three years from the last date prescribed for furnishing the return in respect of such period. On the other hand, in those cases where return is not filed or any dealer, who is liable to pay the tax under the Act, does not get himself registered therein, the period of assessment prescribed is five years. We are not concerned with the alternate situation as in the instant appeals not only the assessees are registered dealers, they had also filed their returns regularly within the prescribed period and, therefore, assessments were to be completed within a period of three years from the last date prescribed for furnishing the returns, which is the normal period*

prescribed. At the same time, sub-section (10) of Section 11 gives power to the Commissioner to extend a period of three years. Interestingly, there is no upper limit prescribed for which the period can be extended, meaning thereby such an extension can be given, theoretically, for any length of time. This discretion is, however, controlled by obligating the Commissioner to give his reasons for extension, and such reasons are to be recorded in writing. Obviously, the purpose of giving reasons in writing is to ensure that the power to extend the period of limitation is exercised for valid reasons based on material considerations and that power is not abused by exercising it without any application of mind, or mala fide or on irrelevant considerations or for extraneous purposes. Such an order of extension of time, naturally, is open to judicial review, albeit within the confines of law on the basis of which such judicial review is permissible.

9. Be that as it may, the question before us is as to whether the power to extend time is to be necessarily exercised before the normal expiry of the said period of three years run out.

.....

22. Even otherwise, it is important to understand the ratio laid down in the judgment of Karnataka High Court in Bharat Heavy Electricals Ltd. (supra). The issue in the said case before the Karnataka High Court was as to whether the power to pass a deferment order is to be exercised even after the expiry of the period of limitation which was answered in the negative. The reasons given in support of this conclusion are as follows:

"...Deferment of assessment has the effect of enlarging the period of limitation which did not expire by the time the deferment order is contemplated to be passed. When once the period of limitation expires, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished. Resort to deferment provisions does not retrieve the situation. There is no question of deferring assessment which has already become time-barred. The provision for exclusion of time in computing the period of limitation of deferment of assessment is meant to prevent further running of time against the Revenue if the limitation had not expired." (emphasis supplied)

It was also observed that upon the lapse of the period of limitation prescribed, the right of the Department to assess an assessee gets extinguished and this extension confers a very valuable right on the assessee.

23. If one is to go by the aforesaid dicta, with which we entirely agree, the same shall apply in the instant cases as well. In the context of the Punjab Act, it can be said that extension of time for assessment has the effect of enlarging the period of limitation and, therefore, once the period of limitation expires, the immunity against being subject to assessment sets in

and the right to make assessment gets extinguished. Therefore, there would be no question of extending the time for assessment when the assessment has already become time barred. A valuable right has also accrued in favour of the assessee when the period of limitation expires. If the Commissioner is permitted to grant the extension even after the expiry of original period of limitation prescribed under the Act, it will give him right to exercise such a power at any time even much after the last date of assessment. In the instant appeals itself, when the last dates of assessment were 30th April, 2004, 30th April, 2005, 30th April, 2006 and 30th April, 2007, order extending the time under Section 11 (10) of the Act were passed on August 17, 2007, August 17, 2007, August 17, 2007 and May 25, 2007 respectively. Thus, for the Assessment Year 2000-2001, order of extension is passed more than three years after the last date and for the Assessment Year 2001-2002, it is more than two years after the last date. Such a situation cannot be countenanced as rightly held by the High Court. When the last date of assessment in respect of these Assessment Years expired, it vested a valuable right in the assessee which cannot be lightly taken away. As a consequence, sub-section (11) of Section 10 has to be interpreted in the manner which is equitable to both the parties. Therefore, the only way to interpret the same is that by holding that power to extend the time is to be exercised before the normal period of assessment expires. On the aforesaid interpretation, other arguments of Mr. Ganguli lose all significance."

15. The ratio laid down in the above case that the extension has to be made before the expiry of the time limit prescribed for original assessment, is applicable to the present case as because, the second proviso clearly uses the words “and during the course of the proceeding for assessment”. The order of the learned Judge has proceeded to record as if no such words are present in the provision to give any indication that the reference is to be made within 21 months, though the contention was that the reference should be made during the course of the assessment proceedings. We fail to comprehend as to what else the section 153 and the first two proviso would mean and convey when they lay down that the time limit to pass the original period of assessment is

21 years and when a reference to TPO is made during the course of such proceedings, the time limit would be 33 months. If no reference is made within the period provided for assessment, no reference can be made subsequently as rightly contended by the learned senior counsel since the assessing officer becomes *functus officio*. The words used in Section 153 are very clear as they lay down that "no order of assessment shall be made". In fact, many judgments have been relied upon by the learned senior counsel, which we are not elaborating as the law is well settled that no order of assessment under Section 143 can be made after the expiry of the period of 21 months provided under Section 153. The direction therein is to complete the proceedings within the time limit prescribed. The judgment of the Apex Court **in Civil Appeal No. 6204 of 2021 (*The Commissioner of Income Tax, Chennai vs. Mohammed MeeranShahul Hameed)*** (supra), relied upon by the learned senior counsel for the appellant becomes relevant. We therefore disagree with the findings of the learned Judge and set aside the same.

