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

Reserved on: 7th January, 2016
Date of Decision: 22nd February, 2016

\+ **ITA 162/2002**

COMMR.OF INCOME TAX-DELHI ..... Appellant
Through: Mr. Kamal Sawhney, Senior Standing Counsel, Mr. Raghvendra Singh, Junior Standing Counsel and Mr. Shikhar Garg & Mr. Sharad Agarwal, Advocates.

versus

MANSAROVAR COMMERCIAL P LTD ..... Respondent
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar and Mr. Suhail Malik, Advocates.

With

\+ **ITA 164/2002**

COMMR.OF INCOME TAX-DELHI ..... Appellant
Through: Mr. P. Roy Choudhary, Senior Standing Counsel.

versus

SOVEREIGN COMMERCIAL P LTD ..... Respondent
Through: Mr.C.S.Aggarwal, Senior Advocate with Mr. Prakash Kumar and Mr. Suhail Malik, Advocates.

With

+ **ITA 165/2002**

COMMR.OF INCOME TAX-DELHI ..... Appellant
Through: Mr.Kamal Sawhney, Senior Standing Counsel, Mr. Raghvendra Singh, Junior Standing Counsel and Mr. Shikhar Garg & Mr. Sharad Agarwal, Advocates.

versus

SWASTIK COMMERCIAL P LTD ..... Respondent
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar and Mr. Suhail Malik, Advocates.

With

+ **ITA 167/2002**

COMMR.OF INCOME TAX-DELHI ..... Appellant
Through: Mr. Rohit Madan, Senior Standing Counsel with Mr. Zoheb Hossain, Advocate.

versus

TRISHUL COMMERCIAL P LTD ..... Respondent
Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar and Mr. Suhail Malik, Advocates.

And

+ **ITA 168/2002**

COMMR.OF INCOME TAX-DELHI ..... Appellant
Through: Mr. Kamal Sawhney, Senior Standing Counsel, Mr. Raghvendra Singh, Junior Standing Counsel and Mr. Shikhar Garg &

Mr. Sharad Agarwal, Advocates.

versus

PASUPATI NATH COMMERCIAL P LTD ..... Respondent

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar and Mr. Suhail Malik, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G M E N T

% 22.02.2016

Dr. S. Muralidhar, J.:

1. These five appeals under Section 260A of the Income Tax Act, 1961 ('the Act') by the Revenue are against a common order dated 8th January, 2002, passed by the Income Tax Appellate Tribunal ('ITAT') for Assessment Years ('AYs') 1987-88, 1988-89 and 1989-90.

Introduction

2. The Assessees - Mansarover Commercial Private Limited (MCPL) (the Respondent in ITA No. 162 of 2002), Sovereign Commercial Private Limited (SCPL) (the Respondent in ITA No. 164 of 2002), Swastik Commercial Private Limited (SWCPL) (the Respondent in ITA No. 165 of 2002), Trishul Commercial Private Limited (TCPL) (the Respondent in ITA No. 167 of 2002) and Pasupati Nath Commercial Private Limited (PNCPL) ((the Respondent ITA No. 168 of 2002) are companies incorporated under the Registration of Companies (Sikkim) Act, 1961. Each of the Assessee companies claims to be carrying on the business of commercial agents in

cardamom and other agricultural products and having bank accounts with UCO Bank, Gangtok and State Bank of India (SBI), Gangtok and Kasturba Gandhi Marg, New Delhi.

3. Sikkim became part of India in April 1975. The Constitution (Thirty sixth Amendment) Act, 1975 inserted Article 371-F in the Constitution of India, in terms of which not all the laws of India were extended to the new State of Sikkim. Under Article 371-F (k) all laws in force immediately before the appointed day, i.e., 26th April, 1975, in the territories comprising the State of Sikkim or any part thereof were to continue to be in force therein until amended or repealed by a competent legislature or other competent authority. The Act was not made straightaway applicable to the State of Sikkim. Till such extension of the Act to Sikkim by a notification issued under Article 371- F (n), income tax was to be charged and collected under the Sikkim State Income-tax Manual 1948 (Sikkim Manual 1948). The recovery of tax was under the scheme of the Sikkim (Collection of Taxes and Prevention of Evasion of Payment of Taxes) Act, 1987.

4. By a Notification No. S.O. 1028 E dated 7th November, 1988 issued under Article 371-F(n) of the Constitution, the Act, the Wealth Tax Act, 1957 and the Gift Tax Act, 1958 were extended to the State of Sikkim. In terms of para 2 of the said Notification, the Central Government appointed, by Notification S.O. 148 E dated 23rd February 1989, the 1st of April, 1989 as the date on which the Act would come into force in the State of Sikkim in relation to the previous year relevant to the AY commencing on the 1st day of April, 1989. However, subsequently by virtue of Section 26 of the

Finance Act, 1989 the Act was made applicable to the State of Sikkim from the previous year relevant to the AY commencing from 1st April 1990, thereby extending the date of applicability of the Act by one year from the date specified in the notification dated 23rd February, 1989.

5. The case of the Assessees is that each of them was a resident of Sikkim, carrying on business in Sikkim and not elsewhere and that till 31st March, 1990, each of them were governed by the Sikkim Manual, 1948 and not the Act. The stand of the Assessees is that the income earned by them till that date was income earned in Sikkim from the business conducted done in Sikkim.

