* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 21 October 2024**
Judgment pronounced on 31 January 2025

\+ W.P.(C) 8444/2018

SUN PHARMACEUTICAL INDUSTRIES LTD. .....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Rohit Jain, Mr. Aniket D. Agrawal and Mr. Abhishek Singhvi, Advs.

versus

INCOME TAX OFFICER & ANR. .....Respondent

Through: Mr. Vipul Agrawal and Mr. Sanjay Kumar, SSC with Mr. Gibran Naushad and Ms. Sakshi Sherwal, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The writ petitioner impugns the order dated 27 March 2018 in terms of which the respondent has come to reject applications filed by it seeking refund of excess tax wrongly deducted and deposited under Section 195 of the **Income Tax Act, 1961**[1]. The applications themselves pertained to **Financial Years**[2] 2010-11 to 2012-13. Since the respondent has also held against the petitioner for a perceived delay in the filing of those applications, the petitioners also mount a challenge to Circular No. 07/2007 dated 23 October 2007 issued by the **Central**

[1] Act
[2] FY

Board of Direct Taxes[3] and which had introduced a prescription of limitation for the institution of such refund applications. The respondent has held against the writ petitioner not only on the ground that the applications were barred by time but also on the basis of those applications not being liable to be granted on merits. In consequence to the challenge as raised, the petitioners also seek an appropriate direction for refund of the excess tax that had come to be deposited.

2. The respondent, while dealing with those applications has firstly alluded to Circular No. 07/2007, and which according to it, had constructed a period of limitation of two years within which an application for excess tax deposited could have been preferred. It has thus held that the applications would be barred by paragraph 9 of the aforesaid circular. It has also questioned the assertion of the tax having been deducted in excess on the ground that the remittance made would not fall within the ambit of the exception which is carved out by clause (b) of Section 9(1)(v) of the Act holding that the same would not fall within the scope of interest paid on monies borrowed and used for the purposes of a business carried on outside India nor fall under the expression "*for the purposes of making of earning any income from any source outside India*".

3. In order to appreciate the challenge which stands raised, we deem it apposite to take note of the following essential facts.

4. **Ranbaxy Laboratories**[4] was a company which was incorporated under the Companies Act, 1956 and was engaged in the business of research, manufacture and trading of drugs and pharmaceuticals. RLL issued an Offering Circular on 13 March 2006, inviting investment in

[3] CBDT
[4] RLL

Foreign Currency Convertible Bonds[5] to the tune of USD 440 Million. The bonds were stated to be convertible at any time on or after 27 April 2006 and the conversion itself envisaged to result in the holders acquiring fully paid-up equity shares at a par value of INR 5/- each in RLL. As per the stipulations contained in the Offering Document, the shares were to be represented by **Global Depository Shares**[6] representing one share at a conversion price of INR 716.32/- per share at a fixed rate of exchange rate of INR 44.15/- per USD. The aforenoted zero coupon FCCBs' were floated by RLL for the purposes of equity infusion in its wholly owned subsidiary, **Ranbaxy Netherlands BV**[7] and for expansion of its global business operations.

5. It becomes pertinent to note that RNBV acted as the holding company of Terapia, SA, a company based in Romania and whose equity share capital was majorly held by RNBV. For the purposes of funding its global business aspirations, it is also stated to have availed of loan facilities extended to it by DBS Bank Limited in 2007 as well as a further facility from the Mizuho Corporate Bank Ltd. It is also stated to have availed of a further loan facility agreement with the Bank of Tokyo-Mitsubishi UFJ Ltd. taken in 2010 in furtherance of the aforesaid objectives as well as an additional loan from the Australia and New Zealand Banking Group Limited.

6. According to RLL, acting in terms of the Offering Document as well as the stipulations contained in the various loan facility agreements, it had paid premium/ interest to various bond holders and banks during FY 2010-11 to 2012-13 without making any deductions

[5] FCCBs'
[6] GDS
[7] RNBV

towards tax. It also claims to have deposited the entire premium and interest after grossing up under Section 195 and to have thus borne the burden of taxes withheld. From the disclosures which are made in this respect in paragraph 10 of the impugned order, it would appear that although the remittances to bond holders and banks were not subjected to any deduction at source, RLL, out of abundant caution, deposited the TDS on the entire premium and interest paid in purported discharge of its perceived obligations under Section 195 of the Act.

7. In the revised TDS returns that RLL came to file for FY's 2010-11 to 2012-13 on 29 March 2014, it claimed a refund of tax deposited on the aforenoted payments of premium and interest on the bonds as well as the **External Commercial Borrowings**[8] that it had obtained. This was followed by the filing of a formal application on 31 March 2014 with the **Assessing Officer**[9] seeking refund of the excess tax so deposited.

8. On 24 March 2015, RLL merged with the petitioner in terms of a Scheme of Arrangement with an effective date of 01 April 2014. The petitioner before us, acting as the successor-in-interest of RLL, is thereafter stated to have addressed various reminders in respect of the applications for refund which were pending. Those refund applications have ultimately come to be rejected in terms of the order dated 27 March 2018 which is impugned before us.

9. Mr. Vohra, learned senior counsel appearing for the writ petitioner, firstly assailed the findings rendered by the respondent of the applications for refund being barred by limitation and submitted that the Act itself stipulates no period or terminal point within which a

[8] ECB
[9] AO

claim for refund of excess TDS may be instituted. In view of the aforesaid, it was his contention that Circular No. 07/2007 is clearly ultra vires and creates a condition absent any statutory backing. According to Mr. Vohra, the CBDT could not have, by way of an administrative circular, created or introduced a condition of ineligibility insofar as a claim for refund of excess TDS was concerned.

10. Mr. Vohra also took us through the various circulars which had come to be issued by the CBDT from time to time and which had preceded the issuance of Circular No. 07/2007. According to Mr. Vohra, even if one were to go by the spirit and intent of Circular No. 07/2007**,** it would become apparent that the respondent has manifestly erred in rejecting the applications for refund. According to learned senior counsel, as is manifest from a reading of paragraph 4 of Circular No. 07/2007, the same was occasioned by the various representations which had been received by the Government and pertained to claims for refund of excess tax that may have been deducted and deposited. Mr. Vohra submitted that the CBDT, being cognizant of the genuine hardship that was faced by such deductors, formulated a procedure for the refund of taxes which had been wrongly or incorrectly deducted. It is these facts, which, according to learned senior counsel, informed the principled stand taken by the CBDT itself that tax which may have come to be deposited in respect of income which had neither accrued or on which no tax was payable or even where tax was due at a lesser rate, those excess payments were not liable to be construed as "tax" at all.

11. Our attention was also drawn to the various other clauses of Circular No. 07/2007, which according to Mr. Vohra, embody the basic intent of the Board being to facilitate the refund of all amounts which

did not represent tax. Since the submissions proceeded principally on the various provisions comprised in the aforenoted circular, the same is extracted in its entirety hereinbelow: -

"**CIRCULAR NO.7/2007 DATED 23-10-2007**

Procedure for refund of tax deducted at source under section 195 to the person deducting the tax- section 239 of the Income Tax 1961- Refunds

The Board had issued Circular No. 790 dated 20th April, 2000, laying down the procedure for refund of tax deducted under section 195, in certain situations to the person deducting the tax at source from the payment to the non-resident. Representations have been received in the Board from taxpayers requesting that the said Circular may be amended to take into account situations where genuine claim for refund arises to the person deducting the tax at source from payment to the non-resident and it does not fall in the purview of the said Circular.

2. The cases which are being referred to the Board mainly relate to circumstances where, after the deposit into Government account of the tax deducted at source under section 195,

a) the contract is cancelled and no remittance is made to the non-resident;

b) the remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount has been returned to the person responsible for deducting tax at source;

c) the contract is cancelled after partial execution and no remittance is made to the non-resident for the non-executed part;

d) the contract is cancelled after partial execution and remittance related to non-executed part is made to the non-resident. In such cases, the remitted amount has been returned to the person responsible for deducting the tax at source or no remittance is made but tax was deducted and deposited when the amount was credited to the account of the non-resident;

e) there occurs exemption of the remitted amount from tax either by amendment in law *or* by notification under the provisions of Income-tax Act, 1961;

f) an order is passed under section 154 or 248 or 264 of the Income-tax Act, 1961 reducing the tax deduction liability of a deductor under section 195;

g) there occurs deduction of tax twice from the same income by mistake;

h) there occurs payment of tax on account of grossing up which

was not required under the provisions of the Income-tax Act, 1961;

i) there occurs payment of tax at a higher rate under the domestic law while a lower rate is prescribed in there levant double taxation avoidance treaty entered into by India.

2.1 In the cases mentioned above, income does not either accrue to the non-resident or it accrues but the excess amount in respect of which refund is claimed, is borne by the deductor. The amount deducted as tax under section.195 and paid to the credit of the Government therefore belongs to the deductor. At present, a refund is given only on a claim being made by the non-resident with whom the transaction was intended or in terms of Circular No. 790 dated 20th April, 2000.

3. In the type of cases referred to in sub-paragraph (a) of paragraph 2 the non-resident not having received any payment would not apply for a refund. For cases covered by sub-paragraph (b)to (i) of paragraph 2, no claim may be made by the non-resident where he has no further dealings with the resident deductor of tax or the tax is to be borne by the resident deductor. This resident deductor is therefore put to genuine hardship as he would not be able to recover the amount deducted and deposited as tax.

4. The matter has been considered by the Board. In the type of cases referred to above, where no income has accrued to the non-resident due to cancellation of contract or where income has accrued but no tax is due on that income or tax is due at a lesser rate, the amount deposited to the credit of Government to that 6 extent under section 195, cannot be said to be “tax”.

4.1 It has been decided that, this amount can be refunded, with prior approval of the Chief Commissioner of Income-tax or the Director General of Income-tax concerned, to the person who deducted it from the payment to the non-resident, under section 195.

5. Refund to the person making payment under section 195 is being allowed as income does not accrue to the non-resident or if the income is accruing no tax is due or tax is due at a lesser rate. The amount paid into the Government account in such cases to that extent, is no longer "tax". In view of this, no interest under section 244A is admissible on refunds to be granted in accordance with this circular or on the refunds already granted in accordance with Circular No. 769 or Circular No. 790.

6. In case of refund being made to the person who made the payment under section 195, the Assessing Officer may, after giving intimation to the deductor, adjust it against any existing tax liability of the deductor under the Income-tax Act, 1961, Wealth-tax Act, 1957 or any other direct tax law. The balance amount, if any, should be refunded to the person who made such payment under section

195. A separate refund voucher to the extent of such liability under each of the direct taxes should be prepared by the Income-tax Officer or the Assessing Officer in favour of the "Income-tax Department" and sent to the bank along with the challan of the appropriate type. The amount adjusted and the balance, if any, refunded would be debitable under the major head "020-Corporation Tax" or the major head "021-Taxes on incomes other than Corporation tax" depending upon whether the payment was originally credited to the major head "020-Corporation tax" or to the major head "021-Taxes on Income other than Corporation tax".

7. A refund in terms of this circular should be granted only after obtaining an undertaking that no certificate under section 203 of the Income-tax Act has been issued to the non-resident. In cases where such a certificate has been issued, the person making the refund claim under this circular should either obtain it or should indemnify the Income-tax Department from any possible loss on account of any separate claim of refund for the same amount by the non-resident. A refund in terms of this circular should be granted only if the deductee has not filed return of income and the time for filing of return of income has expired.

8. The refund as per this circular is, *inter alia*, permitted in respect of transactions with non-residents, which have either not materialized or have been cancelled subsequently. It, therefore, needs to be ensured by the Assessing Officer that they disallow corresponding transaction amount, if claimed, as an expense in the case of the person, being the deductor making refund claim. Besides, in all cases, the Assessing Officer should also ensure that in the case of a deductor making the claim of refund, the corresponding disallowance of expense amount representing TDS refunded is made.

9. The limitation for making a claim of refund under this circular shall be two years from the end of the financial year in which tax is deducted at source. However, ail cases for claim of refund under items *(c)* to (*i)* of paragraph 2 which were pending before the issue of this circular and where the claim for refund was made after the issuance of Circular No. 790 may also be considered.

10. It has been represented to the CBDT that in CircularNo.769 dated 6th August,1998, there was no time limit for making a claim for refund. A time limit of two years, for making a refund claim, was stipulated vide Circular No. 790 dated 20th April, 2000.Some cases covered by Circular No. 769, which were also covered by Circular No. 790, now listed in item (a) and (b) of paragraph 2 of this Circular, and filed before the issue of Circular No. 790, became time-barred because of the specification of time limit in Circular No. 790. It is hereby clarified that such cases may also be considered for refund.

> 11. This Circular is issued in supersession of the Circular No.790/2000 dated 20th April, 2000.
>
> 12. The contents of this Circular may be brought to the notice of all officers in your region."

12. Mr. Vohra further submitted that although the Board chose to create a time frame of two years, and which was described to be a period of limitation, the same clearly would not sustain absent any prescription of limitation or outer time limit having been statutorily engrafted in the Act. It was in the aforesaid light that learned senior counsel submitted that paragraph 9 of the aforenoted Circular is clearly ultra vires the Act itself.

13. While addressing submissions along those lines, Mr. Vohra also took us through Sections 200, 237 as also Section 239 of the Act to buttress his contention that the statute itself never contemplated a period of limitation within which an application for refund of TDS was liable to be submitted.

14. Section 200 as it exists in the statute book today is reproduced hereinbelow: -

> "**Duty of person deducting tax:-**
>
> **200.** [(1)] Any person deducting any sum in accordance with [the foregoing provisions of this Chapter] shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.
>
> [(2) Any person being an employer, referred to in sub-section (1A) of section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.]
>
> [(2A) In case of an office of the Government, where the sum deducted in accordance with the foregoing provisions of this Chapter or tax referred to in sub-section (1A) of section 192 has been paid to the credit of the Central Government without the production of a challan, the Pay and Accounts Officer or the Treasury Officer or the Cheque Drawing and Disbursing Officer or any other person, by whatever name called, who is responsible for crediting such sum or tax to the credit of the Central Government, shall deliver or cause to be delivered to the prescribed income-tax authority, or to the person

authorised by such authority, a statement in such form, verified in such manner, setting forth such particulars and within such time as may be prescribed.]