16. What can be inferred from an overall reading of Section 153 (1) and its first two provisos is that no order of assessment can be made after 21 months and the extended period of limitation to pass an assessment order within further period of 12 months or in other words within 33 months from the end of assessment year, is only when a reference under 92CA(1) is made

during the course of assessment proceedings. Again, the language used in the provision is very clear. The word used is "reference" and not "approval". "Reference" is used in the context of reference to TPO and " approval" is from the Commissioner. The extended period comes into operation only on a reference and not on concurrence. When it was not the intention of the parliament to attach any importance to concurrence from the Commissioner to reckon the period of limitation, it is not for the court to do so. At this juncture, it is relevant to refer to the judgment of the Apex Court in ***Hira Devi v. Distt. Board [1952 SCR 1122 : AIR 1952 SC 362]***, wherein, it was observed as follows:

> "***14.*** *We are afraid we cannot agree with this line of reasoning adopted by the High Court. The defendants were a Board created by statute and were invested with powers which of necessity had to be found within the four corners of the statute itself. The powers of dismissal and suspension given to the Board are defined and circumscribed by the provisions of Sections 71 and 90 of the Act and have to be culled out from the express provisions of those sections. When express powers have been given to the Board under the terms of these sections it would not be legitimate to have resort to general or implied powers under the law of master and servant or under Section 16 of the U.P. General clauses Act. Even under the terms of Section 16 of that Act, the powers which are vested in the authority to suspend or dismiss any person appointed are to be operative only "unless a different intention appears" and such different intention is to be found in the enactment of Sections 71 and 90 of the Act which codify the powers of dismissal and suspension vested in the Board. It would be an unwarranted extension of the powers of suspension vested in the Board to read, as the High Court purported to do, the power of suspension of the type in question into the words "the orders of any authority whose sanction is necessary". It was unfortunate that when the Legislature came to amend the old Section 71 of the Act it forgot to amend Section 90 in conformity with the amendment of Section 71. But this lacuna cannot be supplied by any such liberal construction as the High Court sought to put upon the expression "orders of*

*any authority whose sanction is necessary". **No doubt it is the duty of the court to try to harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an Act."***

Therefore, the fact that the concurrence was obtained from the Commissioner before 31.12.2008 will not be of any assistance to the Revenue as indisputably the reference to the TPO was made only on 17.02.2009. The proceedings would commence only when a refence is made to the TPO, which cannot be beyond the period provided under Section 153 (1) and the first Proviso.

17. Further, it is to be noted that the different timelines to be adhered by the TPO, Assessing Officer to pass a draft order, assessee to file their objections, DRP to issue directions and the assessing officer to pass final order, would commence only on a reference to the TPO and not otherwise. At this juncture, it is not to be forgotten that the period of 33 months is to pass the final order of assessment after the directions from the DRP. In this case, we find from the undisputed dates and events that not only was the reference to the TPO made after the period of expiry of the period of limitation to pass assessment orders, but also that the assessing officer has failed to pass final assessment orders in time. The time to pass the original assessment would end on 31.12.2008 being 21 months from the end of the assessment year 2006-07 i.e 31.03.2007. Then the last date for the assessing officer to pass the final assessment order would end on 31.12.2009, even considering the extension by

twelve months. In the present case, the order of the DRP itself is only 24.09.2010 much beyond the permissible period.

18. That apart, the revenue though on one hand contended that the refence can be made within 24 months, but on the other hand it has contended that the extend period would be 9 months. If the contention of the Revenue is accepted, it would mean that the overall time to pass assessment order in case of reference to TPO, would be 36 months and not 33 months, which is not the intention of the legislature. The amendments brought into the Act would then turn redundant. It is trite law that an interpretation, which defeats the object of the provision by adding or deleting words, cannot be acceptable. It is also settled law that one provision cannot be read to make the other provision redundant and a provision must be construed according to its plain and natural meaning without adding or deleting the words. Even if there is any conflict between two provisions, they must be read harmoniously to make both the provisions workable. In this connection, it is pertinent to refer to the following judgments of the Hon'ble Supreme Court:

(a) Polestar Electronic (Pvt.) Ltd. v. Additional Commissioner, Sales Tax (1978) 1 SCC 636

> *"7.Now, if there is one principle of interpretation more well-settled than any other, it is that a statutory enactment must ordinarily be construed according to the plain natural meaning of its language and that no words should be added, altered or modified unless it is plainly*

necessary to do so in order to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute. This rule of literal construction is firmly established and it has received judicial recognition in numerous cases. Crawford in his book on "Construction of Statutes" (1940 Edn.) at p. 269 explains the rule in the following terms:

b. "Where the statute's meaning is clear and explicit, words cannot be interpolated. In the first place, in such a case they are not needed. If they should be interpolated, the statute would more than likely fail to express the legislative intent, as the thought intended to be conveyed might be altered by the addition of new words. They should not be interpolated even though the remedy of the statute would thereby be advanced, or a more desirable or just result would occur. Even where the meaning of the statute is clear and sensible, either with or without the omitted word, interpolation is improper, since the primary source of the legislative intent is in the language of the statute."

c. Lord Parker applied the rule in R.v. Oakes [(1959) 2 All ER 350] to construe "and", as "or" in Section 7 of the Official Secrets Act, 1920 and stated :

d. "It seems to this Court that where the literal reading of a statute, and a penal statute, produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament. But here we venture to think that the result is unintelligible."

e. Lord Reid also with great clarity and precision which always characterise his judgment enunciated the rule as follows in Federal Steam Navigation Co. Ltd. v. Department of Trade and Industry [(1974) 2 All ER 97] :

f. "Cases where it has properly been held that a word can be struck out of a deed or statute and another substituted can as far as I am aware be grouped under three heads: where without such substitution the provision is unintelligible or absurd or totally unreasonable; where it is unworkable; and where it is totally irreconcilable with the plain intention shown by the rest of the deed or statute."

g. This rule in regard to reading words into a statute was also affirmed by this Court in several decisions of which we may refer only to one, namely, Narayanaswami v. Pannerselvam [(1972) 3 SCC 717 : AIR 1972 SC 2284 : (1973) 1 SCR 172] where the Court pointed out that:

h."'..... addition to, or modification of words used in statutory provision is generally not permissible ...', but 'courts may depart from this rule to avoid a patent absurdity'."