6. The case of the Revenue, on the other hand, is that the control and management of each of the Assessee companies was wholly with their auditor, M/s. Rattan Gupta & Company, Chartered Accountants (CAs), who had their offices in Karol Bagh, New Delhi and, therefore, were companies resident in India in terms of Section 6 (3) of the Act.

Search

7. A search was conducted on 15th March 1990 at the premises of M/s Rattan Gupta & Co. Chartered Accountant ('CA') at Daryaganj, New Delhi and during the course of the search books of account, check books, signed blank cheques, vouchers and other income documents of the Assessees, were found. The statements of Mr. Rattan Gupta, Mr. Ravinder Singh (a former partner of M/s Rattan Gupta & Co.) and a few other partners, both current and former, were recorded.

8. On 10th July 1990, following the search conducted, notices were issued by the Assistant Commissioner of Income Tax ('ACIT') (Investigation) Circle 7 (1), New Delhi to each of the Assessees under Section 148 of the Act, in respect of AYs 1987-88, 1988-89 and 1989-90. An order was passed on 12th July 1990 by ACIT (Investigation), Circle 13(1) in respect of the M/s Rattan Gupta & Co. under Section 132 (5) of the Act. Mr. Rattan Gupta informed the Assessees that the aforementioned notice under Section 148 of the Act had been issued to each of them at the address of M/s. Rattan Gupta & Co. at Daryaganj and had been affixed at the said premises of M/s. Rattan Gupta & Co.

9. Meanwhile, each of the Assessees filed returns of income in terms of the Sikkim Manual, 1948 for the three AYs in question on 27th April 1990. A demand notice was issued to each of them in respect thereof on 23rd July 1990.

Writ petitions in the Sikkim High Court

10. The Assessees filed writ petitions in the High Court of Sikkim, challenging the notices issued under Section 148 of the Act. An interim order was passed by the Sikkim High Court in the said writ petitions staying further proceedings. The said interim order was modified on 26th February 1991, 9th April 1991 and on 30th November 1991 in terms of which the Income Tax Department ('the Department') was permitted to continue with its enquiry and seek facts and information from the Directors of the Assessee companies. The Assessee companies were required to furnish the necessary information and also file returns and produce the books of

accounts before the Assessing Officer ('AO'), New Delhi in compliance of the notices under Section 148 of the Act.

11. Ultimately, on 20th July 1993, by the decision in ***Mansarover Commercial Pvt. Ltd. (1994) 209 ITR 716 (Sikkim),*** the Sikkim High Court dismissed all the writ petitions holding that it had no jurisdiction to entertain the said petitions since no part of the cause of action had arisen in the State of Sikkim. It was stated that inasmuch as the notices were issued by the ACIT, (Investigation) Circle 7(10), New Delhi, and served on the Assessees in New Delhi, it had no jurisdiction over the actions of that authority. The Sikkim High Court declined to examine if such notices were validly issued. The Sikkim High Court observed that "mere fact that the companies have registered offices in Sikkim does not confer jurisdiction on this Court".

12. In the meanwhile, on the basis of the returns filed by the Assessees in Sikkim, the Income & Sales Tax Department of Government of Sikkim raised a revised demand on 30th November 1990, cancelling the earlier demand raised on 30th July 1990.

Writ petitions in this Court

13. Consequent upon the dismissal of their writ petitions by the Sikkim High Court on 20th July 1993, the Assessees filed writ petitions being W.P. (C) Nos. 5565 to 5569 of 1993 in this Court. In the said writ petitions an interim order was passed by the High Court staying the proceedings. On 13th August 1998 an order was passed by the High Court directing the AO to frame the assessment subject to outcome of the writ petition. The High Court directed that the Department may conclude the proceedings and pass orders thereon,

but the orders would not be given effect to unless permitted by the Court.

Assessment orders

14. Following this, on 24th August 1998, notices were issued to the Assessee companies under Section 143 of the Act by the ACIT, Company Circle 2 (2), requiring the Assessee to appear in the office of the ACIT on 7th September 1998. This was in respect of the AY 1987-88. Similar notices were issued in respect of each of the other two AYs i.e. 1988-89 and 1989-90.

15. On 9th October 1998, separate assessment orders were passed by the ACIT, Company Circle 2 (2), New Delhi for each of the AYs 1987-88, 1988-89, 1989-90, in which it was concluded that each of the Assessees were "intentionally trying to take advantage of the prevailing laws at Sikkim by routing money through Sikkim and ploughing back in India." The objections raised by the Assessees as to jurisdiction were rejected. The additions made to the income of the Assessees for the three AYs in question were on the following heads of income: (i) income from commission (ii) unsecured loan from Dengzong Charitable Trust (DCT) (iii) interest accrued/paid on the unsecured loans and (iv) provision for income tax (which was disallowed). Separate penalty proceedings were initiated under Section 271(1)(a), 271(1)(c), 273/274 and 271-B of the Act.

16. The Assessees then filed appeals before the Commissioner of Income Tax (Appeals) [CIT (A)]. Subsequently on 8th December 2000, the writ petitions filed by the Assessee were dismissed by the High Court by the following order:

> "Heard counsel for the parties. Petitioner claims to have moved Appellate authority prescribed under the statute. An apprehension is raised that question whether income Tax Act 1961 is applicable to a company registered in Sikkim may not be within the domain of the appellate authority to decide. Learned counsel for the Revenue states that this apprehension is misconceived because the Appellate Authority has jurisdiction to decide all the aspects of fact and question of law. It shall be open to the Petitioner to raise additional grounds, if any, before the Appellate Authority. In view of the above position we dispose of the writ petition. Interim order stand vacated. Dasti."