[(3) Any person deducting any sum on or after the 1st day of April, 2005 in accordance with the foregoing provisions of this Chapter or, as the case may be, any person being an employer referred to in sub-section (1A) of section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare such statements for such period as may be prescribed and deliver or cause to be delivered to the prescribed income-tax authority or the person authorised by such authority such statement in such form and verified in such manner and setting forth such particulars and within such time as may be prescribed:]

[**Provided** that the person may also deliver to the prescribed authority a correction statement for rectification of any mistake or to add, delete or update the information furnished in the statement delivered under this sub-section in such form and verified in such manner as may be specified by the authority.]

[**Following second proviso shall be inserted after the existing proviso to sub-section (3) of section 200 by the Finance (No. 2) Act, 2024, w.e.f. 1-4-2025:**

Provided further *that no correction statement shall be delivered after the expiry of six years from the end of the financial year in which the statement referred to in sub-section (3) is required to be delivered*]"

15. It becomes pertinent to note that the First Proviso to Section 200 enables a person to deliver to the prescribed authority the correction statement for purposes of rectification of any mistake or even to add, delete or update information that may be contained in a statement submitted by a deductor. Of equal significance is the Second Proviso which came to be inserted in Section 200(3) by Finance (No.2) Act of 2024, with effect from 01 April 2025, and which now stipulates that no correction statement would be entertained if tendered after the expiry of six years from the end of the FY in which the principal statement may have been delivered. This we do note since in the facts of the present case, the correction statement was filed with due promptitude on 29 March 2014.

16. Section 237, which deals with the subject of refunds, reads thus:-

> "**Refunds.**
>
> **237.** If any person satisfies the [Assessing] Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess."

As is evident from a perusal of that provision, any person who asserts that the amount of tax paid exceeds the liability which could have been validly foisted upon it under the Act, could petition for refund and claim the return of monies deposited in excess subject to it satisfying the AO of its claim.

17. Section 239 then provides for the manner in which a claim for refund may be lodged and stipulates that the same would have to be in accordance with the provisions contained in Section 139 with the latter regulating the procedure for submission of returns generally. Section 239 reads as follows: -

> "**Form of claim for refund and limitation.**
>
> **239.** (1) Every claim for refund under this Chapter shall be made [by furnishing return in accordance with the provisions of section 139]
>
> (2) [***]"

18. Of equal significance is sub-section (2) as it existed in Section 239 and which came to be omitted by Finance (No. 2) Act, 2019 with effect from 01 September 2019. Sub-section (2) prior thereto had incorporated the following provisions: -

> "(2) No such claim shall be allowed, unless it is made within the period specified hereunder, namely: —
>
> (a) where the claim is in respect of income which is assessable for any assessment year commencing on or before the 1st day of April, 1967, four years from the last day of such assessment year;

(b) where the claim is in respect of income which is assessable for the assessment year commencing on the first day of April, 1968, three years from the last day of the assessment year;

(c) where the claim is in respect of income which is assessable for any other assessment year, [one year] from the last day of such assessment year;]

(d) where the claim is in respect of fringe benefits which are assessable for any assessment year commencing on or after the first day of April, 2006, one year from the last day of such assessment year."

It is in the aforesaid backdrop that Mr. Vohra submitted that the period of limitation which came to be introduced by the CBDT is clearly illegal and beyond jurisdiction.

19. Our attention was also drawn to the provisions comprised in Circular Nos. 769/1998 and 790/2000 and on the basis of which Mr. Vohra sought to underscore the fact that even those had never introduced any provision of limitation. Circular No. 769/1998 which was issued on 06 August 1998 was concerned with applications for refund in respect of excess or erroneous deduction of tax. The said Circular is reproduced hereinbelow: -

"**1167. Procedure for refund of tax deducted at source under section 195**

1. The Board has received a number of representations for granting approval for refund of excess deduction or erroneous deduction of tax at source under section 195 of the Income-tax Act. The cases referred to the Board mainly relate to circumstances where:—

(i) after the deposit of tax deducted at source under section 195,

(a) the contract is cancelled and no remittance is required to be made to the foreign collaborator;

(b) the remittance is duly made to the foreign collaborator, but the contract is cancelled and the foreign collaborator returns the remitted amount to the person responsible for deducting tax at source;

(c) the tax deducted at source is found to be in excess of tax deductible for any other reason;

(ii) the tax is deducted at source under section 195 and paid in one assessment year and remittance to the foreign collaborator is made and/ or returned to the Indian company following cancellation of the contract in another assessment year.

In all the cases mentioned above, where either the income does not accrue to the non-resident or excess tax has been deducted thereby resulting in a refund being due to the Indian enterprise which deposited the tax, at present a refund can be issued only if valid claim is made by filing a return.

2. In the absence of any statutory provision empowering the Assessing Officers to refund the tax deducted at source to the person who has deducted tax at source, the Assessing Officers insist on filing of the return by the person in whose case deduction was made at source. Even adjustments of the excess tax or the tax erroneously deducted under section 195 is not allowed. This has led to a lot of hardship as the non-resident in whose case, the deduction has been made is either not present in the country or has no further dealings with the Indian enterprise, thus, making it difficult for a return to be filed by the non-resident.

3. The matter has been considered by the Board. It has been decided that in the type of cases referred to above, a refund may be made independent of the provisions of the Income-tax Act,1961 to the person responsible for deducting the tax at source from payments to the non-resident, after taking the prior approval of the Chief Commissioner concerned.

4. The excess tax deducted would be the difference between the actual payment made by the deduct or and the lax deducted at source or that deductible. This amount should be adjusted against the existing tax liability under any of the Direct Tax Acts. After meeting such liability, the balance amount, if any, should be refunded to the person responsible for deduction of tax at source.

5. Where the tax is deducted at source and paid by the branch office of the person responsible for deduction of tax at source and the quarterly statement/annual return of tax deduction at source is filed by the branch, each branch office would be treated as a separate unit independent of the head office. After meeting any existing tax liability of such a branch, which would normally be in relation to the deduction of tax at source, the balance amount may be refunded to the said branch office.

6. The adjustment of refund against the existing tax liability should be made in accordance with the present procedure on the subject. A separate refund voucher to the extent of such liability under each of the direct taxes should be prepared by the Income-tax Officer in favour of the “Income-tax Department” and sent to the bank along with the challan of the appropriate type. The amount adjusted and the balance, if any, refunded would be debitable under the sub-head

"Other refunds" below the minor head "Income-tax on companies" major head "020 - Corporation Tax" or below the minor head "Income-tax other than Union Emoluments" major head "021-Taxes on Incomes other than Corporation Tax", depending upon whether the payment was originally credited to the major head "020 - Corporation Tax" or to the major head "021- Taxes on Income other than Corporation Tax".

7. Since the adjustment/refund of the amount paid in excess would arise in relation to the deduction of tax at source, the recording of the particulars of adjustment/refund should be done in the quarterly statement of TDS/annual return under the signature of the ITO at the end of the statement, *i.e.*, below the signature of the person furnishing the statement.

Circular: No. *769, dated 6-8-1998.*"

20. Similar provisions were made by the CBDT in Circular No. 790/2000 which came to be issued on 20 April 2000, and in paragraph 10 whereof a prescription with respect to limitation appears for the first time. That Circular is quoted hereunder: -

"**SECTION 195 OF THE INCOME-TAX ACT, 1961- DEDUCTION AT SOURCE - OTHER SUMS -PROCEDURE FOR REFUND OF TAX DEDUCTED AT SOURCE UNDER SECTION 195 TO PERSON DEDUCTING TAX**

CIRCULAR NO.790, DATED 20-4-2000

[SUPERSEDED BY CIRCULAR N0.7/2007, DATED 23-10-2007]

1. The Board has issued Circular No. 769, dated 6-8-1998, laying down procedure for refund of tax deducted under section 195, in certain situations to the person deducting the tax at source from the payment to the non-resident. After reconsideration, Circular No. 769 is revoked with immediate effect and refund to the person deducting tax at source under section 195 shall be allowed in accordance with the provisions of this Circular.

2. The Board had received representations for approving grant of refund to the persons deducting tax at source under section 195 of the Income-tax Act, 1961. The cases referred to the Board mainly related to circumstances whereafter the deposit into Government account of tax deducted at source under section 195,—

(a) the contract is cancelled and no remittance is made to the non-resident;

(b) the remittance is duly made to the non-resident, but the contract

is cancelled. In such cases, the remitted amount may have been returned to the person responsible for deducting tax at source.

In the cases mentioned above, income does not accrue to the non-resident. The amount deducted as tax under section 195 and paid to credit of Government, therefore, belongs to the deductor. At present, a refund is given only, on a claim being made by the non-resident with whom the transaction was intended.

3. In the type of cases referred to in sub-paragraph (a) of paragraph 2, the non-resident not having received any payment would not apply for a refund. For cases covered by sub-paragraph (b) of paragraph 2. no claim may be made by the non-resident where he has no further dealings with the resident deductor of tax.This resident deductor is, therefore, put to genuine hardship as he would not be able to recover the amount deducted and deposited as tax.

4. The matter has been considered by the Board. In the type of cases referred to above, where no income has accrued to the non-resident due to cancellation of contract, the amount deposited to the credit of Government under section 195 cannot be said to be 'tax'. It has been decided that this amount can be refunded, with prior approval of Chief Commissioner concerned to the person who deducted it from the payment to the non-resident under section 195.

5. The refund being made to the person who made the payment under section 195, the Assessing Officer may after giving intimation to the deductor, adjust it against any existing tax liability of the deductor under the Income-tax Act, 1961, Wealth-tax Act, 1957 or any other direct tax law. The balance amount, if any, should be refunded to the person who made such payment under section 195. A separate refund voucher to the extent of such liability under each of the direct taxes should be prepared by the Income- tax Officer or the Assessing Officer in favour of the "Income-tax Department" and sent to the bank along with the challan of the appropriate type. The amount adjusted and the balance, if any. refunded would be debitable under the sub-head "Other refunds" below the minor head "Income-tax on Companies"— major head "020—Corporation Tax" or below the minor head "Income-tax other than Union Emoluments" major head "021—Taxes on Incomes other than Corporation Tax" depending upon whether the payment was originally credited to the major head "020—Corporation Tax" or to the major head "021 —Taxes on Income other than Corporation Tax". Since the adjustment/refund of the amount paid would arise in relation to the deduction of tax at source, the recording of the particulars of adjustment/refund, should be done in the quarterly statement of TDS/annual return under the signature of the Income-tax Officer or the Assessing Officer at the end of the statement, i.e.. below the signature of the person furnishing the statement.

6. Refund to the person making payment under section 195 is being

allowed as income does not accrue to the non-resident. The amount paid into the Government account in such cases, is no longer 'tax'. In view of this, no interest under section 244A is admissible on refunds to be granted in accordance with this Circular or on the refunds already granted in accordance with Circular No.769.

7. A refund in terms of this Circular should be granted only after obtaining an undertaking that no certificate under section 203 of the Income-tax Act has been issued to the non-resident. In cases where such a certificate has been issued, the person making the refund claim under this Circular should either obtain it or should indemnify the Income-tax Department from any possible loss on account of any separate claim of refund for the same amount by the non-resident.

8. The refund as per this Circular is permitted only in respect of transactions with non-residents, which have either notmaterialised or have been cancelled subsequently. It, therefore, needs to be ensured by the Assessing Officer that they disallow corresponding transaction amount, if claimed as an expense in the case of person making refund claim.

9. It is hereby clarified that refund shall not be issued to the deductor of tax in the cases referred to in clause(*i*)(c) of paragraph 1 of Circular No. 769, dated 6-8-1998.

10. The limitation for making a claim of refund under this Circular shall be two years from the end of the financial year in which tax is deducted at source."

21. Proceeding further, Mr. Vohra also questioned the correctness of the view expressed by the respondent based on the exception carved out by Section 9(1)(v) and submitted that the view as expressed by the respondents was wholly unsustainable for reasons recorded hereinafter. Mr. Vohra submitted that the funds which were generated by the issuance of bonds as well as the ECBs which were taken by RLL were exclusively intended to aid the global business operations of that entity.

22. It was his submission that no part of the investments made leading up to the placement of funds in the hands of RLL or for that matter the ECBs' were either routed to India or utilized in connection with the operations of RLL in this country. It was thus submitted that the interest was clearly one which had been paid by RLL for the

purposes of a business undertaken outside India as well as for the purposes of making or earning income from a source outside India. Since those funds and investments, according to Mr. Vohra, were primarily utilized to shore up the financials of Terapia, SA, the payment of interest clearly fell within the scope of the exception which clause (b) carves out from the principal part of Section 9(1)(v).

23. Mr. Vohra also assailed the view taken by the respondent that those investments and utilization of funds was not liable to be acknowledged to be for the purposes of business carried on by RLL since the same was made as in connection with the affairs of Terapia, SA. According to learned senior counsel, since Terapia, SA was a wholly owned subsidiary, the respondent was clearly unjustified in disallowing that expense taking an extremely pedantic view that the same was not concerned with or relatable to the business of the petitioner. Learned senior counsel submitted that the investment and infusion of funds in Terapia SA was unquestionably connected with the business which RLL undertook overseas in the expectation of deriving income in the shape of dividend or profits from those ventures.

24. Mr. Vohra also sought to distinguish the opinion formed by the respondent based on the decision in **Commissioner of Income-tax v. Havells India Ltd.**[10] and submitted that the same was clearly distinguishable on facts. In order to appreciate the aforenoted submission, we deem it apposite to extract the following passages from that decision: -

> "**14.** Section 9(1)(vii)(b) contemplates a source located outside India. It is difficult to conceptualise the place/situs of the person who make payment for the export sales as the source located outside India from

[10] 2012 SCC OnLine Del 2963

which assessee earned profits. The export contracts obviously are concluded in India and the assessee's products are sent outside India under such contracts. The manufacturing activity is located in India. The source of income is created at the moment when the export contracts are concluded in India. Thereafter, the goods are exported in pursuance of the contract and the export proceeds are sent by the importer and are received in India. The importer of the assessee's products is no doubt situated outside India, but he cannot be regarded as a source of income. The receipt of the sale proceeds emanate from him from outside India. He is, therefore, only the source of the monies received. The income component of the monies or the export receipts is located or situated only in India. We are making a distinction between the source of the income and the source of the receipt of the monies. In order to fall within the second exception provided in section 9(1)(vii)(b) of the Act, the source of the income, and not the receipt, should be situated outside India. That condition is not satisfied in the present case. The Tribunal, with respect, does not appear to have examined the case from this aspect. Its conclusion that the technical services were not utilised for the assessee's business activity of production in India does not bring the assessee's case within the second exception in section 9(1)(vii)(b) of the Act. It does not bring the case under the first exception either, because in order to get the benefit of the first exception it is not sufficient for the assessee to prove that the technical services were not utilised for its business activities of production in India, but it is further necessary for the assessee to show that the technical services were utilised in a business carried on outside India. Therefore, we cannot also approve of the Tribunal's conclusion in paragraph 29 of its order to the extent it seems to suggest that the assessee satisfies the condition necessary for bringing its case under the first exception. Be that as it may, as we have already pointed out, since the source of income from the export sales cannot be said to be located or situated outside India, the case of the assessee cannot be brought under the second exception provided in the section.

