

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 23RD DAY OF JULY 2018

PRESENT

THE HON'BLE Dr.JUSTICE VINEET KOTHARI

AND

THE HON'BLE Mrs.JUSTICE S.SUJATHA

I.T.A.No.512/2017

Between:

M/s. Fidelity Business Services India Pvt. Ltd.,
‘Pinehurst’ Embassy Golf Links
Business Park, Off Intermediate Ring Road,
Bengaluru-560 071.
PAN: AAACF 6175E.

...Appellant

**(By Mr. Percy Pardiwala, Sr. Counsel
along with Mrs. Tanmayee Rajkumar, Advocate)**

And:

1. Assistant Commissioner of Income- tax,
Circle -- 3(1)(1), Room No.227, 2nd Floor,
BMTC Building, 80 feet road,
Koramangala, 6th Block
Bangalore -560 095.
2. The Principal Commissioner of Income-tax-3,
BMTC Building, 80 feet road,
Koramangala 6th Block,
Bangalore – 560 095.

...Respondents

(By Mr. Aravind K.V. Advocate)

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This I.T.A. is filed under Section 260-A of Income Tax Act 1961, praying to: 1. Formulate the substantial questions of law stated therein. 2. Allow the appeal and set aside the impugned order pronounced on 22/02/2017 by the Tribunal in IT (TP)A No.461/Bang/2016 (Annexure F), to the extent questioned herein; in the interest of justice & equity etc.

This I.T.A. having been heard and reserved on **12-07-2018**, coming on for Pronouncement of Judgment, this day, **Dr Vineet Kothari, J**, delivered the following:

J U D G M E N T

Mr. Percy Pardiwala. Sr. Counsel a/w
Mrs. Tanmayee Rajkumar, Adv. for Appellant - Assessee
Mr. K.V. Aravind. Adv. for Respondents- Revenue

“1. “**SATYAMEV JAYTE**” (Truth alone Triumphs) is the quote from Mundaka Upanishad, the concluding part of the sacred Hindu Vedas and it is the North Star of our Judicial System inscripted at the bottom of our National Emblem, Ashok Stambh and Dharm Chakra.

2. It tells us that, the ‘truth’ should be the Guiding Star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously

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engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth

3. Whether the Income Tax Appellate Tribunal, being a creature of Statute, Income Tax Act and being the final fact finding body and being a non-departmental appellate forum also has a similar mandate in law or not is the bed-rock of this appeal, in which we propose to interpret the powers of the Tribunal while dealing with the appeals under **Section 254** of the Income Tax Act, 1961.

4. This appeal has been filed by the Appellant – Assessee - **M/s. Fidelity Business Services India Pvt. Ltd., Bengaluru**, raising the following substantial questions of law for consideration by this Court:-

Whether on the facts, in the circumstances and on the grounds and contentions urged:

(i) the Tribunal was right in directing examination by the Assessing Officer of the fair market value of the shares bought back and application of Section 2(22)(e) of the Act if the consideration for buy back of shares was in excess of the fair market value of the shares?

(ii) the Tribunal was correct in holding that the difference, if any, between the buy-back price and the fair market value of the shares would be deemed to be dividend in terms of section 2(22)(e) of the Act, although the said provision would not be applicable?

5. We re-formulate the substantial question of law which we propose to answer and on which the arguments were heard by us, in the following manner:-

*“Whether the Income Tax Appellate Tribunal has power **under Section 254 of the Income Tax Act, 1961**, to give directions for fresh enquiry into the aspects of the subject matter of appeal filed before it either*

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suo motu or on any grounds raised by either party to the appeal which have not been investigated or enquired into by the lower Authorities earlier and which may result in enhancement of tax liability of the assessee?”

6. The learned **Income Tax Appellate Tribunal, Bangalore Bench “B”**, vide its Order dated **22/02/2017** for **AY 2011-12** held partly in favour of the Appellant – Assessee that Appellant Assessee was not liable to pay tax on **‘Distribution of Dividend’** as defined under **Section 2(22)(d)** of the Income Tax Act, 1961 (hereinafter referred to as the **‘Act’** for short) in terms of **Section 115-O** of the Act on the pay-out by it for buy-back of its own shares from its foreign Holding Company, **M/s. FIS Holding Muritian Ltd.** incorporated **in Mauritius**.

7. The Appellant Assessee Company bought back its own shares from its Holding Company at Mauritius to the extent of **2,933 Shares** having face

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value of **₹10/- per share** at a hugely high price of **₹2,85,108/- per share** during the relevant previous year. The said Mauritius Company **M/s. FIS Holding Muritian Ltd.** holding **99.99%** of the entire Share Capital of the Assessee Indian Company and the said buy-back of shares was paid out of the '**Reserves and Surplus**' of the Appellant Assessee Indian Company. The Assessing Authority taxed the said amount of **₹83,61,92,434/-** as Dividend under **Section 115-O** of the Act, **[2,933 shares (₹2,85,108 -10) = ₹83,62,21,764/-]**.

8. Since the said Assessment Order was passed in pursuance of the directions of the **Dispute Resolution Panel (DRP)** under **Section 144 C (5)** of the Income Tax Act, 1961, the Assessee Company preferred an appeal before the learned Income Tax Appellate Tribunal (ITAT), who disposed of the said appeal by the impugned Order dated **22/02/2017**.

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9. The learned Tribunal held that after insertion of **Section 115-QA** of the Act with effect from **01/06/2013**, the purchase of its own shares by the Company in accordance with the provisions of **Section 77-A** of the Companies Act, 1956 is chargeable to income tax as **Distribution Dividend Tax (DDT)** but since the transaction in the present case of buy-back of shares took place prior to **01/06/2013**, such buy-back of the shares between the period **01/04/2000 to 31/05/2013** would be taxed as '**Capital Gains**' in the hands of the recipient in accordance with the provisions of **Section 46-A** of the Act and no such amount would be treated as dividend in view of exclusion part of **Section 2 (22)(iv)** of the Act. The Assessing Officer also held that the Capital Gains in the hands of the Holding Company (Mauritius Company) was also not chargeable to tax in India as per the provisions of **Article 13(4)** of the **Indo-Mauritius Double Taxation Avoidance Agreement (DTAA)**.

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10. However, vide para 7 of the impugned Order of the learned Tribunal dated **22/02/2017** and by which para 7 only, the present Appellant Assessee is aggrieved and has filed the present appeal in this Court under **Section 260-A** of the Income Tax Act, 1961, the learned Tribunal observed that there is another aspect of this transaction of buy-back at an abnormally high price of **₹2,85,108/- per share** having face value of **only ₹10/- per share** and therefore the payment made by the Assessee - Indian Company over and above the fair market price of the shares of the Assessee would not be treated as part of the purchase price because, the transaction is between the two closely related parties and not at the Arm's Length Price (ALP) and therefore the payment for buy-back in excess of the fair market price of shares of the Assessee - Indian Company, would certainly fall within the ambit of **Section 2(22)(e)** of the Act and could be taxed as Dividends, in the hands of the Assessee Company.

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11. The learned Tribunal said that since this aspect of the matter was not examined by the Authorities below and it could be treated as a device for transfer of substantial 'Reserves and Surpluses' by the Indian Company to the Holding Company at Mauritius **BEPS -Base Erosion and Profit Shifting** and it could be a colourable device and a dubious method of avoiding tax in the garb of buying back of shares at a highly unrealistic and inflated price, therefore, the matter deserved to be examined again by the Assessing Authority on the said issue of fair market price of shares, vis-à-vis buy-back price of the shares by the assessee Indian Subsidiary Company.