i. Here, the word used in Section 5(2)(a)(ii) and the second

proviso is "re-sale" simpliciter without any geographical limitation and according to its plain natural meaning it would mean re-sale anywhere and not necessarily inside Delhi. Even where the purchasing dealer resells the goods outside Delhi, he would satisfy the requirement of the statutory provision according to its plain grammatical meaning. There are no words such as "inside the Union Territory of Delhi" qualifying "re-sale" so as to limit it to re-sale within the territory of Delhi. The argument urged on behalf of the Revenue requires us to read such limitative words in Section 5(2)(a)(ii) and the second proviso. The question is whether there is any necessity or justification for doing so? If "re-sale" is construed as not confined to the territory of Delhi, but it may take place anywhere, does Section 5(2)(a)(ii) or the second proviso lead to a result manifestly unintelligible, absurd, unreasonable, unworkable or irreconcilable with the rest of the Act? Is there any compulsive necessity to depart from the rule of plain and natural construction and read words of limitation in Section 5(2)(a)(ii) and the second proviso when such words have been omitted by the law-giver? We do not think so.

j.8. It may be pointed out in the first place that the Legislature could have easily used some such words as "inside the Union Territory of Delhi" to qualify the word "re-sale", if its intention was to confine re-sale within the territory of Delhi, but it omitted to do what was obvious and used the word "re-sale" without any limitation or qualification, knowing full well that unless restriction were imposed as to situs, "re-sale" would mean re-sale anywhere and not merely inside the territory of Delhi. The Legislature was enacting a piece of legislation intended to levy tax on dealers who are laymen and we have no doubt that if the legislative intent was that "re-sale" should be within the territory of Delhi and not outside, the Legislature would have said so in plain unambiguous language which no layman could possibly misunderstand. It is a well-settled rule of interpretation that where there are two expressions which might have been used to convey a certain intention, but one of those expressions will convey that intention more clearly than the other, it is proper to conclude that, if the legislature used that one of the two expressions which would convey the intention less clearly, it does not intend to convey that intention at all. We may repeat what Pollack C.B. said in Attorney General v. Sillem [(1864) 2 H & C 431, 526] that:

k. "If this had been the object of our legislature, it might have been accomplished by the simplest possible piece of legislation; it might have been expressed in language so clear that no human being could entertain a doubt about it."

l. We think that in a taxing statute like the present which is intended to tax the dealings of ordinary traders, if the intention of the legislature were that in order to qualify a sale of goods for deduction, "re-sale" of it must necessarily be inside Delhi, the legislature would

have expressed itself clearly and not left its intention to be gathered by doubtful implication from other provisions of the Act. The absence of specific words limiting "re-sale" inside the territory of Delhi is not without significance and it cannot be made good by a process of judicial construction, for to do so would be to attribute to the legislature an intention which it has chosen not to express and to usurp the legislative function.

m. ***11.*** *We fail to see any reason why the word "resale" in Section 5(2) (a)(ii) and the second proviso should not be construed according to its plain natural meaning to comprehend resale taking place anywhere without any limitation as to situs and it should be read as referring only to resale inside Delhi as if the words "inside the Union Territory of Delhi" were added by way of limitation or restriction. Even without such words and reading the statutory provision according to its plain natural sense as referring to resale, irrespective whether it is inside or outside Delhi, Section 5(2)(a)(ii) and the second proviso do not become absurd, unintelligible, unworkable or unreasonable, nor is it possible to say that they come into conflict with any other provision of the Act. We have already explained the scheme of Section 5(2)(a)(ii) and its two provisos and, even on the view that "resale" means resale anywhere and not necessarily inside Delhi, they enact a statutory provision which is quite intelligible, reasonable and workable. The selling dealer is granted deduction in respect of sale to a registered dealer where the goods purchased are of the class or classes specified in the certificate of registration of the purchasing dealer as being intended for resale by him and the purchasing dealer gives a declaration that the goods are purchased by him for resale. So long as the goods are required by the purchasing dealer for resale, whether inside or outside Delhi, the sale to the purchasing dealer is exempted from tax. It is true that if the purchasing dealer resells the goods outside Delhi, the Union Territory of Delhi would not be able to recover any tax since the sale to the purchasing dealer would be exempt from tax under Section 5(2)(a)(ii) and the resale by the purchasing dealer would also be free from tax by reason of Section 27. But that is not such a consequence as would compel us to read the word "resale" as limited to resale inside Delhi. The argument of the Revenue was that the Legislature could never have intended that the Union Territory of Delhi should be altogether deprived of tax in cases of this kind. The legislative intent could only be to exempt the sale to the purchasing dealer in those cases where the Union Territory of Delhi would be able to recover tax on resale of the goods by the purchasing dealer. The goods must be taxed at least at one point and it could not have been intended that they should not be taxable at all at any point by the Union Territory of Delhi. The Revenue urged that it was for the purpose of taxing the goods at least at one point that the second proviso was enacted by the Legislature. We do not think this contention based on*

the presumed intention of the Legislature is-well founded. It is now well-settled that when the court is construing a statutory enactment, the intention of the Legislature should be gathered from the language used by it and it is not permissible to the court to speculate about the legislative intent. Some eighty years ago, as far back as 1897, Lord Watson said in an oft quoted passage in Salomon v. Salomon & Co. Ltd. [1897 AC 22, 38] :

n. "'The intention of the legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.'"