15. Mr. Vohra, learned counsel for the assessee, however, contended that income arose not only from the manufacturing activity but also arose because of the sales of the products and if necessary a bifurcation of the income should be made on this basis and that portion of the income which is attributable to the export sales should qualify for the second exception. This argument is only a limb of the main contention that the income arises from the export sales and the source of the income is located outside India. We have already expressed our difficulty in accepting that argument. It is true that the profits arise both from the manufacturing activity and from the sale. There are several authorities dealing with this question in the context of cases where an assessee had its manufacturing facility in British India but sold the goods outside British India. In such cases, it has been held that the profits arose both from manufacture and the sales

and that part of the profit which arises from sales outside British India would be exempt from tax: See Anglo-French Textiles Co. Ltd. v. CIT (No. 2) [1953] 23 ITR 101 (SC) and CIT v. Ahmedbhai Umarbhai and Co. [1950] 18 ITR 472 (SC). But these cases are not of any assistance to the assessee in the present case since the contention here is that the source of income is the export sales and the export sales are located outside India.

16. For these reasons we are unable to hold that the assessees case falls under the second exception provided in section 9(1)(vii)(b) of the Act. In other words, we are unable to accept that the fees for technical services were paid by the assessee to the US company for the purpose of making or earning any income from any source outside India.

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27. It is well settled that expenditure incurred in connection with the issue of debentures or obtaining loan is revenue expenditure. Reference in this connection may be made to the leading judgment of the Supreme Court in India Cements Ltd. v. CIT (1966) 60 ITR 52 (SC). The question before us, however, is whether it is a debenture issue or an issue of share capital involving the strengthening of the capital base of the company. Though it prima facie appears that there are sufficient facts to indicate that what was contemplated was an issue of shares to the Mauritius company under the investor agreement which would result in strengthening of the assessee's capital base, having regard to the judgments cited on behalf of the assessee, in which it has been held that despite indications to the effect that the debentures are to be converted in the near future into equity shares, the expenditure incurred should be allowed as revenue expenditure on the basis of the factual position obtaining at the time of the debenture issue, we are not inclined to take a different view. The following cases have been cited on behalf of the assessee in support of the view that even in such a situation the expenditure is allowable as revenue expenditure:

(i) CIT v. East India Hotels Ltd. (2001) 252 ITR 860 (Cal) ;

(ii) CIT v. ITC Hotels Ltd. (2011) 334 ITR 109 (Karn) ;

(iii) CIT v. South India Corporation (Agencies) Ltd. [2007] 290 ITR 217 (Mad) ; and

(iv) CIT v. First Leasing Co. of India Ltd. (2008) 304 ITR 67 (Mad).

28. In addition to the above judgments, we also have the judgment of the Rajasthan High Court CIT v. Secure Meters Ltd. (2010) 321 ITR 611 (Raj) against which the special leave petition filed by the Revenue was dismissed. Having regard to the predominant view taken in the above judgments, in which the judgment of the Supreme Court in India Cements Ltd. (1966) 60 ITR 52 (SC) has been

> noticed, we are inclined to uphold the view taken by the Tribunal that the expenditure is revenue in nature. Accordingly, we answer the substantial question of law in favour of the assessee and against the Revenue."

25. Mr. Vohra lastly placed reliance on the decision rendered by the Gujarat High Court in **Multibase India Limited v. Income Tax Officer & 1**[11] and where the powers of the CBDT in the context of Circular 7/2007 came to be lucidly explained. Mr. Vohra principally relied upon the following passages from that decision:

> "**8.** Quite apart from the fact whether the authority itself under the scheme had power to condone the delay, section 119 of the Act clearly empowers the CBDT to do so. Sub-section (1) of section 119 gives a power to the CBDT to issue such orders and instructions and directions to the income tax authorities as it may deem fit for proper administration of the Act and the authorities would observe and follow such orders and instructions of the Board. Sub-section (2) of section 119 further provides inter-alia that without prejudice to the generality of the provisions contained in sub-section (1), the Board may, if it considers it necessary or expedient so to do for avoiding genuine hardships by general or special orders authorizing the income tax authority or the Commissioner (Appeals) to admit an application or claim for any exemption, deduction, refund or any other relief under the Act after the expiry of period prescribed under the Act by or under the Act for making such application or claim and deal with the same on merits in accordance with law.
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> **9.** Thus, CBDT undoubtedly has powers to condone the delay even if we assume the Commissioner does not have such powers. We would have ordinarily requested the CBDT to examine the issue and consider exercising such powers on the petition already filed by the petitioner. However, in the present case, the dispute is lingering since quite some time. In any case, the delay is not gross and the repercussion in law is not widespread. We may recall the last date for filing refund claim under the scheme was 31.03.2008. The petitioner upon coming to realize that excess deduction has been made and deposited with the Government, approached the appropriate authority under letter dated 15.12.2008.
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> **10.** Under the circumstances, we propose to condone the delay here itself and then require the competent authority before whom the petitioner's application for refund is pending to decide the same on merits. We order accordingly. The competent authority shall

[11] 2018 SCC OnLine Guj 336

consider the petitioner's application for refund"

26. Our attention was then drawn to the significant observations which appear in the decision of the Supreme Court in **Commissioner of Income Tax, Bhopal v. Shelly Products and Another**[12]:-

> "**33.** Having considered the authorities on the subject, we find ourselves in agreement with the view of the Gujarat High Court in Saurashtra Cement and Chemical Industries Ltd. The question that falls for our consideration in these appeals is whether on the failure or inability of the authorities to frame a regular assessment after the earlier assessment is set aside or nullified, the tax deposited by an assessee by way of advance tax or self-assessment tax, or tax deducted at source is liable to be refunded to the assessee, since its retention by the Revenue would result in breach of Article 265 of the Constitution which prohibits the levy or collection of any tax except by authority of law. The Revenue does not dispute the position that if an assessment is framed, which is later nullified in appeal or revision or other proceedings, any amount paid by way of income tax pursuant to the order of assessment, over and above the advance tax and self-assessment tax is undoubtedly refundable under Section 240 of the Act. The only dispute is with regard to the refund of the advance tax and self-assessment tax which is paid by the assessee on his own assessment of his liability and is based on the return of income filed by him. According to the Revenue, the tax so paid represents the admitted liability of the assessee, and failure or inability to frame another assessment after the earlier assessment is set aside or nullified in appropriate proceedings, does not entitle the assessee to claim refund because to this extent the assessee has admitted his liability to pay tax in accordance with law. The tax liability is computed on the basis of the relevant Finance Act laying down the rate or rates at which the tax is payable and provides for other matters relevant to the computation of tax. Thus the tax is required to be paid in advance by the assessee, even before assessment is made, and he himself is required to compute his liability having regard to the rates and exemptions applicable. Thus, both the levy and collection of tax is in accordance with law.
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> 34. We find considerable force in the submission of the Revenue and it must be upheld. We have earlier noticed the scheme of the Act. Section 4 of the Act creates the charge and provides inter alia for payment of tax in advance or deduction of tax at source. The Act provides for the manner in which advance tax is to be paid and penalises any assessee who makes a default or delays payment thereof. Similarly the deduction of tax at source is also provided for

[12] (2003) 5 SCC 461

in the Act and failure to comply with the provisions attracts the penal provisions against the person responsible for making the payment. It is, therefore, quite apparent that the Act itself provides for payment of tax in this manner by the assessee. The Act also enjoins upon the assessee the duty to file a return of income disclosing his true income. On the basis of the income so disclosed, the assessee is required to make a self-assessment and to compute the tax payable on such income and to pay the same in the manner provided by the Act. Thus the filing of return and the payment of tax thereon computed at the prescribed rates amounts to an admission of tax liability which the assessee admits to have incurred in accordance with the provisions of the Finance Act and the Income Tax Act. Both the quantum of tax payable and its mode of recovery are authorized by law. The liability to pay income tax chargeable under Section 4(1) of the Act thus, does not depend on the assessment being made. As soon as the Finance Act prescribes the rate or rates for any assessment year, the liability to pay the tax arises. The assessee is himself required to compute his total income and pay the income tax thereon which involves a process of self-assessment. Since all this is done under authority of law, there is no scope for contending that Article 265 is violated.

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36. We cannot lose sight of the fact that the failure or inability of the Revenue to frame a fresh assessment should not place the assessee in a more disadvantageous position than in what he would have been if a fresh assessment was made. In a case where an assessee chooses to deposit by way of abundant caution advance tax or self- assessment tax which is in excess of his liability on the basis of return furnished or there is any arithmetical error or inaccuracy, it is open to him to claim refund of the excess tax paid in the course of assessment proceeding. He can certainly make such a claim also before the authority concerned calculating the refund. Similarly, if he has by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of income tax, or is not income within the contemplation of law, he may likewise bring this to the notice of the Assessing Authority, which if satisfied, may grant him relief and refund the tax paid in excess, if any. Such matters can be brought to the notice of the authority concerned in a case when refund is due and payable, and the authority concerned, on being satisfied, shall grant appropriate relief. In cases governed by Section 240 of the Act, an obligation is cast upon the Revenue to refund the amount to the assessee without his having to make any claim in that behalf. In appropriate cases therefore, it is open to the assessee to bring facts to the notice of the authority concerned on the basis of the return furnished, which may have a bearing on the quantum of the refund, such as those the assessee could have urged under Section 237 of the Act. The authority concerned, for the

limited purpose of calculating the amount to be refunded under Section 240 of the Act, may take all such facts into consideration and calculate the amount to be refunded. So viewed, an assessee will not be placed in a more disadvantageous position than what he would have been, had an assessment been made in accordance with law.

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40. The respondents contend that the circular of the Board is binding upon the authorities of the Income Tax Department and, therefore, so far as the Income Tax Authorities are concerned, they must give to the amendment brought about in Section 240 only prospective operation.

41. We find that para 13.2 of the circular does not advance the case of the respondents. The circular only states that some of the judicial pronouncements did not permit a retention of even the tax due on the basis of the returned income and directed the refund of tax deducted at source or advance tax. To overcome this difficulty and to make the position clear, the proviso to Section 240 was inserted. A plain reading of the circular also indicates that the Board also took the view that the amendment was clarificatory and that it had become necessary to get over the difficulties posed by the judicial pronouncements directing refund of the entire tax including the advance tax and tax deducted at source, which were payable on the basis of income declared in the return by the assessee himself. It is, therefore, not necessary for us to consider the larger question as to the extent to which such circulars are binding upon the Department. In any event, as submitted by counsel for the appellant, the relevant part of the circular contains only a statement of fact. There is no instruction, direction or order to the authorities to act in a particular manner. As rightly submitted by him, the statutory provision has to be examined for its true effect and the circular, in the instant case, is not relevant."

27. Mr. Vohra then drew our attention to a judgment rendered by this Court in **Vijay Gupta v. Commissioner of Income-tax and Another**[13] and where we had laid emphasis on an assessee not being liable to be denied a refund in respect of taxes erroneously deposited or mistakenly paid. It would be appropriate to reproduce the following passages from *Vijay Gupta* hereunder:

"**35.** From the various judicial pronouncements, it is settled that the

[13] 2016 SCC OnLine Del 1961

powers conferred under section 264 of the Act are very wide. The Commissioner is bound to apply his mind to the question whether the petitioner was taxable on that income. Since section 264 uses the expression "any order", it would imply that the section does not limit the power to correct errors committed by the subordinate authorities but could even be exercised where errors are committed by assessees. It would even cover situations where the assessee because of an error has not put forth a legitimate claim at the time of filing the return and the error is subsequently discovered and is raised for the first time in an application under section 264.

36. An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income-tax Act. There is nothing in section 264, which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessee detracts mistakes because of which he was over-assessed after the assessment was completed. Once it is found that there was a mistake in making an assessment, the Commissioner had power to correct it under section 264(1). When the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. It is settled proposition of law that no tax can be levied or recovered without authority of law. Article 265 of the Constitution of India and section 114 of the State Constitution imposes an embargo on imposition and collection of tax if the same is without authority of law.

37. The Commissioner further erred in rejecting the application under section 264 holding that intimation under section 143(1) could not be regarded as an order and was thus not amenable to revisionary jurisdiction under section 264 of the Act. The Intimation under section 143(1) is regarded as an order for the purposes of section 264 of the Act*. He failed to appreciate that the petitioner was not only impugning the intimation under section 143(1) but also the rejection of the application under section 154 of the Act.

38. In the present case, as per the petitioner, in his return of income, he has erroneously offered to tax gains arising on sale of shares as short-term capital gains instead of same being long-term capital gains exempt from tax. Subsequently, the petitioner on January 14, 2011 filed the application under section 154 of the Act. The Assessing Officer on February 21, 2011 partly rectified the intimation and computed the tax on capital gains at 10 per cent. as against 30 per cent. computed in the intimation issued under section 143(1) of the Act. The Assessing Officer, however refused to accept the application under section 154 filed by the petitioner. When the Assessing Officer could rectify the intimation on February 21, 2011, he could also consider the prayer of the petitioner made in the rectification application under section 154 of the Act, which was already pending before him on that date.

> **39.** When the Commissioner was called upon to examine the revision application under section 264 of the Act, all the relevant material was already available on the record of the Assessing Officer. The Commissioner instead of merely examining whether the intimation was correct based on the material then available should have examined the material in the light of the Circular No. 14(XL-35) of 1955, dated April 11, 1955 and article 265 of the Constitution of India. The Commissioner has erred in not doing so and in failing to exercise the jurisdiction vested in him on mere technical grounds."

28. Proceeding then to explain the meaning liable to be ascribed to the expression "*for the purposes of business*" as it appears in Section 9(1)(v), Mr. Vohra submitted that the respondent has grossly erred in seeking to perceive a distinction which the law would countenance in respect of investments made by an entity in itself and those pertaining to related or sister concerns. Mr. Vohra submitted that the Supreme Court has consistently held that the expression "*for the purposes of business*" as occurring in the Act is liable to be answered on the anvil of "commercial expediency" and thus recognizing the indelible interest that a holding entity may have in a subsidiary. Our attention was drawn to the lucid enunciation of the legal position in this respect which appears in **S.A. Builders Ltd. v. Commissioner of Income Tax (Appeals) Chandigarh and Another**[14]:-

> "**20.** We have considered the submission of the respective parties. The question involved in this case is only about the allowability of the interest on borrowed funds and hence we are dealing only with that question. In our opinion, the approach of the High Court as well as the authorities below on the aforesaid question was not correct.
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> **21.** In this connection we may refer to Section 36(l)(iii) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") which states that "the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession" has to be allowed as a deduction in computing the income tax under Section 28 of the Act.