12. The relevant para 7 of the Order of the learned Tribunal is quoted below for ready reference:-

"7. However, there is another aspect in this transaction relating to the buy back price of Rs.2,85,108 per share having face value of Rs.10. So far as the payment on account of buy back made by the assessee to

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*its holding company to the extent of the fair market price of the share of the assessee company is concerned, the same would be treated as capital gain in the hand of the holding company as per the provisions of section 46A and in view of the provisions of Indo-Mauritius DTAA the capital gains on account of sale of share is not chargeable to tax in India. The payment in the name of buy back shares made by the assessee over and above the fair market price of the share of the assessee would not be treated as part of the purchase price because the transaction is between the two closely related parties and therefore the payment which is in excess of fair market price of the share of the assessee company would certainly fall in the ambit of Section 2(22)(e) of the Act. There is no dispute regarding the other condition of the holding company having a voting power of not less than 10% as it holds the shares of the assessee to the extent of 99.99%. In case the buy back price is not based on the real valuation and it is artificially inflated by the parties **then it is certainly a device for***

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transfer of the reserves and surplus to the holding company by avoiding the payment of tax and therefore it will be treated as a colourable device. There are two aspects in this transaction-

(i) It is a simple and plain transaction of buy back of shares without having any dispute of price then the same is beyond the scope of the provisions of Section 2(22) as well as Section 115QA of the Act and therefore cannot be treated as a colourable device.

*(ii) The second aspect is buy back price paid by the assessee to its wholly owned holding company does not represent true fair market price of the share of the assessee then it is nothing but a dubious method of avoiding the tax in the garb of buy back. Thus if the buy back price paid to the holding company is **unrealistic and highly inflated then to that extent the transaction of payment to the holding company has been given a colour of payment towards buy back. We find that neither the Assessing Officer***

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nor the DRP has decided this issue of actual fair market price of the share of the assessee as on the date of buy back to ascertain whether the payment made by the assessee @ Rs.2,85,108 per share is unrealistic and artificially inflated with the motive to avoid tax. Hence this issue of examination of the fair market price of the share vis-à-vis the buy back price of the assessee is set aside to the record of the Assessing officer for adjudication as per law.”

13. Aggrieved by the said remand directions of the Tribunal, the Assessee preferred this appeal before this Court and we propose to answer the aforesaid substantial question of law, about the power of the Tribunal to do so.

14. Mr. Percy Pardiwala, the learned Senior Counsel appearing for the Appellant- Assessee Company vehemently submitted before us that the Tribunal has exceeded its jurisdiction and vide para 7 of the Order

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quoted above, it has unnecessarily opened an enquiry upon remand of the case to the Assessing Authority into the questions of fair market price of the shares' buy-back by the Assessee Indian Company which was done perfectly in accordance with law after passing appropriate Resolutions and paying out of the accumulated Reserves and Surpluses of the Appellant Indian Company in accordance with **Section 77-A** of the Companies Act, 1956 and the same could not be taxed as '**Distribution of Dividend**' in the hands of the Appellant Assessee Indian Company.

15. He emphasized that the learned Tribunal itself had agreed to this extent with the contentions and the grounds of appeal raised by the Assessee while holding that the same could not be taxed as '**Distribution of Dividend**' under **Section 22** of the Act read with **Section 115-O** and later on inserted **Section 115-QA** of the Act prospectively with effect from **01/06/2013**. Since the buy-back of the shares in

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question had taken place in the previous year **2010-11** relevant to **AY 2011-12** and therefore, the Tribunal was bound to allow the appeal of the Assessee in-toto and could not have ventured into a ground or an aspect of the matter, which was neither raised by the Assessee nor by the Revenue by filing any cross objections or cross appeal in the matter and therefore, the present appeal filed by the Assessee deserves to be allowed answering the aforesaid substantial questions of law in favour of the Assessee and against the Revenue.

16. Mr. Pardiwala cited several case laws in support of his contentions which would be dealt with hereinafter.

17. On the contrary, the learned counsel for the Revenue, Mr.K.V. Aravind also relied upon several decisions and precedents and submitted that the learned Tribunal was perfectly justified and well within the parameters of the subject matter of the appeal involved before it and the powers of the Tribunal as

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defined under **Section 254** of the Act to pass such Orders, “**as it thinks fit**” gives sufficiently wide powers to the Tribunal to remand the case back to the Assessing Authority for holding an inquiry into the fair market value of the shares bought back by the Assessee Company from its **99.99%** Holding Company at an abnormally high price of **₹2,85,108/- per share** as against the face value of **₹10/- per share** which were probably issued during **2002** when the said Company started its business in India and which was nothing but an avoidance of tax payment in India by shifting of huge Reserves and Surpluses of the Indian Company to its Mauritius Holding Company where too, on the Holding Mauritius Company also, no Capital Gains tax could be levied as **Article 13** of the **Indo-Mauritius Double Taxation Avoidance Agreement, 1983** which does not permit any such capital gains to be taxed in the hands of the recipient share holder, viz., Mauritius Holding Company in the present case, in India.

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18. He further submitted that the said **Indo-Mauritius DTAA**, of course now stands amended and with the introduction of **Sub-Article (3A)** in **Article 13** with effect from **01/04/2017**, the resident of the contracting State, viz., India, can be taxed in the contracting State.

19. We have heard the learned counsels at length and given our thoughtful consideration to the rival contentions and the case laws cited at the bar.

20. We are essentially called upon to decide the ambit, scope and parameters of the powers of the Income Tax Appellate Tribunal (ITAT) while dealing with the appeals filed before it under **Section 253** of the Act.

21. **Section 254** of the Act delineates the powers of the Tribunal. We are not presently deciding the taxability part of such buy-back of the shares by the Company because that would essentially depend upon the fresh inquiry or investigation upon remand by the learned Tribunal vide impugned Order dated

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22/02/2017 in terms of impugned para 7 of the said Order quoted above. Therefore, the aforesaid proposed substantial question of law No.2 need not be answered at this stage as the question of actual taxability of the said alleged excess fair market value of the shares buy-back under **Section 2(22)(e)** of the Act would depend upon such inquiry which is yet to be undertaken and completed. Therefore the aforesaid substantial question of law No.1 only as reformulated by us, as to whether the Tribunal was justified in making such directions vide para 7 of the Order or not, is the question which we will discuss and answer as below.

22. **Section 254** of the Act which delineates the powers of the Tribunal is quoted below to the relevant extent for ready reference:-

Orders of Appellate Tribunal

254. (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

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(1A) ...

(2) *The Appellate Tribunal may at anytime within [six months from the end of the month in which the order was passed], with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice by the assessee or the [Assessing] Officer:*

Provided that *an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this sub-section unless the Appellate Tribunal has given notice to the assessee of its intention to do so and has allowed the assessee a reasonable opportunity of being heard:*

Provided further that *any application filed by the assessee in this sub-section on or*

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after the 1st day of October, 1998 shall be accompanied by a fee of fifty rupees.”

23. The burden of the argument of the learned Senior Counsel for the Appellant - Assessee, Mr. Percy Pardiwala was that the powers of the learned Tribunal are circumscribed and restricted by the words “**thereon**”, used in juxtaposition with the words “**as it thinks fit**”.

24. He submitted that the Tribunal cannot exceed the parameters or the grounds of the appeal raised by the aggrieved Appellant Assessee Company and what issue has neither been raised by the Assessee Company nor by the Revenue, cannot be dealt with or *suo motu* taken up by the learned Tribunal and such an exercise in excess of its jurisdiction as has been done in para 7 of the impugned Order quoted above, deserves to be quashed and set aside by this Court.

25. He relied upon the decision of the Division Bench of **the Allahabad High Court** in the case of **Smt.**

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Sarika Jain Vs. Commissioner of Income-tax, Bareilly, [2017]84 Taxmann.com 64 wherein dealing with the case of a partner who introduced a Capital of **₹12,20,000/-** in the Partnership Firm and explained that Capital contribution to have been received by her as 'Gifts' and the donors of such 'Gifts' were also produced before the Assessing Authority and even though the Assessing Officer held that the 'Gifts' were not genuine and therefore added back the same as unexplained cash credits as the undisclosed income in the hands of the Assessee under **Section 68** of the Act and the learned Tribunal on an appeal though held that the additions in the hands of the Assessee under **Section 68** of the Act could not be sustained but, the Tribunal proceeded to add the aforesaid amounts as unexplained income of the Assessee under **Section 69-A of the Act**, a different provision. In the appeal filed before the High Court, the Division Bench of the Allahabad High Court held in para-15 that the use of

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word '**thereon**' (under **Section 254** of the Act) is important and it reflects that the Tribunal has to confine itself to the questions which are arising or are the subject matter in the appeal and it cannot travel beyond the same. The power to pass such orders '**as the Tribunal thinks fit**' can be exercised only in relation to the matter that arises in the appeal and it is not open to the Tribunal to adjudicate any other question or an issue which is not in dispute and which is not the subject matter of the dispute in appeal. The appeal of the Assessee was thus allowed and the additions made under **Section 69-A** of the Act by the Tribunal were set aside.