Order of the CIT (A)

17. The conclusions of the CIT (A) in the orders dated 30th March 2001 dismissing the Assessees' appeals were as under:

(a) The Assessees failed to furnish information to substantiate that the persons who claimed to have given huge amounts of commissions were "genuine parties or that the basis of earning commission is genuine or that the assessee has rendered any work alleged by it in Sikkim to earn the commission income in Sikkim."

(b) Although the commission income was more than a crore of rupees, none of the Assessees had incurred any worthwhile expenses and that the whole payment of the commission itself is highly improbable.

(c) No record of the Assessee maintained in terms of the applicable company law was produced despite specific requests of the AO.

(d) The summons sent to different persons who had been paying commission had not been responded to by any of them. The Assessees also did not

produce any worthwhile evidence to prove the genuineness of the commission received.

(e) The complete books of accounts of each of the Assessee companies was found in the office of their CA at New Delhi. It was admitted, in the statements recorded, that the head and brain of each the companies was in India.

(f) The Assessees were unable to produce the present Directors or furnish the name and address of all the Directors from the days of incorporation despite being asked to do so by the AO.

(g) Mr. Rattan Gupta, CA, in his statement recorded on 5th October 1998, claimed not to know anything about the business operations at Sikkim or Delhi of the Assessee. He maintained that he had only rendered some professional services through M/s Rattan Gupta & Co. in October/November 1998.

(h) Mr. U.P. Karma, one of the working Directors of the five companies stated during his examination on 8th October 1998 that he had no idea about the business in which the five Assessees' companies were involved. He claimed that he never gone to Sikkim and yet asserted that books of the companies were present at the Gangtok registered office. His evidence did not inspire confidence.

(i) It appeared that the amount alleged to be earned in Sikkim had factually "surfaced in India and invested in closely held companies of Dalmia Group

in India". The Assessee did not produce any evidence to substantiate its case that the commission income had accrued in Sikkim and had neither accrued nor arisen in India. Therefore, the commission income had accrued in India and not in Sikkim.

18. The additions made by the AO were confirmed by the CIT (A). As regards the interest under Sections 234 A and 234 B of the Act, the CIT(A) held that the interest under Section 139(8) and 215/217 of the Act have been correctly charged for the three AYs in question. While confirming the above additions, the CIT(A) also affirmed disallowance of the sums paid by the Assessees on account of the State income tax.

Impugned order of the ITAT

19. The Appeals by the Assessees against the orders of the CIT(A) were dismissed by the ITAT which came to the following conclusion in the impugned order:

(i) The burden was on the Revenue to prove that the control and management of the Assessee companies was situated wholly in India in the three AYs in question. At the time the AO proposed to issue notice under Section 148 of the Act, there was no cogent material to enable him have reason to believe that the control and management of the affairs of the Assessee was wholly situated in India.

(ii) Mr. Rattan Gupta came to be associated with the Assessee companies in 1988. Although he stated that he was handling their investments in India, there was nothing to show that he was the brain behind the working and the

control and management of the Assessees as a whole. Mere availability of the books of accounts with him, in no manner establishes that the said place was the business premises of the assessee company from where it was carrying on any business. Further, apart from the statement of Mr. Ratan Gupta, the other statements and certain other documents relied on were not confronted to the Assessee for rebuttal and hence could not be considered.

(iii) The CIT (A) erred in proceeding on the basis that the Assessees could not challenge the notices under Section 148 of the Act on the ground of non-existence of reasons to believe since the two High Courts had dismissed the Assessee's writ petitions. The orders of the two High Courts did not determine the pleas raised by the Assessees on merits. Further, the Delhi High Court had specifically permitted the Assessees to raise all pleas before the CIT (A). The AO drew inferences without actually referring to the material before him.

(iv) The service of notice under Section 148 of the Act was a jurisdictional issue. The said notice could not be served on any person readily available without being satisfied that such person had the legal authority to accept the notice. Neither the statement of Mr. Rattan Gupta, nor the fact that the books of accounts and papers pertaining to the Assessees were found at his office established that he was a 'principal officer' of the Assessees within the meaning of Section 2 (35) (a) of the Act. The AO did not serve an notice of his intention of treating Mr. Rattan Gupta as the principal officer for the purposes of Section 2(35)(b). The AO also did not proceed under Section 163 (b) of the Act or in the manner provided in Section 51 of the Companies

Act 1956. Hence those provisions could not be relied on for proving effective service.

(v) The substituted service under Rule 20 (1) of Order V CPC was also legally ineffective, because of refusal of the notice by Mr. Rattan Gupta, who was not authorized to accept service of the notice on behalf of the Assessee companies. The address simply stated 'C/o Ratan Gupta', and C/o merely meant that the addressee "in the present case, the appellant, was to be found at the said address." Therefore, if Mr. Rattan Gupta refused to receive such a notice, he was justified in doing so and his refusal did not authorize the AO to resort to substituted service within the meaning of Rule 20 of the Order V of CPC.