[14] (2007) 1 SCC 781

22. In *Madhav Prasad Jatia v. CIT* this Court held that the expression "for the purpose of business" occurring under the provision is wider in scope than the expression "for the purpose of earning income, profits or gains", and this has been the consistent view of this Court.

23. In our opinion, the High Court in the impugned judgment, as well as the Tribunal and the Income Tax Authorities have approached the matter from an erroneous angle. In the present case, the assessee borrowed the fund from the bank and lent some of it to its sister concern (a subsidiary) on interest-free loan. The test, in our opinion, in such a case is really whether this was done as a measure of commercial expediency.

24. In our opinion, the decisions relating to Section 37 of the Act will also be applicable to Section 36(l)(iii) because in Section 37 also the expression used is "for the purpose of business". It has been consistently held in decisions relating to Section 37 that the expression "for the purpose of business" includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby.

25. Thus in *Atherton v. British Insulated & Helsby Cables Ltd.* it was held by the House of Lords that in order to claim a deduction, it is enough to show that the money is expended, not of necessity and with a view to direct and immediate benefit, but voluntarily and on grounds of commercial expediency and in order to indirectly facilitate the carrying on of the business. The above test in *Atherton case* has been approved by this Court in several decisions e.g. *Eastern Investments Ltd. v. CIT*, *CIT v. Chandulal Keshavlal & Co.*, etc.

26. In our opinion, the High Court as well as the Tribunal and other Income Tax Authorities should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the High Court and other authorities should have enquired as to whether the interest-free loan was given to the sister company (which is a subsidiary of the assessee) as a measure of commercial expediency, and if it was, it should have been allowed.

27. The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.

28. No doubt, as held in *Madhav Prasad Jatia v. CIT* if the borrowed amount was donated for some sentimental or personal reasons and not on the ground of commercial expediency, the interest thereon could not have been allowed under Section 36(l)(iii) of the Act. In *Madhav Prasad case* the borrowed amount was donated to a college

with a view to commemorate the memory of the assessee's deceased husband after whom the college was to be named. It was held by this Court that the interest on the borrowed fund in such a case could not be allowed, as it could not be said that it was for commercial expediency.

29. Thus, the ratio of *Madhav Prasad Jatia case* is that the borrowed fund advanced to a third party should be for commercial expediency if it is sought to be allowed under Section 36(l)(iii) of the Act. a

30. In the present case, neither the High Court nor the Tribunal nor other authorities have examined whether the amount advanced to the sister concern was by way of commercial expediency.

31. It has been repeatedly held by this Court that the expression "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits" vide *CIT v. Malayalam Plantations Ltd. 5, CIT v. Birla Cotton Spg. & Wvg. Mills Ltd*., etc.

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36. We agree with the view taken by the Delhi High Court in *CIT v. Dalmia Cement (B) Ltd.* that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximise its profit. The Income Tax Authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own viewpoint but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

37. We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the Directors of the sister concern utilise the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister concern for commercial expediency in many other circumstances (which need not be enumerated here). However, it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of

interest on its borrowed loans."

29. As is evident from the aforesaid extracts, the Supreme Court while propounding the test of commercial expediency had unambiguously held that although the borrowed amount may not have been utilized by the assessee in its own business and may have been advanced as an interest free loan to a sister concern, the same would clearly not be determinative since what would be significant would be whether that amount as offered to the sister concern was as a measure of commercial expediency.

30. It is this view as expressed in *SA Builders* which has been consistently followed by the Supreme Court as well as various High Courts including our own. In **Hero Cycles (Private) Limited v. Commissioner of Income Tax (Central), Ludhiana**[15]**,** Mr. Vohra submitted, the Supreme Court, while reiterating the foundational principles propounded by the Supreme Court in *SA Builders* had held as under:-

> "**11.** Insofar as loans to the sister concern/subsidiary company are concerned, the law in this behalf is recapitulated by this Court in S.A. Builders Ltd. v. CIT3. After taking note of and discussing on the scope of commercial expediency, the Court summed up the legal position in the following manner: (SCC pp. 787-88, paras 27-31)
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> > "*27.* The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.
> >
> > *28.* No doubt, as held in *Madhav Prasad Jatia v. CIT* if the borrowed amount was donated for some sentimental or personal reasons and not on the ground of commercial expediency, the interest thereon could not have been allowed under Section 36(l)(iii) of the Act. In *Madhav*

[15] (2015) 16 SCC 359

> *Prasad case* the borrowed amount was donated to a college with a view to commemorate the memory of the assessee's deceased husband after whom the college was to be named. It was held by this Court that the interest on the borrowed fund in such a case could not be allowed, as it could not be said that it was for commercial expediency.
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> *29.* Thus, the ratio of *Madhav Prasad Jatia case* is that the borrowed fund advanced to a third party should be for commercial expediency if it is sought to be allowed under Section 36(l)(iii) of the Act. a
>
> *30.* In the present case, neither the High Court nor the Tribunal nor other authorities have examined whether the amount advanced to the sister concern was by way of commercial expediency.
>
> *31.* It has been repeatedly held by this Court that the expression "for the purpose of business" is wider in scope than the expression "for the purpose of earning profits" vide *CIT v. Malayalam Plantations Ltd. 5, CIT v. Birla Cotton Spg. & Wvg. Mills Ltd*., etc."

12. In the process, the Court also agreed that the view taken by the Delhi High Court in *CIT v. Dalmia Cement (B.) Ltd.* wherein the High Court had held that (SCC OnLine Del para 8) once it is established that there is nexus between the expenditure and the purpose of business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. It further held that no businessman can be compelled to maximise his profit and that the Income Tax Authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own viewpoint but that of a prudent businessman.

13. Applying the aforesaid ratio to the facts of this case as already noted above, it is manifest that the advance to M/s Hero Fibres Ltd. became imperative as a business expediency in view of the undertaking given to the financial institutions by the assessee to the effect that it would provide additional margin to M/s Hero Fibres Ltd. to meet the working capital for meeting any cash losses.

14. It would also be significant to mention at this stage that, subsequently, the assessee company had off-loaded its shareholding in the said M/s Hero Fibres Ltd. to various companies of Oswal Group and at that time, the assessee company not only refunded back the entire loan given to M/s Hero Fibres Ltd. by the assessee but this was refunded with interest. In the year in which the aforesaid interest was received, same was shown as income and

offered for tax.

15. Insofar as the loans to Directors are concerned, it could not be disputed by the Revenue that the assessee had a credit balance in the bank account when the said advance of Rs 34 lakhs was given. Remarkably, as observed by CIT (Appeals) in his order, the company had reserve/surplus to the tune of almost Rs 15 crores and, therefore, the assessee company could in any case, utilise those funds for giving advance to its Directors.

16. On the basis of the aforesaid discussion, the present appeal is allowed, thereby setting aside the order of the High Court and restoring that of the Income Tax Appellate Tribunal."

31. The judgment of the Supreme Court in *SA Builders* also came to be noticed by a Division Bench of our own Court in **Commissioner of Income-tax v. Tulip Star Hotels**[16]**.** We deem it apposite to reproduce the following parts of that judgment:

"**2.** A perusal of the orders passed by the Tribunal would reveal that it is noted by the Income-tax Appellate Tribunal that the assessee is in the business of owning, running and managing hotels. For the effective control of new hotels acquired by the assessee under its management it had invested in a wholly owned subsidiary, namely, M/s. Tulip Star Hospitality Services Ltd. On this ground, relying upon the judgment of the Supreme Court in the case of S. A. Builders v. CIT (Appeals) (2007) 288 ITR 1 (SC) the Tribunal has held that the assessee was entitled to the deduction of interest on the borrowed funds. The observations made bv the Supreme Court in S. A. Builders' case (2007) 288 ITR 1 (SC) were quoted by the Tribunal as under (page 10):

> "…where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans"

3. In these circumstances holding it to be expenditure incurred for business the same was allowed under section 36(1)(iii) of the Income-tax Act by the Tribunal. The Tribunal has also held that this expenditure would be allowed even under section 57(iii) of the Act. Though there may be some controversy as to whether the aforesaid expenditure is allowable under section 57(iii) of the Act or not, we have no doubt, in our mind, that the expenditure incurred under the

[16] 2011 SCC OnLine Del 5634

aforesaid circumstances would be treated as expenditure incurred for business purposes and was thus allowable under section 36 of the Act. Mr. O. S. Bajpai, learned senior advocate appearing for the assessee, has produced a copy of the memorandum of association of the assessee which, inter alia, specifies the following objects:

> "To own, purchase, construct, acquire, equip, operate, manage, conduct or in any other manner and in all its aspects deal in hotels, motels, resorts, inns, guest houses, apartments, food courts, shopping plazas, commercial complexes, casinos, entertainment parks, water parks, amusement centres, gaming centres, bowling alleys, wild life parks, restaurants, cafes, refreshment rooms, lodging houses of every kind and sort including all the conveniences, amenities and facilities adjunct thereto, in India or in any other part of the world and to act as consultants, advisors, experts, technical collaborators, valuers, surveyors, inventory analysts in all matters, pertaining to setting up of hotels, resorts, all form of lodging, touristic and leisure projects."

4. We are, thus, of the opinion that no question of law arises. These appeals are accordingly dismissed."

32. A similar view had been expressed in a previous decision rendered by this Court in **Commissioner of Income-tax v. Bharti Televenture Ltd.**[17], where after noticing the decision in *SA Builders*, our Court had observed: -

> "**11.** The hon'ble Supreme Court further held that though, the borrowed amount was not utilized by the assessee in its own business and had been advanced as an interest-free loan to the sister concern, but that is not relevant. What is relevant is whether the assessee advanced such amount to its sister concern as a measure of commercial expediency? The law laid down by the Bombay High Court in Phaltan Sugar Works Ltd. v. CIT (1995) 215 ITR 582 was overruled whereas that of the Delhi High Court in CIT v. Dalmia Cement (B.) Ltd. (2002) 254 ITR 377 was approved. It was further held that it all depends on the facts and circumstance of the case as to whether the directors of the sister concern utilized the amount advanced to it by the assessee for their personal benefit, which obviously could not be said to be an advance as a measure of commercial expediency.
>
> **12.** In the instant case, from the order of the Commissioner of Income-tax (Appeals) and that of the Income-tax Appellate Tribunal,

[17] 2011 SCC OnLine Del 10

> as reproduced above, in paragraphs 3 and 6, we note that the assessee was maintaining a bank account with mixed common funds in which all the deposits and withdrawals were made. There was no specific instance noted by the Assessing Officer in respect of any direct nexus between the borrowed fund and the said advances made to the subsidiaries. The Assessing Officer had made general observations without going into the depth of the matter and without pointing out any specific instance where an interest bearing borrowing was advanced to the subsidiaries or establishing that the borrowings made by the appellant were not for business purposes. Both appellate authorities below were of the view that the assessee had explained the sources of the advances and investments made to the subsidiaries, which could not be linked to the borrowed funds and that the advances were made out of the assessee's own capital. At the relevant time the assessee was found to be having an adequate non-interest bearing fund by way of share capital and reserves. Even otherwise, the advances were found to be made to the subsidiaries for business considerations which is nothing but the commercial expediency of the assessee. That being the factual position reflected from the record of the assessee, the onus that laid on it stood discharged.
>
> **13.** We are in entire agreement with the findings recorded by the Commissioner of Income-tax (Appeals) as also by the Income-tax Appellate Tribunal in all the three cases and do not find any ground to interfere with those findings."

33. Of equal significance is the judgment of this Court in **Principal Commissioner of Income-tax v. Reebok India Company**[18] and where the Court speaking through Sanjiv Khanna, J. [as his Lordship then was] had held that it would be wholly immaterial if a third party benefited from an expenditure incurred as long as the same was voluntarily expended and met the test of "commercial expediency". We deem it appropriate to extract the following paragraphs from the decision of the Court in *Reebok India Company*: -

> "**6.** We have examined the reasoning given by the Tribunal which is primarily factual. The factum that the loans amounting to Rs. 502.69 crores were outstanding, was undisputed. Payment of interest was also disputed. The Tribunal was of the view that the respondent-assessee had paid interest on capital borrowed for business purpose and in the absence of any allegation and finding that the respondent-

[18] 2018 SCC OnLine Del 11724

assessee had diverted unsecured loans for non-business purpose no disallowance could be made. As per section 36(1)(iii) of the Act interest paid for capital borrowed for purpose of business has to be allowed as a deduction.

7. The Supreme Court in S. A. Builders Ltd. v. CIT (Appeals) [2007] 288 ITR 1 (SC) ; (2007) 1 sec 781, had interpreted section 36(l)(iii) of the Act to observe that interest paid on capital borrowed for the purpose of business is to be allowed as a deduction in computing taxable income. The expression "for purposes of business or profession" occurring in section 36(1)(iii) of the Act is wider in scope than the expression "for the purpose of earning income, profits or gains". Accordingly, expenditure voluntarily incurred and meeting the "commercial expediency" test is to be allowed as a deduction. It is immaterial if a third party also benefits by the said expenditure. The expression "commercial expediency" is again of wide import and is satisfied once it is established that there was a connection and nexus between the interest paid claimed as expenditure and the business of the assessee. Purpose of business need not be the business of the assessee, for deduction under section 36(1)(iii) of the Act to be allowed. Further, the Revenue cannot assume the role and occupy the armchair of a businessman to decide whether expenditure was reasonable. The Revenue cannot look at the matter from its own standpoint, but opinion and decision of a businessman on "business expediency" matters. Money borrowed even when advanced to a subsidiary for some business purpose would qualify for deduction of interest. However, if the money borrowed is utilised by the assessee for personal benefit and not for business purpose, interest paid on that money would not satisfy the test of "commercial expediency". In the context of the present case the unsecured loans were not used for personal purpose. Merely because non-interest bearing advances were given to third parties, would not justify a finding that the test of "commercial expediency" was not satisfied. Interest-free advances were preferred to the parties connected with the business of the respondent-assessee. Money taken on loan was not diverted for non-business purpose. The findings of the Tribunal are in accordance with the law."