26. In the said judgment of the Allahabad High Court, it is true that the Tribunal cannot travel beyond the subject matter of the Appeal, but the additions under **Section 69A**, a different provision while deleting the additions under **Section 68** of the Act appears to have been done without affording a specific opportunity

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of hearing to the assessee and that appears to be the reason for setting aside of that Order of the Tribunal by the High Court.

27. The learned counsel for the Assessee Company also relied upon the decision of the Division Bench of **the Calcutta High Court** in the case of ***Income Tax Officer Vs. R.L. Rajghoria [1979] 119 ITR 872.*** The Division Bench of the Calcutta High Court upholding the Order of the learned Single Judge in a Writ Petition in ***R.L. Rajghoria Vs. Income-Tax Officer [1977] 107 ITR 347*** held that the word 'thereon' appearing in **Section 33(4) of the Income Tax Act, 1922** akin to **Section 254 (1) of the Income Tax, 1961** restricts the jurisdiction of the Tribunal to the subject matter of the appeal and there is no doubt that the Tribunal has powers of remanding a case to the lower Appellate Authority or the Assessing Authority as the case may be, requiring him to hold further inquiry and to dispose of the case on the basis of such inquiry,

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but the jurisdiction of the Tribunal is confined only to the subject matter of the appeal.

28. The Tribunal by the impugned Order before the Calcutta High Court had held that for **AY 1962-63**, the loss of **₹23,100/-** in shares transactions on the ground that the Assessee purchased through a Share Broker 15 Ordinary shares of **M/s. Hindustan Motors Limited** on **05/03/1962** for **₹3,17,400/-** and the said shares were sold through another broker for **₹2,94,300/-** on **29/03/1962** and thus the Assessee incurred a loss of **₹23,100/-** for the said year, the learned Tribunal held that though the said loss in sale and purchase of the shares could not be termed as **‘speculative transactions’** and the lower Authorities were not justified in treating the said loss as **‘speculative loss’** but however, the Tribunal remanded the case back to the first Appellate Authority, **Appellate Assistant Commissioner (AAC)** requiring him to decide whether the loss in question was a **‘capital loss’** or a

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'trade loss' in the hands of the Assessee. The said direction of the learned Tribunal was quashed by the learned Single Judge of the Calcutta High Court in a Writ Petition filed by the Assessee, which Order of the learned Single Judge came to be upheld by the Division Bench.

29. We beg to differ, with great respects, for two reasons. Firstly, the said judgment does not deal with the Appellate powers of the Tribunal and Writ jurisdiction was exercised to quash the Order of the Tribunal and secondly, we feel, the directions given by the Tribunal to examine the aspect whether loss on account of shares was in the nature of 'Capital loss' (if shares were held over a particular period) or a 'Trade loss' (if the assessee was engaged in the regular activity of purchase and sale of shares) was perfectly within its powers under **Section 254(1)** of the **1961 Act** or **Section 33(4)** of the **old 1922 Act**.

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30. Similarly, the learned counsel for the Assessee, Mr. Pardiwala submits that the Division Bench of **the Karnataka High Court** itself in the case of ***Karnataka State Forest Industries Corporation Ltd. Vs. Commissioner of Income Tax [1993] 201 ITR 674*** had held that the power of the Tribunal under **Section 254** of the Act can be exercised only in relation to the grounds raised in the appeal and the Tribunal cannot go beyond the scope of the appeal and decide the question which does not form the subject matter of the appeal. In that case, the Assessee - a Government Undertaking was engaged in the business of Development and Manufacture of forest products for sale. It directed the method of Accounting in relation to the valuation of the Closing Stock under a *bona fide* reason and claimed that the Closing Stock figures should be the one as determined by it for the purpose of income tax assessment. The ITO rejected the claim on the ground that the statutory Auditors of the Assessee

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had not agreed to the change in the method of Accounting. On second appeal, the Tribunal took a different stand and leaving out the aforesaid findings, upheld the additions on the ground that because of the change in the method of Accounting of the Valuation of Closing Stock in a particular year, different valuation would be shown for the same Stock which was held as the Opening Stock and remained as the Closing Stock and thus a sum equal to that difference would either be taxed twice or would escape taxation altogether and since the Tribunal thus proceeded on a new ground not taken by the lower Authorities or urged by the Department before the Tribunal, such a direction could not have been given by the learned Tribunal.

31. This judgment of Co-ordinate Bench of the Karnataka High Court to the extent of the Tribunal being bound to decide the issues within the subject matter of the appeal applies to the case before us on all fours. On merits of the case also, the view of the

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Tribunal about additions made on account of change of method for valuation of Closing Stock, having neutral tax effect was required to be interfered with. Therefore, this judgment does not support the contention of the assessee before us in any manner.

32. The learned counsel for the Assessee Company, Mr. Pardiwala also relied upon the decision of **the Bombay High Court** in the case of ***Pokhraj Hirachand Vs. Commissioner of Income Tax, [1963] 49 ITR 293***. The Division Bench of Bombay High Court held that the expression '**thereon**' occurring in **Section 33(4)** of the **1922 Act** means 'on the subject matter of appeal' before the Tribunal and reading the relevant **Rules 22 and 27** of the Income Tax Rules governing the procedure before the Tribunal, the subject matter of appeal before the Tribunal, the grounds of appeal raised by the appellant in his Memorandum of appeal and the grounds which the Tribunal allows him to raise under **Rule 12** and the contentions raised by the Respondent

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before the Tribunal in support of the Order made by the **Appellate Assistant Commissioner(AAC)**.

33. Similarly the Division Bench of **the Gujarat High Court** in the case of **Deepak Nitrite Ltd. Vs. Commissioner of Income-tax [2008] 175 Taxman 230** held that the Tribunal on its own could not have undertaken the exercise without first deciding the controversy brought before it by the parties, where the Assessing Officer disallowed the loss on sale of investments holding that the transaction was a colourable device to reduce the taxable income but, the Commissioner of Income Tax (Appeals) allowed the Assessee's claim and on the appeal filed by the Revenue, the Tribunal restored the issue of quantification of such loss to the Assessing Officer for fresh adjudication, it was held that when the Assessing Officer and Commissioner of Income Tax (Appeals) had not undertaken the issue of quantification of loss on sale of investments and there was no such ground raised by

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the Revenue in the appeal filed by it before the Tribunal, the Tribunal on its own could not have undertaken the said exercise.

34. For the aforesaid reasons given by us on the decision of the Calcutta High Court in the case of **R.L. Rajghoria's case** (supra), we are not inclined to follow the said view of the Gujarat High Court.