(vi) On the question of whether the income could be deemed to accrue or arise in India, it was held that from the perusal of the reasons recorded and noted, there was no such material available with the AO to reopen the assessment. The monies claimed to have been transferred to Gangtok were not even claimed to belong to the Assessee companies and as observed by the CIT (A) it had not been established, even till the final stages of assessment, that the monies transferred to Sikkim in fact belonged to the Assessees. The Revenue failed to show the existence of any source of income from which the monies could be available to the Assessees in India and which, the Assessees could transfer to Sikkim.

(vii) On the existence of commission agents, in response to the Revenue's contention that none responded to the AO's letters, the ITAT observed that since no adverse material had been brought on record, the ACIT could not

have proceeded to draw adverse inference, as the burden was heavy on the Revenue.

(viii) Therefore, the notices under Section 148 of the Act were not validly served on the Assessees. The AO, therefore, did not acquire any jurisdiction under Section 148 of the Act to proceed with the assessments.

(ix) With reference to the addition of the sum of Rs. 30,75,000/- in the account of the assessee in the name of M/s. Dengzong Charitable Trust, Gangtok which according to the assessee is a loan raised by it from the said trust, it was held that the payment was admittedly received through account payee cheque issued by the trust, confirmation letter from the lender was also filed and the details of the bank account of the trust were also available with the AO. There was thus prima facie proof of the loan and the existence and capacity of the lender and the addition was liable to be deleted.

(x) On the question of the interest claimed in relation to the above mentioned loan, as a consequence of the finding that the credit of loan from the aforesaid trust was genuine, the disallowance could not be sustained and was deleted.

Questions of law

20. On 21st September 2004, while admitting these appeals, the Court framed the following questions of law:

> "1. Whether the Tribunal was right in holding that the ACIT exceeded his jurisdiction in issuing notices under Section 148 of the Act and the notices were not served in accordance with law?

> 2. Whether the order made by the ITAT is perverse based on conjectures and surmise and ignorance of evidence and material and has relied upon incorrect facts?
>
> 3. Whether the income of the assessee is taxable in India?"

21. At the instance of the Assessees, an additional question was also framed as under by the same order:

> "4. Whether the ITAT was right in law in holding that the assessee is not a resident of India within the meaning of Section 6 (3) (ii) of the Income-Tax Act, 1961 and whether the said finding of the ITAT is not also vitiated and perverse as it ignores relevant admissible evidence and materials and relies upon incorrect facts and has not given due consideration to several important materials and evidence relevant for determination of residence of the assessee"

Are the Assessees resident Indian companies?

22. The first question that Court proposes to answer is whether the Assessee is a resident of India within the meaning of Section 6(3) (ii) of the Act, since this would be crucial for determining some of the other issues that arise in the case.

23. In terms of Section 6(3)(ii), a company is said to be a resident in India if, during any previous year, "the control and management of its affairs is situated wholly in India". In the present case, inasmuch as each of the Assessees was incorporated under the Registration of Companies Act, Sikkim 1961, none of them was an Indian company and therefore the applicability of Section 6 (3) (i) of the Act did not arise. It is in this context, the question arises whether their management and control was wholly situated in India.

24. In the decision in the Assessees' petitions the Sikkim High Court analysed Article 371 F (k) and (n) of the Constitution of India and concluded that:

> "The combined effect of both these clauses on the present controversy is that so long as the Act of 1961 was not extended to Sikkim, the Sikkim law of income-tax continued to be in force in respect of all incomes earned in Sikkim, notwithstanding the other provisions of the Constitution, and the provisions of the Indian Income-tax Act would not apply to such incomes irrespective of the length of stay in that part of India where the Indian Income-tax Act was in force. That is the natural consequence of the State law being inapplicable in a part of India to which part the Central law did not apply. But the Sikkim law being a State law cannot have extra-territorial operation so as to apply to incomes earned outside Sikkim. So, the only effect of the special provisions contained in Article 371F is that so long as the Indian Income-tax Act did not become applicable to Sikkim, the 1961 Act could not apply to incomes earned in Sikkim, but in respect of the incomes earned in other parts of India where the 1961 Act was in force, the Sikkim law could not operate and the 1961 Act would apply. As such, there cannot be any occasion for double taxation of the same income both under the Sikkim State Income-tax Manual and under the Act".

25. The determination of the issue to the above extent by the High Court of Sikkim has become final as far as the Assessees are concerned, since that decision was not challenged further. It is for this reason that the question of the Act being extended to the State of Sikkim by the notifications issued on 7th November 1988 and 28th February 1989, and later by Section 26 of the Finance Act 1989 make it applicable with effect from AY 1990-91 may notbe relevant as far as the present case is concerned. Here, we are concerned with three AYs i.e., 1987-88, 1988-89 and 1989-90 during which period the Act did not apply to income earned and accrued in Sikkim.

Therefore, as far as AYs 1987-88, 1988-89 and 1989-90 are concerned, the relevant question would be whether for the purposes of Section 6 (3) (ii) of the Act, it can be said, as contended by the Revenue, that the control and management of the affairs of the Assessees' companies was "situated wholly in India". This, therefore, is essentially a question of fact and not so much a question of law.

26. On this question of fact, the concurrent findings of the AO and the CIT (A) have been upset by the ITAT. Therefore, the Court is called upon to determine whether the decision of the ITAT on this aspect can be said to be perverse and therefore unsustainable in law.

The case concerning Alankar Commercial Pvt. Ltd.