34. The last of the decisions that may merit notice is of the Bombay High Court in **Commissioner of Income Tax-7 v. Reliance Communications Infrastructure Ltd.**[19] and which too was a decision rendered in the context of investments made in wholly owned subsidiaries and whether the same could be validly claimed as a

[19] 2012 SCC OnLine Bom 472

deduction under Section 36(1)(iii). The Bombay High Court upon noticing the principles laid down by the Supreme Court in *SA Builders*, held: -

> "**11.** In *S.A. Builders*, the Assessing Officer had observed that the assessee had transferred a certain amount to its subsidiary out of a cash credit account in which there was a debit balance. The Assessing Officer found that the assessee had diverted its borrowed funds to a sister concern without charging any interest and that consequently, a proportionate part of the interest relating to that amount, out of the total interest paid by the assessee to the Bank, had to be disallowed. The CIT(A) had observed that out of the total amount advanced by the assessee to its subsidiary, only an amount of Rs. 18 lakhs had a nexus with borrowed funds and he had directed the Assessing Officer accordingly to calculate the disallowance. The Tribunal allowed the appeal by the Revenue and dismissed the appeal of the assessee. The order was confirmed by the High Court. The Supreme Court observed that the Income Tax authorities, the Tribunal as well as the High Court had approached the matter from an erroneous perspective. The Supreme Court held that where the assessee had borrowed funds from a Bank and lent some of them to a subsidiary as an interest free loan, the test to be applied is whether this was a matter of commercial expediency. The expression "commercial expediency", held the Supreme Court, is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. An expenditure, which is commercially expedient, may not be incurred under a legal obligation, but so long as it meets the requirement of commercial expediency, it has to be allowed. However, the Supreme Court held that it is not in every case that interest on borrowed loans would have to be allowed if the assessee advanced the money to a sister concern. Where the amount is advanced to a sister concern, for the personal benefit of its directors, for instance, it would not qualify to be regarded as commercial expediency. However, noted the Supreme Court, where a holding company "has a deep interest in its subsidiary advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would. ordinarily be entitled to deduction of interest on its borrowed loans." The Supreme Court accordingly set aside all the orders passed by the authorities below including the judgment of the Tribunal and of the High Court and remanded the matter for a fresh decision.
>
> **12.** In the present case, there is a finding of fact by the CIT(A) and by the Tribunal that as a matter of fact, borrowed funds were not used by the assessee for the purposes of investment in the shares of its wholly owned subsidiary Reliance Infocomm Ltd. or for making

advances to Reliance Industries Ltd. But independent of that, in view of the decision of the Supreme Court in *S.A. Builders* what is significant is as to whether the investment and the advances made were commercially expedient and for the purpose of business. In this regard, the assessee had pointed out before the CIT(A) that it is engaged in the business of providing telecommunication infrastructure which mainly consists of a Pan India Fibre Optic Network. Reliance Infocomm Ltd. is a wholly owned subsidiary of the assessee which is engaged in the business of providing telecommunication services. The assessee made investments in the equity shares of its subsidiary and claimed that this was with a view to provide integrated telecommunication services. The case of the assessee was that those investments were to ensure the utilization of the telecommunications infrastructure of the subsidiary and was a strategic investment for furthering business prospects in the area of providing telecommunication services. As regards the advance which was made by the assessee to Reliance Industries Ltd. (RIL) the assessee pointed out to the CIT (A) that it was required to import equipment under the EPCG Scheme. The obligations under the EPCG Scheme were required to be backed by bank guarantees which in turn demanded security for the issuance of guarantees. The assessee entered into an arrangement with RIL to which it advanced a sum of Rs. 476 crores against which RIL provided counter guarantees to financial institutions equivalent to three times the amount of the margin kept by the assessee with RIL

13. Now, having regard to this factual background, both the CIT(A) and the Tribunal held that the investments made in the wholly owned subsidiary and the money advanced to RIL were for furthering the business of the assessee. The findings of both the CIT(A) and of the Tribunal are consistent with the judgment of the Supreme Court in *S.A. Builders*. Where the assessee, as in the present case, has significant interest in the business of the subsidiary and utilizes even borrowed money for furthering its business connection, there is no reason or justification to make a disallowance in respect of the deduction which is otherwise available under Section 36(1)(iii). Counsel appearing on behalf of the Revenue submits that there is a distinction between an advance, which is a payment handed over to some one as a loan and an investment which is money placed into financial schemes, shares or property with the expectation of making a profit. We are unable to accept that such a distinction will have any legal consequence in so far as the entitlement of the assessee to claim a deduction under Section 36(1)(iii) is concerned. In the present case, when the assessee advanced an amount to RIL that was with a view to furthering the business of the assessee. RIL in turn was to execute counter guarantees in favour of financial institutions for the benefit of the discharge of the EPCG obligations by the assessee. That was a security for the guarantees which those institutions were required to

> execute under the EPCG Scheme. The funds which were invested in the wholly owned subsidiary were again for the purposes of the business of the assessee. There is evidently a significant interest of the assessee in the business of its subsidiary since both the assessee and the subsidiary are engaged in providing telecommunication services. Consequently, we are not inclined to interfere with the order of the Tribunal. There is a finding of fact that interest free funds borrowed are not utilised for the purposes of both the transactions. But quite apart from that, the finding is that the funds were deployed as a matter of commercial expediency and to further the business of the assessee. The latter finding is independent of whether borrowed funds were or were not utilized, for in view of the judgment of the Supreme Court held, the fact that borrowed funds were utilized for making investments or, as the case may be, for making advances would not disentitle the assessee to the deduction so long as business expediency exists."

35. Appearing for the respondent, Mr. Agrawal, learned counsel, submitted that the applications were rightly rejected since they clearly fell afoul of the limitation prescriptions as embodied in the Circulars issued by the CBDT. It was further submitted that the investments which the petitioner is stated to have made cannot possibly be construed as those made in connection with or in furtherance of its business. This, according to Mr. Agrarwal, is evident from the fact that RLL was engaged in the business of manufacturing and trading of drugs and pharmaceuticals and was not an investment company. It was Mr. Agrawal's submission that the debt taken by RLL, thus, cannot possibly be viewed as one which could be said to be for the purpose of a business which RLL was engaged in outside India. According to learned counsel, the interest payment would consequently not fall within the scope of the exclusion found in clause (b) of Section 9(1)(v).

36. Having noticed the rival submissions which were addressed, we propose to firstly deal with the challenge to Circular No. 07/2007 and in terms of which the Board had stipulated that the limitation for preferring a claim of refund would be two years from the end of the FY

in which the tax was deducted at source. In order to appreciate the nature and extent of the power which the Act envisages as being exercisable by the Board, it would be appropriate to firstly advert to Section 119 of the Act and which reads as follows:-

> "**Instructions to subordinate authorities.**
>
> **119.** (1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:
>
> **Provided** that no such orders, instructions or directions shall be issued—
>
> (a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or
> (b) so as to interfere with the discretion of the [the Joint Commissioner (Appeals) or] the exercise of his appellate functions.
> (c) so as to interfere with the discretion of the 1*** 2[Commissioner (Appeals)] in the exercise of his appellate functions.
>
> (2) Without prejudice to the generality of the foregoing power,—
>
> (a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time (whether by way of relaxation of any of the provisions of sections 3[115P, 115S, 115WD, 115WE, 115WF, 115WG, 115WH, 115WJ, 115WK,] 4[139,] 143, 144, 147, 148, 154, 155 5[, 158BFA], 6[sub-section (1A) of section 201, sections 210, 211, 234A, 234B, 234C 7[, 234E]], 8[270A,] 271 9[, 271C, 271CA] and 273 or otherwise), general or special orders in respect of 10[any class of incomes or fringe benefits] or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other income- tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in

the public interest so to do, be published and circulated in the prescribed manner for general information;

(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise 11[any income-tax authority, not being a 12*** Commissioner (Appeals)] to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law;

[(c) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement contained in any of the provisions of Chapter IV or Chapter VI-A, where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder, subject to the following conditions, namely:-

(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee; and
(ii) the assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed:

Provided that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament.]

(3) [***]"

37. Sub-section (1) of Section 119 incorporates a broad and general power which the statute confers on the CBDT to issue such instructions or directions for the benefit of Income Tax authorities as it may deem fit for the proper administration of the Act. That power is hedged by two caveats which are spelt out in the Proviso appended thereto. However, and since we are not concerned with the Proviso, we desist from rendering any further observations in that respect.

38. Sub-section (2) thereafter proceeds to broadly delineate the powers which the Board could exercise in various contingencies. The powers which are spoken of in clauses (a), (b) and (c) are obviously not

exhaustive since that provision itself is prefaced by the usage of the expression "*without prejudice to the generality of the foregoing power*". The broad power which thus stands conferred upon the Board is with respect to a proper administration of the Act.

39. However, and as we examine clauses (a), (b) and (c) of Section 119(2), the following position emerges. Clause (a) enables the Board, for the purposes of proper and efficient management of the work of assessment and collection of revenue, to issue, from time to time, such directions, instructions or guidelines that may be followed by Income Tax authorities in connection with the aforesaid. Of significance is clause (a) which envisages the Board in that context also relaxing the rigor of some of the provisions which are specified therein. Clause (b) proceeds then to enable the Board, in cases of genuine hardship and where it be considered desirable or expedient, by a general or special order to authorize any Income Tax authority to admit an application or claim for exemption, deduction, refund, or any other relief after the expiry of the period specified under the Act.

40. As is apparent from a bare reading of clause (b), that provision essentially enables the Board to expand or enlarge the period of limitation that may be applicable in respect of a claim for exemption deduction, refund or any other relief. Similar is the power which stands conferred upon the Board by virtue of clause (c). Clause (c) speaks of a power which the Board could exercise, by way of a general or special order, to relax a requirement prescribed by any of the provisions contained in Chapters IV and VI-A of the Act.

41. The trinity clauses which stand comprised in Section 119(2) are thus clearly intended to enable the Board to relax or enlarge a period

otherwise specified under the Act or to relax a requirement placed in terms thereof. The language in which Section 119 stands couched assumes significance since it is demonstrative of the statute conferring a power upon the Board to relax a prescription or enlarge a period of limitation as opposed to imposing or introducing a restriction or for that matter constricting a period within which a right may be exercised under the Act.

42. Turning then to the specific provisions pertaining to deduction of tax and claims arising therefrom, we note that Section 203, while speaking of the issuance of a certificate in evidence of tax having been deducted within time as prescribed, the aforenoted provision clearly does not spell out a particular time frame within which compliance may be effected. Those time frames are ultimately introduced under the **Income Tax Rules, 1962**[20] and are found in Rule 31 of the Rules. Similar is the position which comes to the fore from a reading of Section 200 and which now by virtue of Finance Act (No. 2) of 2024 for the first time introduces a provision in terms of which a prohibition has come to be introduced to the effect that a correction statement would not be entertained at all after the expiry of six years. The aforesaid Proviso, however, would clearly have no application to the present case having been introduced only by Finance Act (No. 2) of 2024.

43. We then turn our gaze upon Chapter XIX which deals specifically with the subject of refunds. As was noticed in the preceding parts of this decision, neither Section 237 nor Section 239, as they stand today, incorporate a limitation period within which an application for

[20] Rules

refund may be presented. Of equal import is the deletion of sub-section (2) which existed and formed part of Section 239 and which came to be omitted by virtue of Finance Act (No. 2) of 2019. It was Section 239(2) which alone had enacted time lines within which claims for refund were liable to be instituted albeit with respect to income assessable. It is in the aforesaid statutory backdrop that we would have to evaluate whether paragraph 9 of Circular 7/2007 would sustain.

44. In fairness, it may only be noted that since the aforenoted circular was issued way back in 2007, the said direction was perhaps influenced by Section 239(2). However, the question which arises for our consideration is whether the stipulations comprised in paragraph 9 would prevail notwithstanding Section 239(2) having stopped short of creating a period of limitation governing claims like the present.

45. In aid of our analysis of the impact of prescriptions of limitation in taxing statutes insofar as claims for refund are concerned, this would constitute an appropriate juncture to notice some of the relevant provisions in other fiscal statutes. Section 54 of the **Central Goods and Services Tax Act, 2017**[21]**,** which pertains to claims made for refund of tax, reads as follows: -

> "**54. Refund of tax**
>
> (1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:
>
> PROVIDED that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in [such from and] manner as may be prescribed.
>
> (2) A specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the

[21] CGST Act

United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), Consulate or Embassy of foreign countries or any other person or class of persons, as notified under section 55, entitled to a refund of tax paid by it on inward supplies of goods or services or both, may make an application for such refund, in such form and manner as may be prescribed, before the expiry of [two years] from the last day of the quarter in which such supply was received.

****

Explanation: For the purposes of this section,—

(1) "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under subsection (3).

(2) "relevant date" means—

(a) in the case of goods exported out of India where a refund of tax paid is available in respect of goods themselves or, as the case may be, the inputs or input services used in such goods,—

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India; or

(ii) if the goods are exported by land, the date on which such goods pass the frontier; or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is furnished;

[(ba) in case of zero-rated supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit where a refund of tax paid is available in respect of such supplies themselves, or as the case may be, the inputs or input services used in such supplies, the due date for furnishing of return under section 39 in respect of such supplies;]

(c) in the case of services exported out of India where a refund of tax paid is available in respect of services themselves or, as the case may be, the inputs or input services used in such services, the date of—

(i) receipt of payment in convertible foreign exchange, [or in Indian rupees wherever permitted by the Reserve Bank of

India] where the supply of services had been completed prior to the receipt of such payment; or

(ii) issue of invoice, where payment for the services had been received in advance prior to the date of issue of the invoice;

(d) in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any court, the date of communication of such judgment, decree, order or direction;

[(e) in the case of refund of unutilised input tax credit under clause (ii) of the first proviso to sub-section (3), the due date for furnishing of return under section 39 for the period in which such claim for refund arises;]

(f) in the case where tax is paid provisionally under this Act or the rules made thereunder, the date of adjustment of tax after the final assessment thereof;

(g) in the case of a person, other than the supplier, the date of receipt of goods or services or both by such person; and

(h) in any other case, the date of payment of tax"

46. A reading of sub-section (1) of Section 54 reveals that a person seeking refund of tax or interest paid is required to make an application prior to the expiry of two years from the relevant date so applicable in light of sub-section (2) to the Explanation to Section 54. The Proviso to sub-section (1) comes with the caveat that the person seeking refund would have to additionally comply with Section 49(6). In a similar vein, sub-section (2) of Section 54 also requires that applications for refund being made by entities before the expiry of two years from the last day of the quarter in which inward supplies of goods or services or both may have been received.