35. On merits of the case, the learned counsel for the Assessee Company, Mr. Pardiwala drew our attention to the definition of **Section 2(22)** of the Act which defines the word 'Dividend' and the said definition to the extent relevant for his submissions, though we have indicated above that we are not deciding the question of taxability here, is quoted below in the following manner:-

“Section 2(22) “ dividend” includes-

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by

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*the company to its shareholders of **all or any part of the assets of the company;***

*(b) any distribution to its shareholders by a company of debentures, debenture stock or deposit certificates in any form, whether with or without interest, and any distribution to its preference shareholders of shares **by way of bonus, to** the extent to which the company possesses accumulated profits, whether capitalised or not;*

*(c) any distribution made to the shareholders of a company **on its liquidation,** to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation whether capitalized or not.*

*(d) any distribution to its shareholders by a company **on the reduction of its capital,** to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st*

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day of April, 1933, whether such accumulated profits have been capitalised or not;

*(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) [made after the 31st day of May, 1987, **by way of advance or loan to a shareholder**, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten percent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)] or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;*

but “dividend” does not include-

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(i) a distribution made in accordance with sub-clause(c) or sub-clause(d) in respect of any share issued **for full cash consideration**, whether the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;

[(ia) a distribution made in accordance with sub-clause (c) or sub clause (d) in so far as such distribution **is attributable to the capitalised profits** of the company representing **bonus shares** allotted to its equity shareholders after the 31st day of March, 1964, [and before the 1st day of April , 1965];]

(ii) **any advance or loan** made to a shareholder [or the said concern] by a company **in the ordinary course of its business**, where the lending of money is a substantial part of the business of the company.

(iii) Any dividend paid by a company which is **set off by the company against the whole**

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or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e), to the extent to which it is so set off;

(iv) Any payment made by company **on purchase of its own shares** from a shareholder in accordance with the provisions of section **77A** of the Companies Act, 1956 (1 of 1956);

(v) Any distribution of shares **pursuant to a demerger** by the resulting company to the shareholders of the demerged company (whether) or not there is a reduction of capital in the demerged company.”

36. He also drew our attention to **Section 46-A** of the Act which provides for “**Levy of capital gains on purchase by the Company of its own shares or other specified securities**”. The said provision is also quoted below for ready reference:-

“Section 46A: Where a shareholder or a holder of other specified securities receives

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any consideration from any company for purchase of its own shares or other specified securities held by such shareholder or holder of other specified securities, then, subject to the provisions of section 48, the difference between the cost of acquisition and the value of consideration received by the shareholder or the holder of the other specified securities, as the case may be, shall be deemed to be the capital gains arising to such shareholder or the holder of other specified securities, as the case may be, in the year in which such shares or other specified securities were purchased by the company.

Explanation: *For the purposes of this section, “specified securities” shall have the meaning assigned to it in Explanation to section 77A of the Companies Act, 1956 (1 of 1956).”*

37. Further, he drew our attention to **Section 115-O** and **Section 115-Q** of the Act, particularly, the Explanation below **Section 115-Q** of the Act which stands amended by **Finance Act 2018**, with effect from

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01/04/2018. The said provisions to the relevant extent are also quoted below for ready reference:

“Chapter XII-D

**SPECIAL PROVISIONS RELATING TO TAX ON
DISTRIBUTED PROFITS OF DOMESTIC
COMPANIES**

**Section 115-0: Tax on distributed profits
of domestic companies.**

*(1) Notwithstanding anything contained in any other provision of this Act and subject to the provisions of this section, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, **any amount declared, distributed or paid by such company by way of dividends** (whether interim or otherwise) **on or after the 1st day of April 2003**, whether out of current or accumulated profits **shall be charged to additional income-tax** (hereafter referred to as tax on distributed profits) at the rate of [fifteen] per cent;*

Provided that in respect of dividend referred to in sub-clause (e) of clause(22) of

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section 2, this sub-section shall have effect as if for the words ‘fifteen per cent’, the words “thirty per cent” had been substituted.

Section 115-Q: When Company is deemed to be in default:

If any principal officer of a domestic company and the company does not pay tax on distributed profits in accordance with the provisions of section 115-O, then, he or it shall be deemed to be an assessee in default in respect of the amount of tax payable by him or it and all the provisions of this Act for the collection and recovery of income-tax shall apply.

Explanation... 81a[***]

Section 115QA: Tax on distributed income to shareholder:

(1) Notwithstanding anything contained in any other provision of this Act, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any

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amount of distributed income by the company on buy-back shares (not being shares listed on a recognized stock exchange) from a shareholder shall be charged to tax and such company shall be liable to pay additional income-tax at the rate of twenty per cent on the distributed income.

Explanation – *For the purposes of this section,-*

(i) “buy-back” means purchase by a company of its own shares in accordance with the provisions of [any law for the time being in force relating to companies];

(ii) “distributed income” means the consideration paid by the company on buy-back of shares as reduced by the amount, which was received by the company for issue of such shares, determined in the manner as may be prescribed.”

Explanation (81a): *Omitted by the Finance Act, 2018 w.e.f.1-4-2018. Prior to its omission, Explanation read as under:*

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Explanation:- For the purposes of this Chapter, the expression dividends shall have the same meaning as is given to 'dividend' in clause (22) of section 2 **but shall not include sub-clause (e) thereof."**

38. **Section 77-A** of the **Companies Act, 1956** inserted by **Act No.21 of 1999** with retrospective effect from **31/10/1998** providing for buy-back of its own shares by the Company to its relevant extent is also quoted below for ready reference, which essentially provides for the said enabling powers with the restrictions and conditions of such buy-back.

"Section 77A: Power of company to purchase its own securities.-

(1) Notwithstanding anything contained in this Act, but subject to the provisions of sub-section (2) of this section and section 77B, a company may purchase its own shares or other specified securities (hereinafter referred to as "buy-back") out of.

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- (i) its free reserves; or
- (ii) the securities premium account; or
- (iii) the proceeds of any shares or other specified securities.

Provided that no buy-back of any kind of shares or other specified securities shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

(2) No company shall purchase its own shares or other specified securities under sub-section (1), unless

- (a) the buy-back is authorized by its articles;
- (b) a special resolution has been passed in general meeting of the company authorizing the buy-back:

Provided that nothing contained in this clause shall apply in any case where-

- (A) the **buy-back is or less than ten percent**, of the total paid up equity

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capital and free reserves of the company; and

(B) such buy-back has been authorized by the Board by means of a resolution passed at its meeting:

Provided further that no offer of buy-back shall be made within a period of **three hundred and sixty-five days** reckoned from the date of the preceding offer of buy-back, if any.

Explanation- For the purposes of this clause, the expression “offer of buy-back” means the offer of such buy back made in pursuance of the resolution of the Board referred to in the first proviso

*(c) the **buy-back is or less than twenty-five per cent** of the total paid-up capital and free reserves of the company:*

Provided that the buy-back of equity shares in any financial year shall not exceed twenty-

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*five per cent of its total paid-up equity capital
in that financial year.*

... ..

... ..

... ..

(7) Where a company buy-back its own securities, it shall extinguish and physically destroy the securities so bought-back within seven days of the last date of completion of buy-back.”

39. Mr. Pardiwala, therefore, urged that the buy-back of shares from a Holding Company, the shareholder Mauritius Company was not only legally permissible for the Appellant Assessee Indian Company to undertake but the payments made from the Reserves upto the extent permitted under **Section 77-A** of the Companies Act, 1956 could not be treated by any stretch of imagination as Loan or Advance to the Shareholder and which could be brought within the ambit of taxable Dividends under **Section 2(22)(e)** of the Act and therefore, the directions of the learned

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Tribunal for investigating into the fair market value of the said price for buy-back, so that the excess if any, could be treated as purported loan or advance by the Indian Company to the Mauritius Holding Company to be treated as 'Dividends' under **Section 2(22)(e)** of the Act, is too far fetched and in the absence of any such contention or ground raised before it, the learned Tribunal could not have made such directions in excess of its powers to pass such orders '**as it thinks fit**'. The said words he urged do not give extra-ordinary or arbitrary powers to the learned Tribunal to go beyond the subject matter of the appeal itself.

40. He submitted that though the Tribunal had agreed with the Assessee that the said buy-back of shares and payments made by the Indian Company could not be treated as 'Dividend' under **Section 2(22)(d)** of the Act, towards the end of para 6 of the impugned Order of the Tribunal, the learned Tribunal had clearly held that the transaction of buy-back of

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shares in question prior to **01/06/2013** does not attract **Section 115-QA** as well as **Section 2(22)** of the Act, without specifying any of the Sub-clauses of **Section 2 (22)** of the Act and therefore any inquiry in para 7 opened for the same for bringing it in the scope of **Section 2(22)(e)** of the Act was wholly uncalled for and thus the learned counsel for the Assessee urged that the present appeal of the Assessee deserves to be allowed and the substantial question of law deserves to be answered in favour of the Assessee.