o. The same view was echoed by Lord Reid in Black-Clawson International Ltd. v. PapierwerkeWaldhof-Aschaffenburg [(1975) 1 All ER 810, 814] :

p. "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."

q. If the language of a statute is clear and explicit, effect must be given to it, for in such a case the words best declare the intention of the law-giver. It would not be right to refuse to place on the language of the statute the plain and natural meaning which it must bear on the ground that it produces a consequence which could not have been intended by the legislature. It is only from the language of the statute that the intention of the Legislature must be gathered, for the legislature means no more and no less than what it says. It is not permissible to the Court to speculate as to what the Legislature must have intended and then to twist or bend the language of the statute to make it accord with the presumed intention of the legislature. Here, the language employed in Section 5(2)(a)(ii) and the second proviso is capable of bearing one and only one meaning and there is nothing in the Act to show that the legislature exempted the sale to the purchasing dealer from tax on the hypothesis that the Union Territory of Delhi would be entitled to tax the resale by the purchasing dealer. The intention of the legislature was clearly not that the Union Territory of Delhi should be entitled to tax the goods at least at one point so that if the sale to the purchasing dealer is exempt, the resale by the purchasing dealer should be taxable. We do not find evidence of such legislative intent in any provision of the Act. On the contrary, it is very clear that there are certain categories of resales by the purchasing dealer which are admittedly free from tax. If, for example, the purchasing dealer

resells the goods within the territory of Delhi, but such resale is in the course of inter-State trade or commerce, or in the course of export out of the territory of India, it would be exempt from tax and yet, even on the construction suggested on behalf of the Revenue, the sale to the purchasing dealer would not be liable to tax. Both the sale as well as the resale would be free of tax even if the word "resale" were read as limited to resale inside the territory of Delhi. Then again, take a case where the resale by the purchasing dealer, though inside the territory of Delhi, falls within Section 5(2)(a)(ii). The resale in such a case would be exempt from tax and equally so would be the sale. So also the resale would not be taxable if it falls within Rule 29 and in that case too, the sale as well as the resale would both be exempt from tax. It will, therefore, be seen that it is not possible to discover any legislative intent to tax the goods at least at one point and to exempt the sale to the purchasing dealer only if the resale by the purchasing dealer is liable to tax. The second proviso too does not support any such legislative intent, for in the event there contemplated, namely, where the purchasing dealer utilises the goods for any purpose other than "resale", what is taxed in the hands of the purchasing dealer is not the resale by him but the sale to him and that is done not with a view to ensuring that the goods must suffer tax at least at one point, but because the purchasing dealer having committed a breach of the intention expressed by him in the declaration, on the basis of which exemption is granted to the selling dealer, he should not be allowed to profit from his own wrong and to escape the amount of tax on the sale. We do not, in the circumstances, see any cogent or compelling reason for reading the words "inside the Union Territory of Delhi" after "resale" in Section 5(2)(a)(ii) and the second proviso.

r. ***12.*** *It must also be remembered that Section 5(2)(a)(ii) and the second proviso occur in a taxing statute and it is well-settled rule of interpretation that in construing a taxing statute "one must have regard to the strict letter of the law and not merely to spirit of the statute or the substance of the law". The oft quoted words of Rowlett,J., in Cape Brandy Syndicate v. Inland Revenue Commissioner [(1921) 1 KB 64] lay down the correct rule of interpretation in case of a fiscal statute : "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." It is a rule firmly established that "the words of a taxing Act must never be stretched against a tax-payer". If the legislature has failed to clarify its meaning by use of appropriate language, the benefit must go to the tax-payer. Even if there is any doubt as to interpretation, it must be resolved in favour of the subject. We would, therefore, be extremely loathe to add in Section 5(2)(a)(ii) and the second proviso words which are not there and which, if added, would have the effect of imposing tax liability on the purchasing*

dealer. Moreover, it may be noted that if the purchasing dealer resells the goods outside Delhi, then, on the construction contended for on behalf of the Revenue, he would be liable to include the price of the goods paid by him in his return of taxable turnover and pay tax on the basis of such return and if he fails to do so, he would expose himself to penalty, though he has complied literally with the declaration made by him. We find that in fact a penalty of Rs 2 lakhs has been imposed on the assessees in Civil Appeal No. 1085 of 1977 for not including the price of the goods purchased by them in their return of taxable turnover and paying tax on the basis of such return. It would be flying in the face of well-settled rules of construction of a taxing statute to read the words "inside the Union Territory of Delhi" in Section 5(2)(a)(ii) and the second proviso, when the plain and undoubted effect of the addition of such words would be to expose a purchasing dealer to penalty.

*s.**16.** The subsequent history of the Act also supports the construction which we are inclined to place on Section 5(2)(a)(ii) and the second proviso. Section 5(2)(a)(ii) was amended with effect from May 28, 1972 by Finance Act, 1972 and the words "in the Union Territory of Delhi" were added after the word "manufacture" so as to provide that manufacture should be inside the territory of Delhi. It was also provided by the amendment that the sale of manufactured goods should be inside Delhi or in the course of inter-State trade or commerce or in the course of export outside India. This amendment clearly excluded manufacture of goods as also sale of manufactured goods outside Delhi. It is clear from the statement of objects and reasons that this amendment was not introduced by Parliament ex abundanticautela,but in order to restrict the applicability of the exemption clause in Section 5 (2)(a)(ii). The statement of objects and reasons admitted in clear and explicit terms that:*

t. "At present sales of raw materials in Delhi are exempted from tax irrespective of the fact whether the goods manufactured therefrom are sold in Delhi or not. It is, therefore, made clear that sales of raw materials will be tax-free only when such sales are made by those who manufacture in Delhi taxable goods for sale."