47. It would also be apposite in this context to note sub-sections (1) and (2) of Section 54 of the **Delhi Goods and Services Tax Act, 2017**[22] which is *pari materia* to Section 54 of the CGST Act. Furthermore, Section 20 of the **Integrated Goods and Services Tax**

[22] DGST Act

Act, 2017[23] stipulates that the provisions of the CGST Act would apply *mutatis mutandis* in relation to integrated tax as would be applicable to central tax including in respect of matters of refund as per sub-clause (xiii) to Section 20 of the said enactment.

48. Turning our attention then to Section 11B of the **Central Excise Act, 1944**[24], which pertained to claims for refund of duty and interest, it becomes apparent that sub-section (1) of the said provision statutorily engrafted a limitation period thereby requiring claims for refund of any duty of excise and any interest payments made on such duty to be made prior to the expiry of one year from the relevant date as applicable in terms of sub-clause (2) of the Explanation to that provision.

49. The relevant parts of Section 11B are reproduced hereinbelow:-

> "**11B. Claim for refund of [duty and interest, if any, paid on such duty].**—
>
> (1) Any person claiming refund of any [duty of excise and interest, if any, paid on such duty] may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] before the expiry of [one year] [from the relevant date] [in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:
>
> Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) as substituted by that Act:]
>
> [Provided further that] the limitation of [one year] shall not apply where any [duty and interest, if any, paid on such duty] has been

[23] IGST Act
[24] Central Excise Act

paid under protest.

[* * *]

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[*Explanation*.— For the purposes of this section,—

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means,—

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,—

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

[(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]

[(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of Section 5-A, the date of issue of such order;]

[(eb) in case where duty of excise is paid provisionally

> under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;]
>
> [(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;]
>
> (f) in any other case, the date of payment of duty.]"

50. As is manifest from the above, the aforementioned statutes mandate that refund applications must be made within the timeline so prescribed, failing which such claims would be rendered time barred. This is liable to be viewed and appreciated in juxtaposition with the provisions of the Income Tax Act which does not envisage any limitation period within which such claims may be preferred and leads us to the inevitable conclusion that the Act did not seek to place delineated fetters on the time period within which an assessee may file an application for refund. This, of course, subject to what was postulated by Section 239(2) as it stood at the relevant time.

51. More significant is the omission of sub-section (2) of Section 239 which sought to invalidate refund claims made beyond the time periods specified in that provision and thus demonstrative of the legislative intent to eliminate strictures of limitation periods within which an assessee may prefer refund applications in the context of income tax proceedings. This we observe, notwithstanding the principal question which arises before us and stands restricted to whether the CBDT could have introduced such a disqualification

52. The Supreme Court in its decision of **Union of India and others v. Rajeev Bansal (and other appeals)**[25], in the context of reassessment notices has penned the following illuminating passages elucidating the manner in which taxation statutes ought to be interpreted:-

[25] 2024 SCC OnLine SC 2693

> **"34.** Taxing statutes are interpreted by following the principles of strict interpretation. While interpreting a taxing statute, there is no room for any intendment (*Cape Brandy Syndicate v. Inland Revenue Commissioners*). A taxing statute must be construed by having regard to the strict letter of the law (*A. V. Fernandez v. State of Kerala*). In a taxing statute, it is not possible to assume any intention or governing purpose more than what is stated in the plain language. A taxing statute can successfully impose liability on persons or property only if it frames appropriate provisions to that end. The courts cannot plug in a loophole in a taxing statute "by a strained construction in reference to the supposed intention of the Legislature." (**Murarila/ Mahabir Prasad v. B.R. Vad*) Further, the considerations of equity or justice are not relevant in interpreting a taxing statute. (*ITO v. T.S. Devinath Nada*)
>
> **35.** It is a well-accepted rule of construction that in situations where the interpretation of taxing legislation is ambiguous or leads to two possible interpretations, the interpretation most beneficial to the subject of the tax should be adopted (*Central India Spinning and Weaving and Manufacturing Company Ltd. v. Municipal Committee; CIT v. Shahzada Nand and Sons; ITO v. T.S. Devinath Nada/N; Valtas Ltd. v. State of Gujarat*). It would not be an unjust result if a taxpayer escapes the tax net on account of the legislature's failure to express itself clearly. (*CIT v. Jargaon Electric Supply Co. Ltd.; State of West Bena/ v. Kesoram Industries Ltd.*) "

53. To summarise, sub-section (2) to Section 239 was a provision ascribing a period of limitation for instituting claims for refund. The same came to be omitted with effect from 01 September 2019. This legislative act is demonstrative of the clear legislative intent to avoid prescribing strict limitation periods within which refund applications may be preferred and may be considered as having been validly instituted. This more so in light of the stand of the CBDT itself which in its numerous circulars spoke of tax erroneously deducted not being liable to be viewed as a legitimate collection of an impost sanctioned by law.

54. On a more fundamental plane, it becomes pertinent to note that the prescription of a period of limitation is essentially legislative in character. The interplay between a prescription of limitation and its

impact on rights was lucidly explained by the Supreme Court in **M/s Bharat Barrel and Drum MFG. Co. Ltd. And Another v. The Employees State Insurance Corporation**[26]. That judgment was concerned with a limitation prescription which came to be introduced by the State Government in Rule 17 of the **Employees' State Insurance (Central) Rules, 1950**[27]. The question which arose for consideration was whether the same could be recognized as being in valid exercise of the rule making power which stood conferred upon the Government by Section 96 of the **Employees' State Insurance Act, 1948**[28]. The Supreme Court firstly took into consideration the language of Section 96 and which enabled the State Government to prescribe the procedure to be followed in proceedings before court. Proceeding then to elucidate the basic attributes of a law of limitation, the Supreme Court pertinently observed:-

> "**7.** The manner of this approach may be open to the criticism of having over simplified the distinction, but nonetheless this will enable us to grasp the essential requisites of each of the concepts which at any rate "has been found to be workable concept to point out the real and valid difference between the rules in which stability is of prime importance and those in which flexibility is a more important value. Keeping these basic assumptions in view it will be appropriate to examine whether the topic of limitation belongs to the Branch of procedural law or is outside it. If it is a part of the procedure whether the entire topic is covered by it or only a part of it and if so what part of it and the tests for ascertaining them. The law of limitation appertains to remedies because the rule is that claims in respect of rights cannot be entertained if not commenced within the time prescribed by the statute in respect of that right. Apart from Legislative action prescribing the time, there is no period of limitation recognised under the general law and therefore any time fixed by the statute is necessarily to be arbitrary. A statute prescribing limitation however does not confer a right of action no speaking generally does not confer on a person a right to relief which has been barred by efflux of time prescribed by the law. The

[26] [(1971) 2 SCC 360]
[27] Employees' Rules
[28] Employees Act

necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting them in a Court of law. The principle which forms the basis of this rule is expressed in the maximum vigilantibus, non dermientibus, jura subveniunt (the laws give help to those who are watchful and Rot to those who sleep). Therefore the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims. While this is so there are two aspects of the statutes of limitation the one concerns the extinguishment of the right if a claim or action is not commenced with a particular time and the other merely bare the claim without affecting the right which tither remains merely as a moral obligation or can be availed of to furnish the consideration for a fresh enforceable obligation. Where a statute prescribing the limitation extinguishes the right, it affects substantive rights while that which purely pertains to the commencement of action without touching the right is said to be procedural. According to Salmond the law of procedure is that branch of the law of actions which governs the process of litigation, both Civil and Criminal. "All 'the residue" he says "is substantive law, and relation not to the process of litigation but to its purposes and subject-matter"……It does not therefore appear that the statement that substantive law determines rights and procedural law deals with remedies is wholly valid, for neither the entire law of remedies belongs to procedure nor are rights merely confined to substantive law, because as already noticed rights are hidden even in the interstices of procedure". There is therefore no clear-cut division between the two.

8. A large number of decisions have been referred before us both English and Indian some of antiquity, in support of the proposition that the law prescribing the time within which an action can be commenced is purely procedural and therefore when a statute empowers the Government to make rules in respect of procedure it confers upon it also the right to prescribe limitation…….

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10. ……..The present tendency is that where a question of limitation arises, the distinction between so-called substantive and procedural statutes of limitation may not prove ·to be a determining factor but what has to be considered is whether the statute extinguishes merely the remedy or extinguishes the substantive right as well as the remedy. Instead of generalising on a principal the safest course would be to examine each case on its own facts and circumstances and determine for instance whether it affects

substantive rights and extinguishes them or whether it merely concerns a procedural rule only dealing with remedies, or whether the intendment to prescribe limitation is discernible from the scheme of the Act or is inconsistent with the rule-making power, etc.

11. Apart from the implications inherent in the term procedure appearing in Section 96(l)(b) the power to prescribe by rules any matter falling within the ambit of the term must be the "procedure to be followed in proceedings before such Court". The word 'in', emphasised by us, furnishes a clue to the controversy that the procedure must be in relation to proceedings in Court after it has taken seisen of the matter, which obviously it take when moved by an application presented before it. If such be the meaning the application by which the Court is asked to adjudicate on a matter covered by Section 75(2) is outside the scope of the rule-making power conferred on the Government.

12. In the *East and West Steamship Company, George Town, Madras v. S. K. Ramalingam Chettiar*, one of the questions that was considered by this Court was whether the clause that provides for a suit to be brought within one year after the delivery of the goods or the date when the goods should have been delivered, only prescribes a rule of limitation or does it also provide for the extinction of the right to compensation after certain period of time. It was observed by Das Gupta, J., at page 836:

13. What we have to consider is, apart from the question that the Government on the terms of Section 96(1)(b) is not empowered to fix periods of limitation for filing applications under Section 75(2) to move the Court, whether on an examination of the Scheme of the Act, Rule 17 affects substantive rights by extinguishing the claim of the Corporation to enforce the liability for contributions payable by the appellant."

55. It ultimately came to record the following conclusions:-

"**14.** ……..…. It is clear therefore that the right of the Corporation to recover these amounts by coercive process is not restricted by any limitation nor could the Government by recourse to the rule-making power prescribe a period in the teeth of Section 68. What Section 75(2) is empowering is not necessarily the recovery of the amounts due to the .Corporation from the employer by recourse to the Insurance Court but also the settlement of the dispute of a claim by the Corporation against the principal employer which implies that the principal employer also can, where he disputes the claim made and action is proposed to be taken against him by the Corporation under Section 68 to recover the amounts said to be due from him. While this is so there is also no impediment for the Corporation itself to apply to the Insurance Court to determine a dispute against an employer where it is satisfied that such a dispute

> exists……Be that as it may in our view the omission to provide a period of limitation in any of these provisions while providing for a limitation of a claim by an employee for the payment of any benefit under the regulations, shows clearly that the legislature did not intend to fetter the claim under Section 75(2)(d). It appears to us that where the Legislature clearly intends to provide specifically the period of limitation in respect of claims arising thereunder it cannot be considered to have left such matters in respect of claims under some similar provisions to be provided for by the rules to be made by the Government under its delegated powers to prescribe the procedure to be followed in proceedings before such Court. What is sought to be conferred is the power to make rules for regulating the procedure before the Insurance Court after an application has been .tiled and when it is seized of the matter. That apart the nature of the rule · bars the claim itself and extinguishes the right which is not within the pale of procedure. Rule 17 is of such a nature and is similar in terms of Section 80. There is no gain-saying the fact that if an employee does not tile an application before the Insurance Court within 12 months after the claim has become due or he is unable to satisfy the Insurance Court that there was a reasonable excuse for him in not doing so, his right to receive payment of any benefit conferred by the Act is lost……..……... By this amendment the claim under clause (d), as well as the one under clause (f) of sub-section {2) of Section 75, which provide for the adjudication of a claim by the Insurance Court for the recovery of any benefit admissible under the Act for which a separate limitation was fixed under Section 80, is now to be made within three years from the date of the accrual of the cause of action. This amendment also confirms the view taken by this Court that the power under Section 96(l)(b) does not empower the Government to prescribe by rules a period of limitation for claims under Section 75. In the result this appeal is dismissed with costs."

56. Speaking on the law of limitation as would generally apply, the Supreme Court explained the operation of such a law as pertaining to claims which could not be entertained if not commenced within the time prescribed. It was further pertinently observed that unless the statute itself were to fix a period within which an action may be initiated or instituted, there is no general law which governs the issue of limitation. It proceeded further to observe that a statute of limitation intends to compel a person to exercise a right or institute an action within a reasonable time and thus discourage stale claims.

57. Speaking of the two basic facets of a rule of limitation, the Supreme Court explained that while one is concerned with the extinguishment of a right to institute a claim or commence an action, the other merely bars the remedy without impacting or affecting the right itself. It was thus held that where a statute prescribes a limitation and which results in the extinguishment of a right itself, it is clearly substantive in character and not merely procedural. However, it was also pertinently observed that the distinction between substantive and procedural aspects of a statute of limitation may not really be determinative and it would thus be prudent to determine the same in individual instances by pausing the question whether it was intended to affect a substantive right in the sense of extinguishing the same or whether it was intended to be merely procedural and confined to impacting remedies that may be pursued. Proceeding further to rule upon the validity of Rule 17, it took note of the fact that the principal enactment had not adopted any provision of limitation insofar as claims were concerned. It thus held that Rule 17 was clearly ultra vires Section 96.

58. Tested on the aforesaid principles, it becomes apparent that paragraph 9 of the Circular No. 07/2007 essentially results in deprivation of a right to petition for refund and thus seeks to extinguish the claim itself. This the CBDT has chosen to do, not in amplification of a provision contained in the Act, but in purported exercise of powers conferred by Section 119. That provision, as was noticed hereinabove, is clearly couched in permissive language and cannot possibly be construed as empowering the Board to extinguish a right or the remedy which otherwise existed in the statute.

59. The family of provisions which deal with claims of refund, except to the limited extent of what is provided in Rule 31A of the Rules and which pertains to statement of deduction of tax under sub-section (3) to Section 200, do not even attempt to disentitle an assessee from petitioning for refund after the expiry of a particular period of time. In fact, and to the contrary, the various provisions comprised in Chapter XIX of the Act desist from introducing a prescription of limitation. It becomes pertinent to note that even Rule 41 which pertains to refund claims made under Chapter XIX of the Act does not prescribe any period of limitation.