41. On the other hand, the learned counsel for the Revenue, Mr. Aravind K.V. also with equal vehemence submitted that the entire argument of the learned counsel for the Assessee is fallacious and the huge pay-out under the cover of and in the name of buy-back of shares at a price far in excess of the normal price of such shares, which could be easily ascertained had the Company been listed on Stock Exchange, but here in a transaction between the closely related parties

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where **99.99%** shareholding was with the Mauritius Holding Company, it was nothing but a payment of 'Dividend' under the garb of buy-back of shares, which could be brought to the tax- net if the inquiry in the fair market value of shares is allowed to be conducted in pursuance of para 7 of the Order of the learned Tribunal.

42. Mr. Aravind stoutly submitted that the powers of the learned Tribunal are not circumscribed by any limitation and the words "**as it thinks fit**" are wide enough to confer powers upon the Tribunal to make such directions of the nature as is made by it in para 7 of its Order quoted above.

43. He submitted that the word "**thereon**" does not de-limit or restrict the powers of the Tribunal to pass such Orders "**as it thinks fit**" and it also cannot be said that the directions in para 7 of the Order are beyond the subject matter of the appeal filed by the Assessee before the Tribunal.

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44. He submitted that the power to remand a case by the Tribunal is admittedly vested in it and this is nothing but a remand for inquiry into an aspect of the subject matter which was not admittedly discussed or inquired into by the Assessing Authorities or Dispute Resolution Panel (DRP) in the first instance and therefore, the Tribunal being the final Appellate body under the Act, has not only the power but a duty to see that all related aspects of the subject matter are properly inquired into by the Assessing Authority, to meet the ends of justice and interest of the Revenue. The Tribunal has made the remand of the case to the Assessing Authority with certain directions to inquire into the fair market value of the shares bought back by the Assessee Company and no valid exception can be taken to the same by the Assessee.

45. He further submitted that the Assessee Company should have nothing to fear or hide, if the shares have been bought back from its Holding

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Company at a fair market value and if such a buy-back has been undertaken by the Assessee Company in accordance with the provisions of the Companies Act and also the provisions of the Income Tax Act and on the conclusion of the fresh inquiry now to be undertaken in pursuance of para 7 of the Order of the Tribunal also, the Assessee Company may not be ultimately held liable to tax under the Act and therefore, it would be premature to curtail or shoot down such an inquiry in the matter under the remand directions of the learned Tribunal.

46. Mr. Aravind relied upon certain judgments also in support of his submissions which are also briefly discussed below.

47. In ***Commissioner of Income Tax Vs. Mahalakshmi Textile Mills Ltd. [1967] 66 ITR 710 (SC)***, the Hon'ble Supreme Court held that there is nothing in the Income Tax Act which restricts the Tribunal to the determination of the questions raised

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before the Departmental Authorities. All questions whether of law or of fact, which relate to the assessments of the Assessee may be raised before the Tribunal. If any reasons recorded by the Departmental Authorities in rejecting the contentions raised by the Assessee but the grant of relief to the Assessee on another ground is justified, it would be open to the Departmental Authorities and the Tribunal and indeed they would be under a duty to grant that relief. The right of the assessee to such a relief is not restricted to the plea raised by him.

48. In the case before the Hon'ble Apex Court, the Assessee spent **₹93,215/-** for introduction of "Casablanca conversion system" in its Spinning Plant for manufacture and sale of cotton yarn. Substantially, this involved replacement of certain roller stands and fluted rollers fitted with rubber aprons to the spinning machinery, removal of right-frames from certain existing parts, introduction, *inter alia*, of ball-bearing jockey-

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pulleys for converting the original band-drivers to tape-drivers and other additions and alterations in the drafting mechanism. The ITO disallowed the said claim of ₹93,215/- because it was not admissible as 'development rebate' as in the opinion of the ITO, it did not involve installation of new machinery. The first Appellate Authority affirmed the order of the ITO, but the Tribunal itself inspected the Spinning Factory of the Assessee and studied the working of the machinery with 'Casablanca conversion system' in the process of spinning yarn and came to the conclusion that though such expenditure cannot be admissible as Development Rebate, but the same was admissible as an allowance under **Section 10(2)(v)** of the Income Tax Act and it allowed the expenditure as "current repairs to the existing machinery". The Apex Court upholding the said Order of the learned Tribunal held that such Order could be passed within its powers under **Section 33(4)** of the Act to pass such Orders '**as it thinks fit**'.

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49. Similarly in the case of ***Kapurchand Shrimal Vs. Commissioner of Income Tax [1981] 131 ITR 451 (SC)***, the Hon'ble Supreme Court held that the Appellate Authority has the jurisdiction as well as duty to correct all errors in the proceedings under appeals and to issue, if necessary, appropriate directions to the Authorities against whose decisions the appeal is preferred, to dispose of the appeal or any part of the matter afresh unless forbidden from doing so by the statute. While rejecting the appeal of the Assessee, the Hon'ble Supreme Court directed the Tribunal to further direct the Income Tax Officer (ITO) to make fresh assessments after holding an enquiry under **Section 25-A(1)** of the Act regarding the partition of Hindu Undivided Family (HUF) corresponding to **Section 171** of the Income Tax Act, 1961.

50. Mr. Aravind also relied upon the Division Bench decision of **the Madras High Court** in the case of ***Commissioner of Income Tax Vs. Indian Express***

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(Madurai) (P.) Ltd., [1983] 140 ITR 705 (Madras)

which *inter alia*, also relied upon the decision of the Apex Court in the case of **Mahalakshmi Textile Mills Ltd.** (*supra*). The Division Bench of the Madras High Court held that the Tribunal is constituted as the final Authority on facts and the penultimate Authority on law touching the assessment and other proceedings under the Act and has the plenary jurisdiction in the matters of assessment. It held that the task of an Appellate Authority under the taxing Statute, especially a non-Departmental Authority like the Tribunal, is to address its mind to the factual and legal basis of an assessment for the purpose of properly adjusting the tax payer's liability to make it accord with the legal provisions governing his assessment and to ascertain the tax payer's liability correctly to the last pie, if it were possible.

51. The Division Bench of the Madras High Court also relied upon the earlier Full Bench decision of the

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Madras High Court itself in the case of ***State of Tamil Nadu Vs. Arulmurugan & Co. [1982] 51 STC 381 (Madras) (FB)*** to hold that the function of the Appellate Authority is same and co-extensive with that of the Assessing Authority and the Appellate proceedings are continuation of the Assessment proceedings, therefore, the Appellate Authority can itself enter the arena of assessment, either by pursuing further investigation or causing further investigation to be done. It can do so on its own initiative, without being prodded by any of the parties. It can enhance the assessment, taking advantage of the opportunity afforded by the tax payer's appeal, even though the appeal itself has been mooted only with a view to a reduction in the assessment.

It is considered apt to quote below the paragraphs 22 to 25 from the said judgment of Madras High Court, *albeit* they are little lengthy but are found to be containing good reasonings therein.