u. It is obvious that under Section 5(2)(a)(ii), as it stood prior to the amendment, the exemption was available to the selling dealer even if the purchasing dealer used the goods purchased as raw materials in manufacture outside Delhi, or having manufactured the goods, sold them outside Delhi. That is why Parliament amended Section 5(2)(a)(ii) with a view to restricting manufacture as well as sale inside the territory of Delhi. It is of course true that a parliamentary assumption may be unfounded and an amendment may proceed on an erroneous construction of the statute and, therefore, it cannot alter the correct interpretation to be placed upon the statute; but if there is any ambiguity in the statute, the subsequent amendment can certainly be relied upon for fixing the proper

interpretation which is to be put upon the statute prior to the amendment. The amendment made in Section 5(2)(a)(ii) read with the statement of objects and reasons thus clearly supports the construction that under the unamended section manufacture as well as sale could be anywhere and not necessarily inside the territory of Delhi. It is also significant to note that though Parliament amended Section 5(2)(a)(ii) for restricting manufacture as well as sale to the territory of Delhi, it did not carry out any amendment in the section with a view to limiting resale in the same manner by the addition of some such words as "in the Union Territory of Delhi" or "inside Delhi". This clearly evinces parliamentary intent not to insist upon resale being restricted to the territory of Delhi. It is a circumstance which lends support to the view that "resale" in Section 5(2)(a)(ii) and the second proviso meant resale outside as well as inside Delhi.

v. ***21.*** *…… She, however, urged that in her submission the second proviso was inconsistent with Section 4 and, therefore, no effect should be given to it. This contention is, in our opinion, wholly unsustainable. We fail to see how the second proviso can be said to be inconsistent with Section 4. It may be pointed out that even if there were some conflict, which we do not think there is, it would have to be reconciled by a harmonious reading of the two sections and it would not be right to adopt a construction which renders one of the two sections meaningless and ineffectual unless the conflict between the two is so utterly irreconcileable that the Court is driven to that conclusion. Here we find that Section 4 merely imposes liability on a dealer to pay tax if his gross turnover exceeds the taxable quantum. It is really Section 5 which provides for levy of tax and it says that the tax payable by a dealer shall be levied on his "taxable turnover" Now, "taxable turnover" is a concept entirely different from gross turnover and it is arrived at by making certain additions and deductions to the gross turnover. Section 5(2)(a)(ii) provides for a deduction while the second proviso speaks of an addition. Where the conditions of the second proviso are satisfied, the price of the goods purchased is to be added to the "taxable turnover" of the purchasing dealer and it would then form part of the "taxable turnover" on which the tax is levied. This provision has been made in order to ensure that the purchasing dealer does not commit a breach of the declaration given by him on the basis of which exemption is given to the selling dealer. The sale to the purchasing dealer is exempted from tax in the hands of the selling dealer but it is taxed in the hands of the purchasing dealer on account of breach of faith committed by him. We do not, therefore, see any inconsistency at all between Section 4 and the second proviso and the contention urged on behalf of the appellants in these appeals must be rejected."*

(b) Sultana Begum v. Prem Chand Jain, (1997) 1 SCC 373 at page 381

*"**11.** The statute has to be read as a whole to find out the real intention of the legislature.*

***12.** In Canada Sugar Refining Co. v. R. [1898 AC 735 : 67 LJPC 126] , Lord Davy observed:*

"Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

…….

***14.** This rule of construction which is also spoken of as "ex visceribus actus" helps in avoiding any inconsistency either within a section or between two different sections or provisions of the same statute.*

***15.** On a conspectus of the case-law indicated above, the following principles are clearly discernible:*

(1) It is the duty of the courts to avoid a head-on clash between two sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.

(2) The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them.

(3) It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of "harmonious construction".

(4) The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction.

(5) To harmonise is not to destroy any statutory provision or to render it otiose."

(c) ***CIT v. Hindustan Bulk Carriers, (2003) 3 SCC 57 : 2002 SCC OnLine SC 1226.***

*"**16.** The courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used. (See Salmon v. Duncombe [(1886) 11 AC 627 : 55 LJPC 69 : 55 LT 446 (PC)] AC at p. 634, Curtis v. Stovin [(1889) 22 QBD 513 : 58 LJQB 174 : 60 LT 772 (CA)] referred to in S. Teja Singh*

case [AIR 1959 SC 352 : (1959) 35 ITR 408] .)

18. *The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.*

19. *The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with other parts of the law and the setting in which the clause to be interpreted occurs. (See R.S. Raghunath v. State of Karnataka [(1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507 : AIR 1992 SC 81] .) Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty of the court to avoid a head-on clash between two sections of the same Act. (See Sultana Begum v. Prem Chand Jain [(1997) 1 SCC 373 : AIR 1997 SC 1006] .)"*

(d) State of A.P. v. Linde (India) Ltd., (2020) 16 SCC 335 : 2020 SCC OnLine SC 362

*"**17.** The term "medicine" is not defined in the 1940 Act. It is a trite principle of interpretation that the words of a statute must be construed according to the plain, literal and grammatical meaning of the words. Justice G.P. Singh in his seminal work Principles of Statutory Interpretation states:*

"The words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context or in the object of the statute to suggest the contrary ... in the statement of the rule, the epithets 'natural', 'ordinary', 'literal', 'grammatical' and 'popular' are employed almost interchangeably.

***

It is often said that a word, apart from having a natural, ordinary or popular meaning (including other synonyms i.e. literal, grammatical and primary), may have a secondary meaning which is less common e.g. technical or scientific meaning. But once it is accepted that natural, ordinary or popular meaning of the word is derived from its context, the distinction drawn between different meanings loses much of its relevance."