60. While we had referred to the time when Circular No. 07/2007 came to be issued and when sub-section (2) of Section 239 had existed on the statute book, we find that the prescription of two years would not sustain even when viewed in the backdrop of that provision as it existed at the relevant time. The outer limit which came to be constructed by CBDT could have at best been shored by Section 119. However and was noticed in the preceding parts of this decision, the same is confined to relaxation, incorporating a power to condone or to relieve a person from the rigours of the statute. That provision surely cannot be construed as contemplating the CBDT extinguishing a claim or a right.

61. We are thus of the firm opinion that given the scope of the power conferred upon the Board, it is evident that a circular made in exercise of powers conferred by Section 119 could have neither curtailed nor erased a right to petition for refund or extinguish a claim for refund of tax erroneously deposited and that too by prescribing periods of limitation when none existed in the statute.

62. Our Court, as far back as 1998 in the decision of **Dr. K.**

Jagadeesan v. Central Board of Direct Taxes and Others[29], while examining the powers of the Board under Section 119, in the context of Section 279(2), had categorically observed that the CBDT does not have the power to issue instructions, circulars or orders which contravene provisions of the statute. This becomes apparent from the following observations rendered therein:-

> "**10.** The background in which the Explanation above said came to be appended to section 279 is not clear. However, the very language employed in Explanation reveals that the amendment is clarificatory and declaratory in nature. Some doubts must have been expressed if the power of the Board to issue orders, instructions or direction under the Act (obviously referable to section 119(1) of the Act), included the power to issue instructions or directions for the proper composition of offences under section 279. The doubts have been removed by declaring that such power was so included and thereby setting at rest the doubts, if any. The Explanation is thus in the nature of a proviso to section 279(2) of the Act as held in Y.P. Chawla v. M.P. Tiwari, [1992] 195 ITR 607 (SC), and has also to be read as clarificatory and declaratory of the scope of power of the Board emanating from section 119.
>
> **11.** Section 119, as it stands, contemplates orders, instructions and directions to the income-tax authorities being issued by the Board for the proper administration of the Act. They are the policy decisions and thus of general nature which are covered by section 119(1). The proviso makes it clear that the Board does not have power to circumvent the statutory powers or discretion of an income-tax authority by reference to a particular assessment or a particular case. The only cases in which the orders touching any individual case can be issued are provided by clauses (b) and (c) of sub-section (2) [as it now stands]. They are for avoiding genuine hardship occasioned by rigourous application of the rule of limitation in specified matters and for avoiding genuine hardship in any case, by relaxing any requirement contained in any of the provisions of Chapter IV or VIA relating to deduction claimed thereunder. The categories of such "any case" do not cover the cases of prosecution and composition.
>
> **12.** The Explanation to section 279 read with section 119 does not empower the Board to issue order, instruction or direction to compound in an individual case. The power can be exercised only for the purpose of laying down policy or general guidelines.

[29] 1998 SCC OnLine Del 996

> **13.** We are, therefore, of the opinion that the petitioner's effort at directly approaching the Central Board of Direct Taxes for issuance of order, instruction or direction so as to compound his prosecution was entirely misconceived. No fault can be found with the Board having turned down the petitioner's such attempt. The petitioner would have been better advised to approach the Chief Commissioner or the Director-General as contemplated by section 279(2). Any communication between any of them and the Board would have been an internal matter between the two. The petitioner is still at liberty to approach the Chief Commissioner or the Director-General which he does not appear to have done so far. Learned counsel for the petitioner submitted that once the Board has turned down his petition under section 279, howsoever misconceived it might have been, no income-tax authority subordinate to the Board would have power to entertain the petitioner's prayer for compounding in face of the order of the Central Board of Direct Taxes and, therefore, the court may at least quash the order of the Central Board of Direct Taxes as uncalled for. The contention cannot be entertained even for a moment for two reasons. Firstly, the petitioner has to thank himself for having invited the pronouncement of the Central Board of Direct Taxes. Secondly, the cause of action to the petitioner has arisen only at Chennai. If the Chief Commissioner or the Director-General decline the petitioner's prayer for compounding on the ground of the order of the Central Board of Direct Taxes, then he may file an appropriate writ petition in Chennai and therein lay a challenge to the order of the Central Board of Direct Taxes as well. However we express no opinion thereon."

63. We also take note of a judgement rendered by a Division Bench of this Court in **Vikram Singh v. Union of India and Others**[30] which dealt with a challenge to a CBDT Circular dated 23 December 2014 issuing guidelines for the compounding of offences under the Direct Taxes Law and Practices, 2015. The petitioner therein, in addition to challenging the compounding charges levied upon it and the rejection of its compounding application, also sought the quashing of the aforenoted Circular on the grounds of clause 11(v) of the said Circular stating that compounding applications may be rejected if the compounding charge is not deposited within the time frame stipulated

[30] 2017 SCC OnLine Del 7826

therein, despite the same not being envisaged under Section 279(2) of the Act or Clause 12 which prescribed compounding fee. While dealing with the petitioner's challenge to the rejection of its compounding application, the Court had observed as follows:-

> "**7.** The circular dated December 23, 2014 does not stipulate a limitation period for filing the application for compounding. What the said circular sets out in para 8 are "Offences generally not to be compounded". In this, one of the categories which is mentioned in subclause (vii) is : "Offences committed by a person for which complaint was filed with the competent court 12 months prior to receipt of the application for compounding".
>
> **8.** The above clause is not one prescribing a period of limitation for filing an application for compounding. It gives a discretion to the competent authority to reject an application for compounding on certain grounds. Again, it does not mean that every application, which involves an offence committed by a person, for which the complaint was filed to the competent court 12 months prior to the receipt of the application for compounding, will without anything further, be rejected. In other words, resort cannot be had to para 8 of the circular to prescribe a period of limitation for filing an application for compounding. For instance, if there is an application for compounding, in a case which has been pending trial for, let us say 5 years, it will still have to be considered by the authority irrespective of the fact that it may have been filed within ten years after the complaint was first filed. Understandably, there is no limitation period for considering the application for compounding. The grounds on which an application may be considered, should not be confused with the limitation for filing such an application.
>
> **9.** This has to be also understood in the context of the object of providing for compounding of offences. There is an acknowledgment that the judicial system is not as efficient as it is intended to be. There are trials, even in non-serious offences, that have been pending for decades. It is in the public interest, apart from the interest of the Department itself, that some closure is brought to such cases which may be pending interminably in our court system. It is for this reason that some discretion has been vested in the officers of the Department to compound offences. It provides an opportunity for some assessees, notwithstanding that their appeals as regards the assessments may be pending, to come forward to have their offences compounded. It does subserve both public interest as well as the interest of the Department itself that on some reasonable terms such offences, which may not be considered serious, are compounded. The guidelines have to be understood only in that context.

> **10.** The reason given in the impugned order dated November 3, 2016 for rejection of the petitioner's application does not satisfy the criteria spelt out in the guidelines issued by the Department by its Circular dated December 23, 2014. It has proceeded on a ground that is not available to the Department viz., that the application is inordinately delayed. Since there is no other reason given for the rejection of the application, the court is unable to sustain the order dated November 3, 2016 of the Chief Commissioner of Income-tax by which the petitioner's application for compounding was rejected. The said order is hereby set aside. The petitioner's application for compounding will have to be considered afresh by the Chief Commissioner of Income-tax."

64. Adverting then to the principal challenge of the petitioner to the aforementioned Circular, the Court proceeded to observe as follows:-

> "**12.** Mr. Rahul Kaushik, learned counsel for the Department, in seeking to justify the levy of the compounding fee in advance, placed reliance on the decision of the Supreme Court in Y. P. Chawla v. M. P. Tiwari [1992] 195 !TR 607 (SC) where the Supreme Court while setting aside the judgment of this court in M. P. Tiwari v. Y. P. Chawla, ITO (1991) 187 !TR 506 (Delhi) took note of the insertion of the following Explanation under section 279 of the Act inserted with retrospective effect from April 1, 1962:
>
> **13.** The Supreme Court reversed the judgment of this court on the facts of that case and held that the Central Board of Direct Taxes had the power to issue instruction to the authorities, other than the Income-tax authorities, in the matter of compounding of offences. However, that judgment does not answer the principal question that arises for consideration in the present writ petition, viz., whether on the strength of the above Explanation to section 279 of the Act the Central Board of Direct Taxes can issue instructions requiring an applicant seeking compounding of an offence, to pay upfront the compounding fee even before the application for compounding can be considered on the merits? It would appear from para 11(v) of the impugned circular dated December 23. 2014 of the Central Board of Direct Taxes that where an applicant seeking compounding of the offences does not pay the compounding fee upfront, his application need not be considered at all.
>
> **14.** The court finds nothing in section 279 of the Act or the Explanation thereunder to permit the Central Board of Direct Taxes to prescribe such an onerous and irrational procedure which runs contrary to the very object of section 279 of the Act. The Central Board of Direct Taxes cannot arrogate to itself, on the strength of section 279 of the Act or the Explanation thereunder, the power to insist on a "predeposit" of sorts of the compounding fee even without considering the application for compounding. Indeed Mr.

> Kaushik was unable to deny the possibility, even if theoretical, of the application for compounding being rejected despite the compounding fee being deposited in advance. If that is the understanding of para 11(v) of the above circular by the Department, then certainly it is undoubtedly ultra vires section 279 of the Act. The court, accordingly, clarifies that the Department cannot on the strength of para 11(v) of the circular dated December 23, 2014, of the Central Board of Direct Taxes reject an application for compounding either on the ground of limitation or on the ground that such application was not accompanied by the compounding fee or that the compounding fee was not paid prior to the application being considered on the merits.
>
> **15.** The question of payment of the compounding fee, if any, would arise, only if upon considering the application on the merits, the Department is of the view that the prayer should be allowed subject to the terms that are reasonable and subserve the object of section 279 of the Act.
>
> **16.** The further and larger question that remains to be answered is whether in the garb of a circular the Central Board of Direct Taxes can prescribe the compounding fee in the absence of such fee being provided for either in the statute or prescribed under the rules. However, at this stage when the petitioner's application is yet to be decided afresh, the said question may be academic. The court, accordingly, while directing the Chief Commissioner of Income-tax to consider afresh the petitioner's application for compounding of offence under section 279 of the Act and communicate to the petitioner the decision thereon in writing consistent with the present judgment, within a period of six weeks from today, leaves it open to the petitioner to urge the larger question which has not been decided in this writ petition in the event that the petitioner is aggrieved by the fresh order passed by the Chief Commissioner of Income-tax."

65. The decision of the Court in *Vikram Singh* is of significant import insofar as the powers of the CBDT are concerned in light of the Court holding that the Board does not have the power to prescribe mandates or instructions that run afoul of the contours of the statutory provision concerned.

66. Applying the said principles in the context of the present case, it becomes evident that paragraph 9 of Circular No. 07/2007 cannot be sustained absent a specific provision in the Act disentitling a person from claiming refund of tax erroneously withheld. The prescription so

introduced by the CBDT is clearly ultra vires and beyond the power which Section 119 sought to confer upon that entity.

67. Close on the heels of the *Vikram Singh* decision, the Bombay High Court has, in the decision of **Sofitel Realty LLP and Others v. Income Tax officer (TDS) and Others**[31] following *Vikram Singh* as well as another decision of the Bombay High Court in **Footcandles Film Private Limited and Others v. Income Tax Officer-TDS-1 and Others**[32] held that CBDT Circulars cannot curtail the statutory provisions by prescribing limitation periods in the event that none is prescribed in the Act. The observations made in *Sofitel Realty* are reproduced hereinbelow:-

> "**9.** We have to observe, in view of the comment made by the Income-tax Officer in the affidavit-in-reply, that sub-section (2) of section 279 of the Act provides for compounding of any offence by the authorised officer either before or after the institution of the proceedings. There is no limitation provided under sub-section (2) of section 279 of the Act for submission or consideration of the compounding application. What is relied upon by the Income-tax Officer is the Guidelines issued by respondent No. 4, Central Board of Direct Taxes (CBDT). The Central Board of Direct Taxes by the Guidelines cannot provide for limitation nor can it restrict the operation of sub-section (2) of section 279 of the Act. Mr. Suresh Kumar submitted that the Guidelines were issued under second Explanation appended to section 279 of the Act. The Guidelines is subordinate to the principal Act or Rules, it cannot override or restrict the application of specific provision enacted by the Legislature. The Guidelines cannot travel beyond the scope of the powers conferred by the Act or the Rules. It cannot contain instructions or directions curtailing a statutory provision by prescribing the period of limitation where none is provided by either the Act or the Rules framed thereunder. Moreover, the Explanation merely explains the main section and is not meant to carve out a particular exception to the contents of the main section. Paragraphs 9 to 14 of the judgment of the Allahabad High Court in *G. P. Engineering Works Kachhwa v. Union of India* [2022] 446 ITR 563 (All) ; (2022) 139 taxmann.com 130 (All) (page 568 of 446 ITR) :

[31] 2023 SCC OnLine Bom 1498
[32] 2022 SCC OnLine Bom 11768

"From a bare perusal of sub-section (2) of section 279, it is evident that any offence under Chapter XXII of the Act, 1961 may be compounded by the authorized officer either before or after the institution of the proceedings. No limitation for submission or consideration of compounding application has been provided under sub-section (2) of section 279 of the Act, 1961. Therefore, the Central Board of Direct Taxes by a circular can neither provide limitation for the purposes of sub-section (2) nor can restrict the operation of sub-section (2) of section 279 of the Act, 1961, in purported exercise of its power to issue circular under the second Explanation appended to section 279 of the Act, 1961. It has not been disputed before us by the learned counsel for the respondent or in the impugned show-cause notice that the criminal case in question is still pending.

A circular is subordinate to the principal Act or Rules, it cannot override or restrict the application of specific provision enacted by Legislature. A circular cannot travel beyond the scope of the powers conferred by the Act or the Rules. Circulars containing instructions or directions cannot curtail a statutory provision as aforesaid by prescribing a period of limitation where none has been provided by either the Act, 1961 or the Rules. The authority to issue instructions or directions by the Board stems from the second Explanation appended to section 279 of the Act, 1961. It is well settled that the Explanation merely explains the main section and is not meant to carve out a particular exception to the contents of the main section (Sonia Bhatia v. State of U. P. (1981) 2 SCC 585 at page 597). The object of an Explanation to a statutory provision was elaborated by the Supreme Court in *S. Sundaram Pillai v. V. R. Pattabiraman* (1985) 1 SCC 591, in which it was held as follows :

"53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—

"(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere

> with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the court in interpreting the true purport and intendment of the enactment, and
>
> (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same".