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“22. Quite apart from precedents, it seems to us quite in the fitness of things **to invest the Tribunal with the plenary jurisdiction in matters of assessment.** As we earlier observed, the Tribunal was **created in 1941 as an independent, non-departmental body,** in whose hand the Legislature intended to entrust the task of reviewing assessments made under the Act. Under the scheme of the Act, which gives only the **High Courts and the Supreme Courts the power of interference on questions of law, the Tribunal is constituted the final authority on facts and the penultimate authority on law touching the assessment** and other proceedings under the Act. **The Primary purpose of the statute is to levy and collect the Income-tax.** This is based on the cardinal principle, which has been incorporated as a veritable constitutional provision, that no tax can be levied or collected save under authority of law. The task of an appellate authority under the taxing statute, especially a non-departmental authority like the Tribunal, is to

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address its mind to the factual and legal basis of an assessment for the purpose of properly adjusting the taxpayer's liability to make it accord with the legal provisions governing his assessment. Since the be-all and end-all of the statutory provisions, especially those relating to the administration and management of income-tax, **is to ascertain the taxpayer's liability correctly, to the last pie, if it were possible, the various provisions** relating to appeal, second appeal, reference and the like **can hardly be equated to a lis or dispute as arises between the two parties in a civil litigation.** Although the income-tax statute makes the department or its officer's figure as parties in appeal proceedings, they are not in the strict sense what are called by American writers as parties to adversary proceedings. **This is so, because the very object of the appeal is not to decide a point raised as a dispute, but any point which goes into the adjustment of the taxpayer's liability.** In that sense, a view prevails, even in England

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*that the authorities sitting in appeal in a tax case cannot be regarded as deciding a lis, but they are only engaged in an administrative act of adjusting the taxpayer's liability. Under our fiscal jurisprudence, we may regard the appellate authorities as exercising quasi-judicial functions in the same sense as a taxing officer does. But, even so, the proceedings before them lack the basic elements of adversary proceedings. It, therefore, follows that the discussion and the scope of the appellate jurisdiction of the Tribunal and other authorities under the tax code cannot be pursued by drawing a parallel to civil litigation with particular reference to appeals from decrees, and the like. The insistence on one party to appeal being entitled to the fruits of finality, as it is called, and the **appellate authority being con-find (sic! confined) to the subject matter of the appeal, are all ideas which might have relevance if the discussion centres in purely civil litigation and such like adversary proceedings as in an industrial dispute.** But in a case where the*

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revenue is all the while a party, in a manner of speaking and is also at the same time, an authority vested with the responsibilities of drawing up the assessment and laying down the correct liability, it would not be in accord with the scheme of the Act to impose restrictions on the ambit and the power of the Tribunal by such like notions as finality, subject matter of the appeal and the like. The statutory provision in Section 33(4) of the 1922 Act and Section 254 of the 1961 Act which confers appellate jurisdiction on the Tribunal clearly lays down that the Tribunal, in disposing of an appeal may pass such orders thereon as it thinks fit. **Excepting that the expression 'subject-matter' has taken the fancy of many learned and eminent judges, that is an expression which is not employed by the provision conferring the jurisdiction in the Tribunal.** Indeed, in Mahalakshmi Textile Mills' case (supra) in one of the passages to which we have made reference, the Supreme Court has understood the Tribunal's appellate jurisdiction as jurisdiction to pass

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*‘such orders on the appeal as it thinks fit’, without adding any gloss of their own to the expression. In Nelliappan’s case (supra), as well as Mahalakshmi Textile Mills’ case (supra), the Supreme Court had even used phrases which are reminiscent of the language which English judges have used while describing a tax appeal. **The Supreme Court observed that the Tribunal is not precluded from ‘adjusting’ the tax liabilities of the assessee in the light of its findings merely because the findings are inconsistent with the case pleaded by the assessee.** English judges have regarded a tax appeal, not as a lis, but as a process of further adjustment of taxpayer liability – vide **Lord Hewart in Rex v. Special CIT [1935]20 TC 381 (CA); Greer L.J. in IRC v. Sneath [1932] 17 TC 149 (CA);** Romer L.J. in the same case, Sneath (supra) and Lord Wright M.R. in Rex’s case (supra).*

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23. In Rex's case (*supra*), **Lord Hewart, CJ.** laid down the nature of an appeal in tax matters as under:

"In my opinion, the argument of the learned Attorney-General is absolutely correct, and the argument upon the other side is manifestly based, as he said, upon a misapprehension that an appeal under the Income-tax Act, 1918, is the same in substance as an appeal where two private persons are engaged in litigation. It is of course, totally different." (p. 382)

In *Sneath's case (supra)*, Greer, L.J. gave a similar description of the true position of a tax appeal in the following words:

"I think, the estimating authorities, even when an appeal is made to them, are not acting as judges deciding the litigation between the subject and the Crown. They are merely in the position of valuers whose proceedings are

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regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question.” (p.164)

Romer, L.J. in the same case, held as under:

“The appeal is merely another step taken by the Commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax.” (p.168)

Rex’s case (supra), went to the Court of Appeal and there Lord Wright MR reiterated the position in the following passage in his judgment:

*“I may note here at once that in making the assessment and in dealing with the appeals, the Commissioners are exercising their statutory authority and their statutory duty which they are bound to carry out, **not as judges***

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deciding an issue between two particular parties; their obligation is wider than that. It is to exercise their judgment on such material as comes before them, and, as we shall see later, to obtain any material which they think it is necessary and which they think they ought to have, and on that to make the assessment or the estimate which the law requires them to make. They are not deciding the case inter partes ; they are assessing or estimating the amount which in the interests of the country at large the taxpayer ought to have to deal with as the basis on which he is to be 'taxed.'(p.387)

24. In a recent Full Bench decision of this Court in **State of Tamil Nadu v. Arulmurugan & Co. [1982] 51 STC 381**, it was held that the appellate authorities perform precisely the **same functions as the assessing authority**. The Full Bench expressed the view that a **tax appeal is a**

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rehearing of the entire assessment and it cannot be equated to adversary proceedings in appeal in civil cases. The following passage from the judgment of the Full Bench would be relevant to the discussion in the present case:

“An appellate authority under the taxing enactments sits in appeal, only in a manner of speaking. What it does functionally, is only to adjust the assessment of the appellant in accordance with the facts on the record and in accordance with the law laid down by the Legislature. An appeal is a continuation of the process of assessment, and an assessment is but another name for adjustment of the tax liability to accord with the taxable event in the particular taxpayer’s case. There can be no analogy or parallel between a tax appeal and an appeal, say, in civil cases. A civil appeal, like a law suit in the Court of first instance out of which it arises, is really and truly an adversary

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*proceeding, that is to say, a controversy or tussle over mutual rights and obligations between contesting litigants ranged against each other as opponents. **A tax appeal is quite different.** Even as the assessing authority is not the tax payers opponent, in the strictly procedural sense of the term, so too the appellate authority sitting in appeal over the assessing authority's order of assessment is not strictly an arbitral Tribunal deciding a contested issue between two litigants ranged on apposite sides. **In a tax appeal, the appellate authority is very much committed to the assessment process.** The appellate authority can itself enter the arena of assessment, either by pursuing further investigation or causing further investigation to be done. **It can do so on its own initiative, without being prodded by any of the parties. It can enhance the assessment, taking advantage of the opportunity***

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afforded by the taxpayer's appeal, even though the appeal itself has been mooted only with a view to a reduction in the assessment. These are special and exceptional attributes of the jurisdiction of a tax appellate authority. These attributes underline the truth that the appellate authority is no different, functionally and substantially, from the assessing authority itself."

25. It seems to us, therefore, that both on principle and on precedent, ***there is no reason why the Tribunal must be precluded from handling a point which appertains the assessee's assessment merely because nobody else had handled it before it has not occurred either to the assessee or to the department to raise and urge that point at earlier stages of the proceedings."***

We respectfully agree with the aforesaid view of the Madras High Court.

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52. The **Rajasthan High Court** in the case of **Commissioner of Income Tax Vs. Pratapsingh and others [1987] 164 ITR 431** also dealt with the power of the Income Tax Appellate Tribunal (ITAT) to permit a new ground to be raised before it and the power under **Section 254** to enhance the assessment and answer the said question on the basis of leading judgment in the case of **Hukumchand Mills Ltd. Vs. Commissioner of Income Tax [1967] 63 ITR 232 (SC)** in the following manner:-

“The question before us is limited to the power or the jurisdiction of the Tribunal to go into the point of contention which has not been raised earlier by the Department. The observations made in Hukumchand’s case [1967] 63 ITR 232 (SC) have been pressed into service by the Tribunal for coming to the conclusion that it cannot consider and examine the point not raised by the Department as it may involve enhancement of tax liability. It may be stated that their

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Lordships of the Supreme Court have not laid down that the Tribunal cannot exercise the power of enhancement under its appellate jurisdiction. **The words “except possibly the power of enhancement” have been put by their Lordships in brackets.** The use of the word “possibly” and putting these words in brackets shows that only an observation has been made and the effect of it cannot be taken that any law has been laid down. The word “possibly” is clearly indicative of it.