18. *Similarly, Craies on Statute Law states:*

"One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary to, or inconsistent with, any express intention or declared purpose of the statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity."

19. *The words of a statute should be first understood in their natural, ordinary or popular sense and phrases and sentences should be construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary. Where a word has a secondary meaning, the assessment is whether the natural, ordinary or popular meaning flows from the context in which the word has been employed. In such cases, the distinction disappears and courts must adopt the meaning which flows as a matter of plain interpretation and the context in which the word appears.*

20. *In State of H.P. v. Pawan Kumar [State of H.P. v. Pawan Kumar, (2005) 4 SCC 350 : 2005 SCC (Cri) 943] it was contended that the safeguards provided in Section 50 of the Narcotics Drugs and Psychotropic Substances Act, 1985 regarding search of any person would also apply to any bag, briefcase or any such article or container, which is being carried by the person. The word "person" was not defined in the Act. A three-Judge Bench of this Court, having regard to the scheme of the Act and the context in which the word — "person" has been used, rejected the contention and held thus : (SCC p. 358, para 8)*

"8. One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary to, or inconsistent with, any express intention or declared purpose of the statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity."

The above canon of statutory interpretation has been consistently followed by this Court in State of H.P. v. Pawan Kumar [State of H.P. v. Pawan Kumar, (2005) 4 SCC 350 : 2005 SCC (Cri) 943] , State of Haryana v. Suresh [State of Haryana v. Suresh, (2007) 15 SCC 186 :

(2010) 3 SCC (Cri) 528] , State of Rajasthan v. Babu Ram[State of Rajasthan v. Babu Ram, (2007) 6 SCC 55 : (2007) 3 SCC (Cri) 52] and Commr. of Customs v. Dilip Kumar & Co. [Commr. of Customs v. Dilip Kumar & Co., (2018) 9 SCC 1]"

(d) Franklin Templeton Trustee Services (P) Ltd. v. Amruta Garg, (2021) 6 SCC 736 : 2021 SCC OnLine SC 88 at page 752

> "***17.*** *The concept of "absurdity" in the context of interpretation of statutes is construed to include any result which is unworkable, impracticable, illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief [See Bennion on Statutory Interpretation, 5th Edn., p. 969.] . Logic referred to herein is not formal or syllogistic logic, but acceptance that enacted law would not set a standard which is palpably unjust, unfair, unreasonable or does not make any sense. [Bennion on Statutory Interpretation, 5th Edn., p. 986.] When an interpretation is beset with practical difficulties, the courts have not shied from turning sides to accept an interpretation that offers a pragmatic solution that will serve the needs of society [Id, p. 971, quoting Griffiths, L.J.]. Therefore, when there is choice between two interpretations, we would avoid a "construction" which would reduce the legislation to futility, and should rather accept the "construction" based on the view that draftsmen would legislate only for the purpose of bringing about an effective result. We must strive as far as possible to give meaningful life to enactment or rule and avoid cadaveric consequences [See Principles of Statutory Interpretation by Justice G.P. Singh, 14th Edn., p. 50.].*

19. Similarly, the contention of the learned counsel for the revenue that both the provisos to section 153 (1) are independent, have no connection in their operation and the reference to the TPO has to be made within 24 months and additional time of 9 months was granted to complete the final assessment proceedings is fallacious. The said contention is against the scheme of determination and assessment of Arm's Length Price dealt in the Act under Sections 92CA, 144C and 153. As discussed in the timeline(supra), when the

time given to the DRP itself is 9 months from the date of draft order to complete the assessment and then a further time of one month to the assessing officer to complete the assessment from the end of the month in which the direction is received, it cannot be said that the total additional time was 9 months and the provisos have no connection. It is also not out of place to mention here that if the time provided to the TPO to pass an order and for the assessee to submit their objections as per 144C (2) are also considered along with the time period for the DRP and the assessing officer, it is beyond any doubt that the extended period is 12 months and not 9 months. Further, when one proviso provides a time limit and when another proviso extends such time under certain circumstances, it cannot be held that both the provisos are independent. Therefore, the proviso which has altered the original time limit from 24 months to 21 months vide amendment in Finance Act, 2006 with effect from 01.06.2006 and the second proviso inserted by Finance Act 2007, extending the time for completion of assessment, when a reference has been made to TPO, during the course of assessment proceedings, have to be read in tandem and together. Our decision is also fortified by the fact that Section 153 was repealed and substituted with effect from 01.06.2016, where under Section 153 (1) it is clearly mentioned that the period of assessment is 21 months and under 153 (4), it is clearly mentioned that in case of reference under 92CA (1)

during the course of assessment proceedings, the period of assessment would be extended by twelve months clarifying the mischief caused on account of the interpretation adopted by the officials. Therefore, when the extended time provided for the department is 12 months, the department cannot contend that it is only 9 months as because the reference was not made in time. Similarly, we also disagree with the findings of the Learned Judge, who has embarked much on the circular regarding the necessity for more time for TPO and the reason for the amendment losing sight of the time provided in the amendment and period within which the reference is to be made.

20. Now, coming to the next contention on "estoppel", we have already held that the question of limitation is a legal plea, which goes to the root of the jurisdiction of the authorities. A legal plea can be raised at any stage of the proceedings. It will be useful to refer to the following judgments in this regard.

(a) National Textile Corpn. Ltd. v. NareshkumarBadrikumarJagad, (2011) 12 SCC 695 : (2012) 2 SCC (Civ) 791 : 2011 SCC OnLine SC 1212 at page 706:

> *"**19.** There is no quarrel to the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings. [See Sanghvi Reconditioners (P) Ltd. v. Union of India [(2010) 2 SCC 733 : AIR 2010 SC 1089] and Greater Mohali Area Development*

Authority v. Manju Jain [(2010) 9 SCC 157 : (2010) 3 SCC (Civ) 639 : AIR 2010 SC 3817] .]"