27. There was another company, Alankar Commercial Pvt. Ltd. ('ACPL'), in respect of which proceedings under Section 148 were initiated by the Revenue and which company was also incorporated in Sikkim. In the case of ACPL also, the notices were served at the address of Rattan Gupta & Co. and refused, on the ground that no office of ACPL was running from the said address i.e. 4556/4, Ansari Road, Daryaganj. Challenging the said notice, ACPL filed a writ petition in the High Court of Sikkim. In ***Alankar Commercial Pvt. Ltd. v. Assistant Commissioner of Income Tax (2000) 243 ITR 626 (Sikkim)***, the Division Bench of the High Court of Sikkim held that it had territorial jurisdiction to entertain the petition since a part of cause of action did arise therein. It was found that notices were served both at theaddress of Rattan Gupta & Co. in New Delhi (which notice was refused to be accepted) as well as at the address of ACPL at Gangtok. The High

Court of Sikkim made a reference to a letter dated 7th April 1994 addressed on behalf of the ACPL by its Advocate Mr. T.P. Thapa to the ACIT, New Delhi in which inter alia it was stated that notice under Section 142(1) of the Act had been received by ACPL through Rattan Gupta &Co. The High Court of Sikkim declined to draw an inference from the above letter that Rattan Gupta was authorized to receive notice on behalf of the ACPL. It was factually determined that: "There is no other document on record to prove that Rattan Gupta and Company was the principal officer or the authorised agent of the petitioner-company". It was in the above context held that notice under Section 148 was served at Gangtok and that the service of notice at the address of Rattan Gupta & Co. by refusal of registered posts "did not amount to service of notices on the company". It was held that "under Section 282(2)(b) of the Income-tax Act notice is required to be served in the case of a company on its principal officer". Since the notice was served only in Gangtok it was held that the part of cause of action did arise within the territorial jurisdiction of the Sikkim High Court and it had jurisdiction to entertain the petition.

28. In Alankar Commercial Pvt. Ltd. v. Assistant Commissioner of Income Tax (supra) the High Court held that the jurisdiction of the ACIT, Delhi to issue notice under Section 148 of the Act was not ousted by Article 371 F of the Constitution of India . Consistent what was earlier held by it in the case of Assessees herein, i.e., Mansarover Commercial Pvt. Ltd. (supra), the High Court of Sikkim held that the said provision could not "stultify theoperation of the central law of income-tax with respect to a company registered in Sikkim concerning its income which accrued or was received outside

Sikkim. Further, law of income-tax is not a personal law which a person may carry with him wherever he goes or functions." It was held that if ACPL had carried on its business activities or had received income outside Sikkim but within India, the same would be liable to tax under the Act.

29. The third question that was addressed by the Sikkim High Court in ***Alankar Commercial Pvt. Ltd. v. Assistant Commissioner of Income Tax*** (*supra*) was whether it was open to the High Court to exercise jurisdiction under Article 226 of the Constitution of India to determine whether the ACIT had rightly formed "reason to believe for the purposes of Section 148 of the Act that the Assessee's (ACPL) income had escaped assessment." Here, the Sikkim High Court was of the view that from the document seized as a result of search and seizure operations in terms of 15th March 1990, the AO had reason to believe that the income shown in the notice under Section 148 was chargeable to tax and had escaped assessment. This was because the AO entertained the plea that although the ACPL was registered in Sikkim "income had accrued and arisen in Delhi and the head and brain of the company was situated in Delhi". It was also found that no office existed in fact at Sikkim. There was only a signboard at the address and the office remained mostly locked. Consequently the notice issued under Section 148 of the Act was not interfered with.

30. The above decision of the High Court of Sikkim was upheld by the Supreme Court in ***Alankar Commercial Pvt. Ltd. v. ACIT (2000) 244 ITR 31(SC)***. In a short order, the Supreme Court held as under:

"It is contended that Sikkim was not a part of India and at that time the Income-tax Act was not applicable in respect of the assessment year for which notice was served at New Delhi. Learned counsel for the petitioner relies upon the decision of this court in *State of Sikkim v. Surendra Prasad Sharma AIR 1994 SC 2342*.

The aforesaid decision in *Surendra Prasad Sharma's* case related to the employees employed in a company in Sikkim and the question which arose there was whether the Indian law applied or not. The question of applicability of the Income-tax Act did not arise in that case, therefore, the said decision has no relevance. The Indian Income-tax Act, inter alia, taxes income which accrues or arises in India. It is immaterial whether the petitioner company has its head office in Sikkim or may be carrying on business activities there. The impugned notice under section 148 of the Income-tax Act has been issued in relation to the income which is stated to have arisen in India and this can be done even if the petitioner has a company registered in Sikkim. The decision of the High Court calls for no interference.

The petition for special leave is dismissed."

31. On this aspect, a reference may also be made to the decision of the High Court of Sikkim in ***Sikkim Manipal University v. State of Sikkim (2014) 369 ITR 57 (Sikkim)***. The High Court discussed the notifications dated 7th November 1988 and 28th February 1989 and Section 26 of the Finance Act 1989 and held that by necessary implication the Sikkim State Manual 1948 stood repealed on 1st April 1990.

32. To summarize the legal position as far as the applicability of the Act was concerned:

(i) even though a company may have been incorporated under the Companies Act of Sikkim, in the period prior to 1st April 1989, if it earned

any income outside Sikkim but within India, the Income Tax Act 1961 would apply to such income

(ii) the jurisdiction of the Indian income tax authorities would not get excluded as long as what is sought to be brought to tax is the income of a company incorporated in Sikkim which income accrued to it and was earned in India.