... ..
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... ..

In the light of the above discussion, our answer to the question is that the Tribunal was not justified in refusing to entertain the plea of the Department that the income from the **lease rent of the cinema building was assessable under the head “Income from other sources” instead of under the head “Income from house property”** on the grounds mentioned in the question referred to us. Our answer to the question is, therefore,

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in the negative, in favour of the Revenue and against the assessee.

The parties are left to bear their own costs of the reference”

Other Relevant Case laws:

53. In the case of **National Thermal Power Co.Ltd. Vs. Commissioner of Income-Tax [1998] 229 ITR 383 (SC)**, the Hon'ble Supreme Court following its earlier view in **Jute Corporation of India Ltd. Vs. Commissioner of Income-Tax [1991] 187 ITR 688 (SC)**, held as under:-

*“In the case of Jute Corporation of India Ltd. v. CIT [1991] 187 ITR 688, this court, while dealing with the powers of the Appellate Assistant Commissioner observed that an **appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any prescribed by the statutory provisions. In the absence of any statutory provision, the***

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appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

The view that the Tribunal is confined only to issues arising out of the

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appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal (*vide, e.g., CIT v. Anand Prasad [1981] 128 ITR 388 (Delhi), CIT v. karmachand Premchand P. Ltd. [1969] 74 ITR 254 (Guj) and CIT v. Cellulose Products of India Ltd. [1985] 151 ITR 499 (Guj) [FB]*). Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.”

54. In **Jute Corporation of India Ltd. (supra)**, the Hon’ble Supreme Court held that the Appellate Authority has all the plenary powers which a subordinate Authority may have in the matter.

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The relevant extract from Head Note is quoted below:-

“An appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer.”

55. In the case of **Hukumchand Mills Ltd. Vs. Commissioner of Income-Tax, Central, Bombay [1967] 63 ITR 232**, the Hon'ble Supreme Court held that Rules 12 and 27 of the Appellate Tribunal Rules, 1946 are not exhaustive of the powers of the Tribunal and words “pass such orders as the Tribunal thinks fit”

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including all the powers (except **possibly** ! the power of enhancement). The Court itself expressed its doubt over the power of enhancement of the assessment or tax liability of the assessee in the said judgment which was later on explained by the Rajasthan High Court in the case of **Commissioner of Income-Tax Vs. Pratapsingh and others (supra)**.

The relevant extract from the said judgment in **Hukumchand Mills Ltd. case (supra)** is quoted below for ready reference:-

“The powers of the Appellate Tribunal in dealing with appeals are expressed in section 33(4) of the Income-tax Act in the widest possible terms. The word “thereon” in section 33(4) restricts the jurisdiction of the Tribunal to the subject matter of the appeal. The words “pass such order as the Tribunal thinks fit” include all the powers (except possibly the power of enhancement) which are conferred on the Appellate Assistant Commissioner by section 31. Consequently, the Tribunal has

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authority under section 33 to direct the Appellate Assistant Commissioner of the Income-tax Officer to hold a further enquiry and dispose of the case on the basis of such enquiry.

Rules 12 and 27 of the Appellate Tribunal Rules, 1946, are not exhaustive of the powers of the Tribunal. They are merely procedural in character and do not, in any way, circumscribe or control the power of the Tribunal under section 33(4).”

56. The Full Bench of Gujarat High Court in the case of **Commissioner of Income-Tax, Gujarat-I Vs. Cellulose Products of India Ltd.[1985] 151 ITR 499 (Guj) (FB)** held that the scope of appeal before the Tribunal extends to the subject matter of the appeal before the Appellate Assistant Commissioner (AAC), the first Appellate Authority and merely because a ground has not been raised, though it could be raised in support of the relief sought in the appeal, it cannot be

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said that a ground could not be raised before the Tribunal.

The relevant portion from the Head Note of the said judgment is quoted below:-

“The scope of an appeal before the Appellate Tribunal extends to the subject matter of the appeal before the AAC and if the question sought to be raised for the first time before the Tribunal is a question which concerns the subject-matter of the appeal which was before the AAC, then such question would be permissible. What the subject-matter of the appeal is, has, therefore, to be decided first. It may be that the same claim or relief is sought to be sustained on a different approach or by presenting a different aspect. So far as the assessee is concerned, it is the relief that he seeks to obtain that is material to him.

It is not necessary that the question should be specifically raised before the AAC as a ground, but it has not been dealt with, in order to imply a decision on that point. The

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*decision of the AAC is on the subject-matter of the appeal. The subject-matter of the appeal may be capable of challenge on various grounds. Some of which might have been raised and some not. Those raised might have been dealt with, or some of them might not have been dealt with, but a decision on the subject-matter is an implied decision on all matters which are raised and which could have been raised, whether dealt with or not. **Merely because a ground has not been raised, though it could be raised in support of the relief sought in the appeal, it cannot be said that it cannot be raised before the Tribunal.** Such a ground can be raised provided it falls within the contours of the subject-matter of the appeal before the AAC.”*

57. The **Calcutta High Court** in the case of ***Khaitan Paper and Industries Ltd. Vs. Commissioner of Income-Tax [2005] 273 ITR 234*** held that **Section 254(1)** of the Act empowers the

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Tribunal to recall its previous Order where the Assessee could not be present at the time of hearing and hear the Appeal again on merits even though there is no express provision in this regard yet as an ancillary jurisdiction under **Section 254** of the Act, the Tribunal is empowered to do so.

The relevant extract from the Head Note of the said judgment is quoted below for ready reference:-

*“The tribunal has the power to recall its previous order where the petitioner has made out a case that he was prevented from being present at the hearing of the appeal. The power of setting aside an ex parte order and thereby affording an opportunity of being heard to the aggrieved party is not the same as the power of review. When adequate and reasonable grounds for omission to appear at the hearing are made out to the satisfaction of the Tribunal, it is only a question before the Tribunal **as to the adequacy of that opportunity of being heard which subsection (1) of section 254 of the Income-***

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tax Act, 1961, enjoins to be given before the Tribunal to enable it to pass orders in the appeal. In other words, though not by any express provision, yet ancillary to the jurisdiction given by section 254 of the Income-tax Act, the Income-tax Appellate Tribunal has power to restore and rehear an appeal disposed of on the merits in the absence of any hearing.”

58. In the case of ***MCORP Global P.Ltd. Vs. Commissioner of Income-Tax [2009] 309 ITR 434 (SC)***, the Hon’ble Supreme Court held in the context of findings given by the learned Assessing Authority, the Tribunal could not take back the benefit conferred by the Assessing Authority without any controverting material. The Court observed:-

“When the matter came before the Appellate Tribunal, the Tribunal held that since the lease was not renewed and the bottles were not returned on expiry, the transaction in question was only a financial

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arrangement and not a lease and disallowed the depreciation and the High Court affirmed the decision of the Tribunal. On appeal to the Supreme Court:

Held, that under Section 254 (1) of the Income-tax Act, 1961, the Appellate Tribunal had no power to take back the benefit conferred by the assessing Officer or enhance the assessment. Since the Assessing Officer had granted depreciation in respect of 42,000 bottles that benefit could not be withdrawn.”