(b) ***Band Box (P) Ltd. v. Punjab & Sind Bank, (2014) 16 SCC 321 : (2015) 3 SCC (Civ) 652 : 2014 SCC OnLine SC 162 at page 323:***

"***6.*** *On the other hand, it was submitted by Mr Vikas Singh, learned Senior Counsel appearing for the respondent Bank that the appellant had raised at an intermediate stage the plea of not being covered under the Public Premises Act, and had subsequently dropped that plea. They had then relied upon the guidelines and, therefore, the plea, which is sought to be raised at a second stage, cannot be allowed to be raised now on the ground of res judicata, as well as constructive res judicata. As far as this objection of Mr Vikas Singh is concerned, inasmuch as the plea raised by Mr Raval is based on a legal submission, we would not like the appellant to be denied the opportunity of raising the legal plea and, therefore, we do not accept this submission."*

(c) ***K. Lubna v. Beevi, (2020) 2 SCC 524 : (2020) 1 SCC (Civ) 589 : 2020 SCC OnLine SC 26:***

"***10.*** *On the legal principle, it is trite to say that a pure question of law can be examined at any stage, including before this Court. If the factual foundation for a case has been laid and the legal consequences of the same have not been examined, the examination of such legal consequences would be a pure question of law [Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari, 1950 SCR 852 : AIR 1951 SC 16].*

11. *No doubt the legal foundation to raise a case by including it in the grounds of appeal is mandated. Such mandate was fulfilled by moving a separate application for permission to urge additional grounds, a course of action, which has already been examined by, and received the imprimatur of this Court in ChittooriSubbanna v. Kudappa Subbanna [(1965) 2 SCR 661 : AIR 1965 SC 1325].*

12. *We may also usefully refer to what has been observed by Lord Watson in Connecticut Fire Insurance Co. v. Kavanagh [1892 AC 473] in the following words: (AC p. 480)*

"*… When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only*

competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below."

13. *In our view, the aforesaid succinctly sets forth the parameters of scrutiny, where the question of law is sought to be raised at the final court stage. There are no "nice questions of fact" required to be decided in the present case which would dissuade us from examining this plea at this stage. We have set forth the undisputed facts aforesaid. Thus, the only question is whether this is a question of law which deserves to be examined, and has ramifications in the present case."*

21. Further, there cannot be any waiver of a statutory right as rightly contended by the learned senior counsel for the appellant. It is useful to refer to some judgments on this aspect.

(a) ***Supdt. of Taxes v. OnkarmalNathmal Trust, (1976) 1 SCC 766 : 1976 SCC (Tax) 73 at page 779:***

"***27.*** *A distinction arises between the provisions which confer jurisdiction and provisions which regulate procedure. Jurisdiction can neither be waived nor created by consent. A procedural provision may be waived by conduct or agreement. In the case of Kammins Ballrooms Co. [(1971) AC 850] it was said that waiver arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is inconsistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be legal consequence of what he did. He is sometimes said to have "waived" the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition. This is also sometimes described as "election" rather than "waiver". Another type of waiver debars a person from raising a particular defence to a claim against him. It arises when he either agrees with the claimant not to raise that particular defence or so conducts himself as to be estopped from raising it.*

28. *In the present case, the respondent cannot be said to have waived the provisions of the statute. There cannot be any waiver of a statutory*

requirement or provision which goes to the jurisdiction of assessment. The origin of the assessment is either an assessee filing a return as contemplated in the Act or an assessee being called upon to file a return as contemplated in the Act. The respondents challenged the Act. The order of injunction does not amount to a waiver of the statutory provisions. The issue of a notice under the provisions of the Act relates to the exercise of jurisdiction under the Act in all cases. Revenue statutes are based on public policy. Revenue statutes protect the public on the one hand and confer power on the State on the other."

(b) ***Commissioner of Income-Tax v. Jolly Fantasy World Ltd., 2015 SCC OnLineGuj 6242 : (2015) 373 ITR 530 at page 538:***

"***9.*** *Apart from the above, even if, it is considered for the sake of examination that the ground so raised before the Tribunal could also be raised before this court in the present appeals, then also, we find that it is well settled legal position that there cannot be any estoppel or waiver against statute or law. We may make useful reference to the decision of this court in the case of P.V. Doshi (supra), wherein the question came up before this court for consideration as to whether any point or contention, which was expressly not pressed but if it touches to the root of the matter based on the statutory provisions or the law, can be agitated in the further proceedings before the higher forum or not and this court in the said decision, observed thus (page 30 of 113 ITR):*

> "*The legal position about waiver of such a mandatory provision created in the wider public interest to operate as fetter on the jurisdiction of the authority is well settled that there could never be waiver, for the simple reason that in such cases jurisdiction could not be conferred on the authority by mere consent, but only on conditions precedent for the exercise of jurisdiction being fulfilled. If the jurisdiction cannot be conferred by consent, there would be no question of waiver, acquiescence or estoppel or the bar of res judicata being attracted because the order in such cases would lack inherent jurisdiction unless the conditions precedent are fulfilled and it would be a void order or a nullity. The settled distinction between invalidity and nullity is now well brought out in the decision in Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, AIR 1964 SC 1300, 1304, where their Lordships had gone into this material question as to whether the act in breach of the mandatory provision is per force a nullity. The passage in Macnamara on Nullities and Irregularities, referred to in Ashutosh Sikdar v. Behari Lai Kirtania, [1907] ILR 35 Cal 61 [FB], at page 72, was in terms relied upon as*

under:

> *'… no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated.'*

Thereafter, their Lordships pointed out that whether a provision fell under one category or the other was not easy of discernment, as in the ultimate analysis, it depended upon the nature, scope and object of the particular provision. Their Lordships in terms approved a workable test laid down by Justice Coleridge in Holmes v. Russel, [1841] 9 Dowl 487 as under:

> *'It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity.'*

Thereafter, it was pointed out that a waiver is an intentional relinquishment of a known right, but obviously an objection to jurisdiction could not be waived, for consent could not give a court jurisdiction where there was none. Even if there was inherent jurisdiction, certain provisions could not be waived. What can be waived would be only those provisions which are for the private benefit and protection of an individual in private capacity, which might be dispensed with without infringing any public right or public policy.

This settled legal position was again reiterated in Superintendent of Taxes v. OnkarmalNathmal Trust, (1976) 1 SCC 766 : AIR 1975 SC 2065, where the question had arisen in the context of the Assam Taxation (on Goods Carried by Road and on Inland Waterways) Act, 1961. The assessee had obtained an injunction order against the State in a writ petition challenging the validity of the Act. The assessee had not submitted the return under section 7(1) and under section 7(2) a notice had to be issued only within two years from the end of the return period. The procedure of best judgment assessment was laid down in section 9(4) and the question arose whether, in view of the injunction order obtained by the assessee, ignoring the two years' limit laid down as a fetter for issuance of the notice under section 7(2), the best judgment assessment procedure was permissible. At page 2070, the learned Chief Justice first held that if a return under section 7(1) was not made, the service of a notice under section 7(2) of the Act was the only method for initiation of a valid assessment proceeding under the Act. The period of two years under section 7(2) was a fetter on the power of the authority and was not just a bar of time. It was the scheme of the Act that the service do notice within two years from the end of the return period was an imperative requirement for initiation of assessment proceeding as also

reassessment proceeding under the Act. Further proceeding, at page 2071, their Lordships pointed out the settled legal distinction between the provisions which conferred jurisdiction and the provisions which regulated procedure, because the jurisdiction could neither to waived nor treated by consent, while a procedural provision could be waived by conduct or agreement. Their Lordships pointed out that in that case the assessee could not be said to have waived the provisions of the stature because there could not be any waiver of a statutory requirement or provision which went to the jurisdiction of assessment. The origin of assessment was either as assessee filing a return as contemplated in the Act or an assessee being called upon to file a return as contemplated in the Act. The respondents challenged the Act. The order of injunction did not amount to a waiver of the statutory provisions. The issue of a notice under the provisions of the Act related to the exercise of jurisdiction under the Act in all cases. The learned Chief Justice in terms pointed out that the revenue statutes are based on public policy. The revenue statutes protect the public on the one hand and confer power on the State on the other. Therefore, even in the context of such a revenue statute like a taxation measure such fetter on the jurisdiction being a fetter laid to protect public, on wider ground of public policy, it was held that such provisions which confer jurisdiction on assessment and reassessment could never be waived for the simple reason that jurisdiction could neither be waived nor created by consent. In the concurring judgment his Lordship, Beg., at page 2077, also pointed out that if the notice under section 7(2) was a condition precedent to the exercise of jurisdiction to make the best judgment assessment, the doctrine of waiver could never confer jurisdiction so as to enable the parties to avoid the effect of violating a mandatory provision on a jurisdictional matter even by agreement. This decision completely settles the legal position. It makes a distinction between the provisions which confer jurisdiction and provisions which merely regulate the procedure by holding that such provisions which confer the jurisdiction or such mandatory provisions which are enacted in public interest on ground of public policy even in such revenue statutes could not be waived, because of the underlying principle that jurisdiction could neither be waived nor created by consent."

10. *Under the circumstances, as on the point of estoppel or waiver, the point is already covered by the decision of this court, we do not find that a participation by the assessee in the earlier round of litigation either before the Assessing Officer or before the Tribunal or consequently before the Assessing Officer can operate as a bar to the assessee to challenge the jurisdictional authority of the Assessing Officer under section 158BC of the Act."*

22. From the above judgments, it is clear that a legal plea can be raised at any stage and there cannot be any waiver of a statutory right. In the

present case, though the appellant/ petitioner has participated in the proceedings before TPO and the assessing officer, it is their specific stand that they have raised the issue before the DRP and also that, when they submitted their objections and documents to the TPO, the date of reference was not known to them. This stand is not factually objected by the department. Further, there is no acquiescence, waiver or estoppel in taxing laws. The law on this point is well settled. The Levy and collection of tax must be within the four corners of law in compliance with the substantial and procedural mandates of connected legislations. Therefore, we again disagree with the findings of the learned Judge.

23. If the reference is bad, then as a sequitur, all further proceedings, in furtherance of the same are also bad. In the present case, because of a reference after the permissible period, the time line has been missed by the department at every stage. Therefore, the appellant is entitled to succeed in the appeal.

24. In the result, the appeal succeeds and the writ petition stands allowed. There will be no order as to costs.

(**R.M.D., J**.) (**J.S.N.P., J**.)
09.06.2022

rsh
Internet : Yes / No
Index : Yes / No

To

1. The Dispute Resolution Panel (DRP)
   Income Tax Department
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2. The Joint Commissioner of Income Tax
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3. The Additional Commissioner of Income Tax
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   Company Range-V
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R. MAHADEVAN, J.
and
J.SATHYA NARAYANA PRASAD, J.

rsh/rk

Writ Appeal No. 1903 of 2021

09.06.2022