33. It is not disputed that the Assessees, incorporated under the company law of Sikkim, are resident Indian companies. If any income has accrued to them or earned by them in India prior to 1st April 1990, then such income is taxable under the Act.

Objections as to jurisdiction

34. In the present case, the question whether the Assessee companies could be said to be a resident for the purposes of Section 6 (3) (ii) of the Act arose in the light of the categorical finding of the AO in the assessment orders dated 9th October 1998 for all three AYs 1987-88, 1988-89 and 1989-90 that although the Assessees had been registered in Sikkim and had been subject to tax in Sikkim "but most of factors so emanated later proved that the total management and control lies in India is liable to be taxed in India under Section 6 (3) (ii) of the Act".

35. This finding was relevant for determining the validity of the exercise of jurisdiction by the ACIT, Circle 7 (1), New Delhi, who issued the notices to the Assessees under Section 148 of the Act. In other words, unless it was found as a matter of fact that the management and control of the Assessees

was wholly situated in New Delhi, the ACIT Circle 7 (1), New Delhi, would not have jurisdiction, since otherwise the Assessees would be taken to be resident Indian companies located in Gangtok, Sikkim over which the Commissioner of Income Tax, West Bengal alone would have jurisdiction.

36. A notification was issued on 30th March 1998, by the Central Board of Direct Taxes ('CBDT'), whereby in respect of the territorial area of the State of Sikkim, it was notified that the Chief Commissioner, Calcutta having office at Calcutta would have jurisdiction with effect from 1st April 1989. By notification dated 19th May 1989, the Chief Commissioner (Administration) notified that the jurisdiction over Chief Commissioner, Circle-1, Gangtok would be that of the Commissioner of Income Tax, West Bengal-1.

37. In the present case, it is sought to be urged by the Assessees that they had no income accruing to them in India and that their the source of income as stated in the return of income was at Sikkim. The ordinary jurisdiction vested on the basis of residential status with ACIT, Circle (1), Gangtok in terms of the CBDT Notification No. 1770, dated 19th May 1989. In as much as only the CIT West Bengal could exercise administrative control over the ACIT, Circle-1, Gangtok, no order could have been passed on 8th July 1993 by the CIT, Delhi-1 under Section 127 of the Act, transferring the case of the Assessees to the ACIT, ICC-4, New Delhi. For the same reason, it is contended that even the subsequent order dated 7th August 1996 under Section 127 of the Act by the CIT, Circle-1, New Delhi transferring the case from ACIT ICC-4 to the ACIT Circle 7(1) could not have been issued. A further point urged is that although the notice was issued by the ACIT,

Circle 7(1), the assessment was in fact completed by the ACIT Coy. Cir 2(2) and was, therefore, bad in law. It is pointed out that the jurisdiction as far as M/s Rattan Gupta & Co. was concerned was vested with ACIT (Investigation) 13(1), New Delhi. It is however emphasised that the Assessees are not challenging the place of assessment but the jurisdiction of the AO. Reliance is placed on the decisions in ***Pannalal Binjraj v. Union of India 31 ITR 565(SC) Rai Bahadur Seth Teomal v. CIT 36 ITR 9 (SC)*** and ***Industrial Trust Ltd. v. CIT [1973] 91 ITR 550 (SC)***. It is contended that the Assessees have been challenging the jurisdiction of the ACIT, Investigation Circle 7(1), New Delhi and also of ACIT, Central Circle - 4, New Delhi.

38. An objection is raised by learned counsel for the Revenue to the Court permitting the Assessees to urge the above pleas on the ground that Section 124 (3) of the Act constituted a bar inasmuch as such objection was not raised at the first available opportunity in the assessment proceedings. It is submitted that the principal place of business of the Assessees was located in Delhi. It is submitted that by not raising the plea of jurisdiction at the earliest opportunity, the Assessees waived their right to raise such challenge by virtue of Section 124 (4) and by virtue of the fact that they urged that plea for the first time before the ITAT. Further it is pointed out that the objection raised was generally to the applicability of the Act. It is stated that the Assessees also had a right of appeal under Section 246 of the Act which he failed to exercise. On this aspect it is further submitted that this was only an irregularity at the highest and the ITAT ought to have remanded the matter and not set aside the assessments. Reliance is placed on the decisions

in ***CIT v. SS Ahluwalia [2014] 46 Taxmann.com 169 (Delhi); Kanji Mai & Sons v. CIT, [1982] 138 ITR 391 (Delhi)*** and ***Hindustan Transport Co. v. Inspecting Asstt. CIT [1991] 189 ITR 326 (All)***.

39. In ***Industrial Trust Ltd. v. CIT*** (*supra*), it was observed: "Ordinarily an assessee has to be assessed by the ITO within whose territorial jurisdiction he resides. But, it is open to the Central Board of Revenue to assign any particular class of assessees or any particular type of assessments to an ITO of its choice." In ***Hindustan Transport Co v. Inspecting Assistant Commissioner of Income Tax*** (*supra*), it was explained that the stage of raising an objection on the grounds of jurisdiction was prior to the completion of the assessment. It was held:

> "As provided in Section 124(5)(a), the right is lost as soon as the assessment has been completed. Even where the right is exercised before the assessment is completed, the question is to be decided by the Commissioner or by the Board. Courts do not come into the picture."