59. Thus on the analysis of the provisions of the Act and the case laws discussed above, we are of the clear and considered opinion that the directions of the learned Tribunal in para 7 for holding an inquiry into the matter by the Assessing Authority into the aspect of fair market price of the shares bought back by the Assessee from its major share holding Mauritius Holding Company is not beyond the jurisdiction of the learned Tribunal and the said remand direction of the Tribunal to hold such an enquiry not only falls within

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the ambit and scope of the “subject matter” of the appeal filed by the Assessee by which he claimed that the remittance by the Assessee Company to its Mauritius Holding Company could not be taxed as dividend, forgetting the aspects relating to **Clause (e)** of **Section 2(22)** of the Act and therefore the said directions were within the subject matter or the issues raised by the Assessee and making a direction to hold an enquiry into the aspect of fair market value of shares cannot be said to be beyond the subject matter of the appeal. The said directions cannot be said to be *per se* amounting to taxability of the said pay-out by the Appellant Assessee as ‘Dividend’ but the same would depend upon the nature of enquiry to be conducted by the Assessing Authority and findings arrived at in pursuance of the said direction. The power to remand including for conducting an enquiry in the aspect of the matter which was not earlier adjudicated upon by the

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lower Authorities, cannot, in our considered opinion, be questioned by the Assessee or the Revenue.

60. The words “as it thinks fit” employed in **Section 254** of the Act is only bound by the requirement of giving an opportunity of being heard to the parties to the appeal.

61. **Section 254(1)** of the Act clearly stipulates that the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such Orders thereon as it thinks fit. The emphasis on the word ‘**thereon**’ sought to be placed by the learned counsel for the Assessee, Mr. Pardiwala on the basis of case laws relied upon by him as against the words ‘**as it thinks fit**’ is slightly misplaced. The emphasis while analyzing the powers of the Tribunal should be on the words ‘**as it thinks fit**’ rather than on the word ‘**thereon**’. The word ‘**thereon**’ only relates to the ‘subject matter’ of the appeal in first part of the Sub-section (1) and therefore while the Tribunal is

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dealing with the subject matter of the appeal, it can pass any such relevant Order as it thinks fit, which would be rational, germane, reasonable, appropriate, necessary and expedient in the opinion of the learned Tribunal subject to the requirement that it gives an opportunity of hearing to both the parties to the appeal, viz., the Assessee and the Revenue. Neither the powers are restricted nor the power to allow the fresh and new ground to be raised before it is restricted nor the powers to enhance an assessment or tax liability or reduce the tax especially enumerated in the Proviso to **Sub-section (2) of Section 254** of the Act also is restricted.

62. The powers under **Section 254** of the Act with the Tribunal to pass such Orders '**as it thinks fit**' cannot be lesser than the powers conferred upon the lower and first Appellate Authority, viz., the Commissioner of Income Tax(Appeals) who under **Section 251(1)(a)** of the Act has power to dispose of an appeal against the Order of assessment and he may

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confirm or reduce or enhance or annul the assessment. The higher and final Appellate Authority under the Act cannot be intended by the Parliament to have lesser power than the first Appellate Authority as is well settled that the powers of the Appellate Authorities are always co-extensive with that of the Assessing Authority and therefore what the Assessing Authority or the first Appellate Authority could do in the matter of assessment, the Tribunal cannot be said to have any lesser power to do so.

63. **Section 254** of the Act, in our opinion, does not have any narrower scope to put fetters on the powers of the Tribunal as is sought to be canvassed before us that the Tribunal could not have exceeded the grounds raised before it by the Appellant Assessee. The Appellant may be either Assessee or Revenue before the Tribunal and the Tribunal has also powers to allow fresh ground of appeal or allow the other party to the appeal to file its cross objections and even *suo motu*

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pass appropriate Orders '**thereon**' and therefore the words '**as it thinks fit**' in our opinion, confer wide powers upon the Income Tax Appellate Tribunal to pass such Orders on the subject matter of appeal '**as it thinks fit**' whether the issue is raised by either party to the appeal or not. The Tribunal is not bound to decide the appeal in a particular or narrower manner or limited to the grounds raised in the appeal before it. The confines or boundary limit is only "subject matter" of the appeal.

64. The powers of the Tribunal are not limited or circumscribed by the grounds raised before it and any order on the subject matter of appeal can be passed if it is found to be necessary, expedient and relevant by the learned Tribunal.

65. Truth being the cherished ideal and ethos of India, pursuit of Truth should be the guiding star of the entire justice system. For justice to be done, truth must prevail. It is truth that must protect the innocent

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and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the courts to become active seekers of truth. It is of seminal importance to inject vitality into our system. Concern for and duty to seek the Truth should not become the limited concern of the Courts or Tribunals and adjudicating Authorities but should percolate down in other Executive wings of the State as well.

66. 'Truth' has a strange but a firm character of finding its way and coming out and revealing itself even though embedded at the bottoms of time periods and piles of papers bound through the chain of litigation in the Courts of law but the quest for truth should not get bogged-down merely because a long period has lapsed.

67. The ultimate object of providing the multiple Tiers of appellate forums and mechanism in the Income Tax law and then further providing for remedies by way

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of Appeals before the Constitutional Courts on the substantial questions of law is nothing but to allow the quest for Truth to be taken to its logical end.

68. Reverting to the facts of the present case, what the learned Tribunal has done is merely to ask the Assessing Authority to hold an enquiry as to whether the abnormally high price paid for buy-back of shares from almost a single shareholder only, viz., the Mauritius Company, a Holding Company which held **99.99%** of the share holding of the Assessee Indian Company so as to ascertain the fair market value of the shares which can certainly be determined with the relevant data and evidence available with the Respondent Assessing Authority. Since the shares are not listed on the Stock Exchange, therefore, fair market value of the shares on a particular date of transaction was not ascertainable otherwise readily and the said aspect of the matter was not admittedly looked into by the Authorities below before the appeal was decided by

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the learned Tribunal. Therefore, even though the some findings were given by the Tribunal in favour of the Assessee that the said pay-out for buy-back of the shares at an abnormally high price was not taxable under **Section 115-O or Section 115-QA** read with its Explanation and **Section 2(22)(d)** of the Act as per the contention raised by the Assessee before the Tribunal, the Tribunal was perfectly justified in directing an enquiry into the fair market price of the share of the Assessee Company which could have an implication of taxability under **Section 2(22)(e)** of the Act or otherwise.

69. However, since we are not deciding the question of taxability here, as the factual foundation for the same is not there and we are not expressing any opinion on the taxability on such findings upon an enquiry which may now be held by the Assessing Authority in pursuance of the directions of the learned Tribunal. Therefore that question is left open.

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70. The Mauritius route of tax avoidance and evasion is a hugely suffered phenomenon in our Country. It also resulted in a huge tax controversy in the case of **Vodafone** in which even after the decision of the Hon'ble Apex Court in favour of the Assessee in **2012**, there was a retrospective amendment of law and the said matter is still being debated in the international Arbitration between India and the Vodafone and even the **Indo Mauritius DTAA** has now been amended recently by adding certain Protocols in the said DTAA with effect from **01/04/2017** seeking to plug the loopholes for the tax evasion through misuse of the erstwhile **DTAA of 1983** between India and Mauritius, but it has been a route of tax evasion and money laundering in the past.

71. However, as we are not required to go into taxability aspects of the matter at this stage, as indicated above and we are not proposing to answer the substantial question of law No.2 raised by the Appellant

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Assessee in the present appeal regarding the taxability aspect of the matter and we have restricted ourselves to the substantial question No.1 as re-formulated by us only regarding the powers of the Tribunal under **Section 254 (1)** of the Act.

72. Accordingly on the basis of the aforesaid discussion, we are of the opinion that the present appeal filed by the Assessee deserves to be dismissed and the substantial question of law framed by us in para 5 in the present appeal is answered in favour of the Revenue and against the Assessee and it is held that the Income Tax Appellate Tribunal (ITAT) has the power to give directions for fresh enquiry into the aspects of the subject matter of appeal filed before it either *suo motu* or on any grounds raised by either party to the appeal which have not been investigated or enquired into by the lower Authorities earlier and which may result in enhancement of tax liability of the assessee and in the present case, the Appellate Tribunal was

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right and within its jurisdiction in directing the examination of the fair market value of the shares bought back by it during the previous year relevant for the **AY 2011-12** in question.

73. Accordingly, the Appeal of the Appellant - Assessee Company is dismissed. No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

BMV*