By means of para 7(ii) of the compounding guidelines circulated by F. No. 285/08/2014-IT (Inv.V)/147 dated June 14, 2019, that has been quoted in the impugned notice dated November 16, 2021 the period for filing an application for compounding has been restricted to 12 months from the end of the month in which the prosecution complaint has been filed in the court of law. Given the interpretation of the Supreme Court regarding the object of an Explanation to a statutory provision, the Board has sought to introduce the provision of limitation by means of a circular that is not contemplated by the second Explanation.

In the case of *Vikram Singh v. Union of India* [2017] 394 ITR 746 (Delhi) ; in W. P. (C) No. 6825 of 2016 decided on April 11, 2017 by a Division Bench of the Delhi High Court (enclosed as annexure No. 5 to the writ petition), in response to the petitioner's application for compounding of offences under section 279(2) of the Act, 1961, he was sent a communication informing him the total compounding charges payable in his case which he was required to pay even for his application to be considered. This was purportedly in terms of a circular dated December 23, 2014 ([2015] 371 ITR (St.) 7) issued by the Board containing guidelines for compounding of offence under clause 11(v). A writ petition was filed seeking quashing of the circular dated December 23, 2014 particularly the paragraph which set out the fee for compounding. In the reply filed to the writ petition, the Department, inter alia, stated that the compounding application under consideration was filed by the accused after about 10 years of filing the prosecution complaint ; that para 8(vii) of the revised guidelines for compounding dated December 23, 2014 provides that offences committed by a person for which prosecution complaint was filed by the Department with the competent court 12 months prior to receipt of the compounding application are generally not to be compounded. With that

reply, the Department had also filed an order dated November 3, 2016 passed by the Chief Commissioner of Income-tax on the ground that there was inordinate delay of nine years in filing of the application for compounding of offences by the assessee. While referring to para 8(vii) of the circular dated December 23, 2014, the court observed that it did not stipulate a limitation period for filing the application for compounding. It gave a discretion to the competent authority to reject an application for compounding on certain grounds. Thus, the court held that resort cannot be had to para 8 of the circular to prescribe a period of limitation for filing an application for compounding. The court accordingly held as follows (page 751 of 394 ITR):

> "The court finds nothing in section 279 of the Act or the Explanation thereunder to permit the Central Board of Direct Taxes to prescribe such an onerous and irrational procedure which runs contrary to the very object of section 279 of the Act. The Central Board of Direct Taxes cannot arrogate to itself, on the strength of section 279 of the Act or the Explanation thereunder, the power to insist on a "pre- deposit" of sorts of the compounding fee even without considering the application for compounding. Indeed Mr. Kaushik was unable to deny the possibility, even if theoretical, of the application for compounding being rejected despite the compounding fee being deposited in advance. If that is the understanding of para 11(v) of the above circular by the Department, then certainly it is undoubtedly ultra vires section 279 of the Act. The court, accordingly, clarifies that the Department cannot on the strength of para 11(v) of the circular dated December 23, 2014 of the Central Board of Direct Taxes reject an application for compounding either on the ground of limitation or on the ground that such application was not accompanied by the compounding fee or that the compounding fee was not paid prior to the application being considered on merits.'

However, in the present case a specific limitation has been provided by para 7(ii) of the compounding guidelines contained in the circular dated June 14, 2019 in purported exercise of power under the second Explanation to section 279(2) of the Act, 1961. The second Explanation merely enables the Board to issue instructions or directions to other Income-tax authorities for the proper composition of offences under that section. That is to say the instructions or

directions may prescribe the methodology and manner of composition of offences to clarify any obscurity or vagueness in the main provisions to make it consistent with the dominant object of bringing closure to such cases which may be pending interminably in our court system. Such instructions or directions that are prescribed by the Explanation cannot take away a statutory right with which an assessee has been clothed, or set at naught the working of the provision of compounding of offences.

Considering the facts and circumstances of the case and the provisions of sub-section (2) of section 279 of the Act, 1961, the writ petition is allowed to the extent that compounding application of the petitioner cannot be rejected by the Income-tax authority concerned on the ground of delay in filing the application. Accordingly, we also direct that compounding application of the petitioner shall be considered by the Income-tax authority concerned in accordance with law. (emphasis supplied)"

10. It will also be useful to reproduce paragraph 33 of the judgment of this court in Footcandles Film (P.) Ltd. v. ITO [2023] 453 ITR 402 (Bom) ; (2023) 146 taxmann.com 304 (Bom) which reads as under (page 415 of 453 ITR) :

"Under these circumstances, we are of the view that the findings arrived at by respondent No. 3 in the impugned order dated June 1, 2021, that the application for compounding of offence, under section 279 of the Income-tax Act, was filed beyond twelve months, as prescribed under the Central Board of Direct Taxes Guidelines dated June 14, 2019, are contrary to the provisions of sub-section (2) of section 279. Respondent No. 3 has failed to exercise jurisdiction vested in it while deciding the application on merits and consideration of the grounds set out when the application for compounding of offence was filed before it. On this count, the impugned order dated June 1, 2021 needs to be quashed and set aside. Accordingly, we pass the following order :

(i) The impugned order dated June 1, 2021 passed by respondent No. 3-Chief Commissioner of Income-tax (TDS), Mumbai, on the application filed by the petitioners for compounding of an offence, is quashed and set aside.

(ii) Consequently, we remand the application, under the provisions of section 279(2) of the Income-tax Act, of the petitioners back to respondent No. 3 to consider afresh on its own merits.

(iii) Respondent No. 3 shall dispose of the application of the petitioners preferably within a period of thirty days

from the date of receipt of this judgment.

(iv) Until disposal of the application of the petitioners for compounding of offence, under sub-section (2) of section 279 of the Income-tax Act, 1961, by respondent No. 3, the proceedings, being Criminal Appeal No. 127 of 2020, along with Criminal Miscellaneous Application No. 407 of 2020, pending before the City Sessions Court, Greater Mumbai, shall remain stayed.

(v) The challenge to the validity of clause 7(ii) contained in Guidelines F. No. 285/08/2014-IT(INV.V)/147 dated June 14, 2019, as raised in the present petition, is left open in the event the petitioners are aggrieved by a fresh order to be passed by respondent No. 3." (emphasis supplied)

It will also be useful to reproduce paragraph 6 of the judgment of the Delhi High Court in Sports Infratech (P.) Ltd. v. Dy. CIT [2017] 391 ITR 98 (Delhi) ; (2017) 78 taxmann.com 44 (Delhi), which reads as under (page 102 of 391 ITR) :

> "The learned counsel for the Revenue urges that the binding nature of the Board's instructions and guidelines is apparent from Explanation to section 279(3) which clarifies that the power to grant or refuse compounding is essentially discretionary and actually administrative. Therefore, the guidelines framed for its exercise under section 279 are binding upon all Revenue authorities including the Chief Commissioner. Learned counsel relied upon the Supreme Court decision in Asst. Commissioner, Assessment II v. Velliappa Textiles Ltd. [2003] 263 ITR 550 (SC) ; 132 Taxman 165 (SC) to highlight that compounding application cannot be concluded to as a matter of right but rather is subject to exercise of discretion. There is no quarrel with the proposition that power to accept a plea for compounding or refusal is essentially discretionary. The exercise, however, in each case is dependent upon the authority who has to apply his or her mind judiciously to the circumstances of each case. The rejection of the petitioner's application in this case is entirely routed on the Chief Commissioner's understanding of the conditions of ineligibility of para 8(v) apply. In this court's opinion, that view was based upon an erroneous understanding of law. Whilst guidelines no doubt are to be kept in mind specially while exercising jurisdiction, they cannot blind the authority from considering the objective facts before it. In the present case the petitioner's

> failure to deposit the amount collected was beyond its control and was on account of seizure of books of account and documents, etc. But for such seizure, the petitioner would quite reasonably be expected to deposit the amount within the time prescribed or at least within the reasonable time. Instead of considering these factors on their merits and examining whether indeed they were true or not, the Chief Commissioner felt compelled by the text of para 8(v). That condition, no doubt is important and has to be kept in mind, cannot be only determining. In the present case, the material on record in the form of a letter by the Superintendent of CBI also shows that a closure report was in fact filed before the competent court. Having regard to all these facts, this court is of the opinion that the refusal to consider and accept the petitioner's application under section 279(2) cannot be sustained. The impugned order is hereby set aside." (emphasis supplied)

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12. It will also be appropriate to reproduce paragraphs 12 to 15 of the judgment of the Delhi High Court in Vikram Singh v. Union of India [2017] 394 ITR 746 (Delhi) which read as under (page 751 of 394 ITR) :

> "Mr. Rahul Kaushik, learned counsel for the Department, in seeking to justify the levy of the compounding fee in advance, placed reliance on the decision of the Supreme Court in Y. P. Chawla v. M. P. Tiwari [1992] 195 ITR 607 (SC) where the Supreme Court while setting aside the judgment of this court in M. P. Tiwari v. Y. P. Chawla, ITO [1991] 187 ITR 506 (Delhi) took note of the insertion of the following Explanation under section 279 of the Act inserted with retrospective effect from April 1, 1962 :
>
> > 'Explanation.—For the removal of doubts, it is hereby declared that the power of the Board to issue orders, instructions or directions under this Act shall include and shall be deemed always to have included the power to issue instructions or directions (including instructions or directions to obtain the previous approval of the Board) to other Income-tax authorities for the proper composition of offences under this section.'
>
> The Supreme Court reversed the judgment of this court on the facts of that case and held that the Central Board of Direct Taxes had the power to issue instruction to the authorities, other than the Income-tax authorities, in the

matter of compounding of offences. However, that judgment does not answer the principal question that arises for consideration in the present writ petition, viz., whether on the strength of the above Explanation to section 279 of the Act the Central Board of Direct Taxes can issue instructions requiring an applicant seeking compounding of an offence, to pay upfront the compounding fee even before the application for compounding can be considered on the merits? It would appear from para 11(v) of the impugned circular dated December 23, 2014 ([2015] 371 ITR (St.) 7) of the Central Board of Direct Taxes that where an applicant seeking compounding of the offences does not pay the compounding fee upfront, his application need not be considered at all.

The court finds nothing in section 279 of the Act or the Explanation thereunder to permit the Central Board of Direct Taxes to prescribe such an onerous and irrational procedure which runs contrary to the very object of section 279 of the Act. The Central Board of Direct Taxes cannot arrogate to itself, on the strength of section 279 of the Act or the Explanation thereunder, the power to insist on a 'pre-deposit' of sorts of the compounding fee even without considering the application for compounding. Indeed Mr. Kaushik was unable to deny the possibility, even if theoretical, of the application for compounding being rejected despite the compounding fee being deposited in advance. If that is the understanding of para 11(v) of the above circular by the Department, then certainly it is undoubtedly ultra vires section 279 of the Act. The court, accordingly, clarifies that the Department cannot on the strength of para 11(v) of the circular dated December 23, 2014, of the Central Board of Direct Taxes reject an application for compounding either on the ground of limitation or on the ground that such application was not accompanied by the compounding fee or that the compounding fee was not paid prior to the application being considered on the merits.

The question of payment of the compounding fee, if any, would arise, only if upon considering the application on the merits, the Department is of the view that the prayer should be allowed subject to the terms that are reasonable and subserve the object of section 279 of the Act."

13. Therefore, we make it clear to respondent No. 3 that the compounding application cannot be rejected on the ground of delay in filing the application. Moreover, there is no restriction also on the number of applications that could be filed. The only requirement under sub-section (2) of section 279 of the Act is that the complaint

> filed should be still pending which Mr. Suresh Kumar concurs with Mr. Waive, is still pending."

In light of the aforesaid, we are of the considered opinion that the limitation period as prescribed in paragraph 9 could not have imposed impediments upon the sustainability of the petitioners' application for refund.

68. We also and in this regard bear in consideration, the undisputed fact of the applications for refund having been originally made way back in 2014. Those applications ultimately came to be rejected after a lapse of more than three years on 27 March 2018. Viewed in that light, it is manifest that the stand as taken by the respondents is clearly rendered unjust and arbitrary.

69. We then proceed further to examine the view as expressed by the respondents based on Section 9(1)(v)(b). The respondent has taken the view that the interest burden which was borne by the petitioner could not be said to be one incurred for the purposes of a business carried on outside India or for earning income from a source outside India. The view so taken is rendered wholly unsustainable when tested on the salient principles which had come to be propounded by the Supreme Court in *S.A. Builders*.

70. To recall, in *S.A. Builders*, the Supreme Court had enunciated the precept of commercial expediency and thus any expenditure that may be incurred by a person as a prudent businessmen qualifying for deduction. It was thus observed that for the purposes of claiming it as a deduction, the assessee would not be obliged to establish that it was incurred under a legal obligation which applied. It was further held that even if a third party benefited from such an expense, the same would

not warrant the expenditure being disallowed.

71. *S.A. Builders* was a case where the money borrowed had been advanced as an interest free loan to the sister concern of the appellant before the Supreme Court. This too, as the Supreme Court held, was irrelevant since the advance so made was clearly entitled to be viewed as a measure adopted and motivated by commercial expediency. It is the view so expressed in *S.A. Builders* which has been consistently reiterated by the Supreme Court including in some of the decisions which were cited for our consideration by Mr. Vohra and which included *Hero Cycles*, as noticed by us in the preceding parts of this decision.

72. A holding entity would undeniably have an enduring interest in the business prospects and performance of a related entity. Any advances made or liabilities taken over would thus clearly qualify the test of commercial expediency unless it be found to be a case of an illegal diversion or funnelling of funds. Undisputedly, the revenues generated from the issuance of FCCBs as well as the ECBs were utilized exclusively for the benefits of RNBV which, to recall, was the holding company of Terapia, S.A. The liability so taken over by the petitioner thus clearly fell within the ambit of a debt incurred as well as moneys borrowed and used for the purposes of making or earning income from a source outside India. The expected source of income and which was envisaged to accrue would clearly arise from the activities undertaken by Terapia, S.A. The investment was thus clearly motivated by the expectation of making or earning income from a source outside India.

73. Accordingly and for all the aforesaid reasons, we find ourselves

unable to sustain the order impugned before us.

74. We consequently allow the instant writ petition. We declare paragraph 9 of the CBDT Circular No. 07/2007 dated 23 October 2007 to be ultra vires the Act and hold that the applications for refund were wrongly rejected as being barred by time.

75. We, in light of the above, quash the impugned order dated 27 March 2018 and consequently declare the petitioner eligible for refund of excess taxes deposited by it under Section 195 for FY 2010-11 to 2012-13.

76. The respondents shall thus release consequential refund to the petitioner along with statutory interest.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JANUARY 31, 2025/*neha/DR*