40. The decision in ***Pannalal Binjraj v. Union of India*** (*supra*) holds that the principles of natural justice must be followed while transferring cases from one jurisdiction to another. However the objection as to place of assessment has to be raised at the earliest stage. In ***Rai Bahadur Seth Teomal v. CIT*** (*supra*) it was held that the objection as to the place of assessment having not been raised before the ITO (of Calcutta in that case) could not be raised thereafter in an appeal to the Appellate Assistant Commissioner and then before the ITAT. Therefore, the Revenue is justified in contending that the Assessees not having raised such objection at the first available opportunity should not be permitted to urge the ground of lack of

jurisdiction of the Delhi officers to issue notices to them under Sections 147/148 of the Act.

41. Nevertheless the Court proposes to examine if the management and control of the Assessee companies could be said to be situated wholly in New Delhi. This question also becomes relevant to the issue concerning service of notice on the Assessees in terms of Section 148 read with Section 282 (2) of the Act.

Statement of Rattan Gupta

42. The Court has examined the statement recorded by the Department of Mr. Rattan Gupta, CA, on 24th April 1990 under Section 131 of the Act. He first confirmed what he had stated in his previous statement recorded on 15th March 1990 under Section 132 (4) of the Act. He stated that he had gone to Sikkim only once during last two years, where he got to meet one Mr. Bansal. In regard to the books and documents of the Assessees which were found in the premises, Mr. Gupta sought to explain as under:

> "We are rendering professional services to these companies. These records were in our office premises in connection with the professional services. The professional services which we render are finalization of accounts, reconciliation of bank accounts, reconciliation with various parties accounts, company law formalities etc.".

43. Mr. Rattan Gupta stated that the professional work for the Assessees was taken up by Rattan Gupta & Co. somewhere during the year 1987-88 from Mr. Ravinder Singh, CA. When asked with whom he was corresponding on behalf of the companies, Mr. Rattan Gupta stated:

> "The persons to be contacted in Dalmia Resorts International Pvt. Ltd.

and Gujarat Heavy Chemicals Ltd. were from Accounts Department and I never noted or remember the names".

44. Specific to five Assessee companies, when asked with whom he had been in touch, Mr. Rattan Gupta stated: "There was one person Sh. H.L. Verma who used to come to our office and handover the papers sometime he sent by the courier/post also". However, he claimed not to know the whereabouts of Mr. Verma for the last one year. When asked how he was doing the work of reconciliation of the accounts of the five Assessee companies, Mr. Rattan Gupta stated:

> "There is hardly any transaction in the above 5 companies namely Pashupatinath, Swastik, Trishul, Sovereign and Mansarover during the last one year or even more than one year. Mr. H.L. Verma had handed over the entire record and from which we finalized the accounts, reconciled the banks and accounts with the partner".

45. Mr. Rattan Gupta admitted that Mr. Rajeev Jain became "Director in 3 companies on my asking". He further stated that I also made directors in these 5 Sikkim companies. I do not remember all but Mr. S.P. Sethi, Mr. Vijay Goswami, Mr. Rajesh Goswami, Mr. Vedant Mehta are there". The next question was whether the above persons were working in the office of Rattan Gupta & Co. and what work was performed by them in their capacity as Directors, Mr. Rattan Gupta categorically stated that "These persons became directors on my asking and there was no work performed by these persons except signing papers etc." When asked what kind of papers were signed by them, he mentioned "papers relating to bank accounts and copies of resolution and statement of accounts".

46. Mr. Rattan Gupta did not deny that Mr Rajeev Jain resigned at his

instance. Instead he stated that he discussed with Rajeev Jain about the directorship in these companies "as there was no professional talent required Shri Rajeev Jain resigned". As regards the work done by five Assessee companies and their source of income, Mr. Rattan Gupta stated that he had come to know from the accounts and vouchers of the companies "the main source of income was from commission earned in Sikkim on sale/purchase of agriculture products". According to him, the work done by the five Assessees' companies was "commission business". While answering the subsequent question, he stated that he was not involved in the appointment of Directors in World Growth Fund Ltd.(Sikkim based company) "However, in other companies the persons have been become directors at my instance".

47. When asked whether he was taking these decisions independently or whether someone else directed him, Mr Rattan Gupta stated:

> "I was taking decision in my professional capacity only. Sometime I have taken advise from Dalmia Bros. Pvt. Ltd. I am talking about National, Norbu, Sikkim Ispat and Sikkim Produce.
>
> Q. 22. Why did you take the advice of Dalmia Bros(P) Ltd.? Was the first step taken by you or take took the initiative.?
>
> Ans 22. There was no obligation on me to take the advice of Dalmia Bros Pvt. Ltd. The funds in the Sikkim companies were to be invested for which decision was to be taken by me in professional capacity. The advise become important for safety of funds".

48. On appointment of brokers for sale of shares of the Sikkim company, Mr Rattan Gupta stated: "The Directors of the company after discussing with me appointed the brokers for the sale of shares". When asked whether there was any employer or director based in Sikkim in respect of the other four

Sikkim companies, i.e., Nova Investment Pvt. Ltd., Lovely Investment Pvt. Ltd., Altar Investment Pvt. Ltd and Illac Investment Pvt. Ltd. (which were also part of the Dalmia Group of Companies), Mr. Gupta stated: "There is no employer/director based in Sikkim". He was again asked why Dalmia Bros. (P) Ltd., should know about where the four investment companies were investing. He answered that as Dalmias were his clients and these investment companies were making investment in the Dalmias companies, their names were referred by the manufacturing companies of Dalmia

49. In his statement made on 29th May 1990, Mr. Rattan Gupta mentioned that he was associated with five Assessees' companies only in professional capacity. Answering to questions 5 and 6 which are relevant, read as under:

> "Q5. From statement of some directors recorded u/s 131, the directors who are in these 5 companies, named in Q1, it is clear, that you appointed them and it is only at your behest that they sign any papers or documents. They are directors only for name sake. Is this correct?
>
> A5. Yes, as far as the business conducted by these companies is concerned.
>
> Q6. You have also stated in your earlier statement of 24/4/90 that you are rendering professional services comprising of finalization of accounts, finalization of bank accounts, reconciliation of party accounts, company law matters etc. In effect, considering your answer to Q5, you are managing the affairs of these 5 companies. Is this correct?
>
> A6. I do not want to argue this at this stage but I have already stated that I was not associated in the business of earning commission which was done at Sikkim only.
>
> Q.7. How do you know that these 5 companies were doing any kind of business at Sikkim?

> A.7. Because the Commission was earned at Sikkim as the vouchers like shows which were given to us for the finalization of accounts, the amount of commission were received and deposited in Sikkim and then transferred to Delhi for utilization and investment etc."

50. The question then turned to Mr. H.L. Verma, and he claimed that Mr. Verma used to come frequently and that he met him many times upto April/May 1989 and not thereafter. It was Mr. Verma who was looking after the company in Sikkim. According to him, the papers, documents, cheques and drafts were all sent by Mr. Verma himself through one Mr. Sitani. He stated that the cheque books found in the office have been kept by Mr. Verma "as this was required for making draft for transfer to Delhi". According to him the blank signed cheques were given to Mr. Verma since he was depositing the funds "and there was no risk on our side in handing over the signed cheque book to Mr. H.L. Verma for utilization".

51. An analysis of the statement of Mr. Rattan Gupta indicates that he could not have acted merely as an Auditor, giving professional advice to the five Assessees. Clearly his own employees were appointed as Directors of the companies. The four names, he subsequently mentioned are Mr. S.P. Sethi, Mr. Vijay Goswami, Mr. Rajesh Goswami and Mr. Vedant Mehta. The explanation for the signed cheque books, the rubber seals of the companies and their letter-heads being available in his office is also not convincing. He seeks to shift the entire responsibility for the handing of the cheques to Mr. Verma but then Mr. Verma was never produced by the Assessees.

52. The burden shifted to the Assessees to show that the control and

management did not only vests with Mr. Rattan Gupta but that it was Mr. H.L. Verma who was handling the affairs of the companies. Even otherwise with Mr. H.L. Verma himself not being Director of any of the Assessees' companies, the answer given by Mr. Rattan Gupta raised more questions which required an explanation. In other words, in view of the fact that the books of accounts, the signed blank cheques of the accounts of the five Assessees' companies with banks in Gangtok and their letterheads being found in his office, the conclusion drawn by the AO as regards the precise role of Mr. Rattan Gupta as being in de facto control of the five Assessees appears to be correct.

Statement of Ravinder Singh

53. Turning to the statement of Mr. Ravinder Singh, recorded on 30th April 1990, he admits to having been present during the incorporation of four of the Assessee companies i.e. MCPL, SCPL, PCPL and TCPL. He became a Director of the said companies on November/December 1985 and his basic function was to operate bank accounts in the said companies. He was clear that he performed the function of Director from Delhi and his basic role was to invest the monies that he received from Gangtok. He continued as Director till March 1988. He identified two sources of earning of these five Assessee companies. One was loan from charitable trust i.e. Dengzong Charitable Trust ('DCT') and the second from trading commission. According to him, till September 1986 "monies were coming Gangtok to Delhi via telegraphic transfer and later on it came in the shape of drafts". As far as loan obtained from DCT, according to him, no security was furnished for procuring the loan.

54. According to Mr. Ravinder Singh, the trading business for the five companies was done by Mr. H.L. Verma, who was not an employee but the Manager of DCT. He was then confronted with certain documents which contained notings in his own handwriting, in which he seemed to be "agitated on some point regarding the working of 40 companies". It contained reference "an immediate meeting with Sh. Anurag Dalmia". When asked to explained, he stated "I do not remember as to what state of my mind does it explain". He further stated that he had written the said letter to Mr. Dalmia because the compensation he was getting at that time was not adequate keeping in view the expenses incurred. According to him Mr. Anurag Dalmia "represented the principal shareholders of these companies. The other shareholders were companies which were either Sikkim Companies or which had became subsidiaries of Sikkim companies". He claimed that he "did not come to in contact with anybody except Mr. Anurag Dalmia on behalf of these companies".

55. As regards the telegraphic transfer or transfer of monies through drafts, Mr. Ravinder Singh explained:

> "Sir, the drafts were sent from Sikkim by Shri Hira Lal Verma, the person who were conducting the business on behalf of our companies in Sikkim. These drafts were always send by hand by that gentleman. Generally, these drafts were coming through the employees of Shri Uma Shankar Sitani who would either cause the drafts to be deposited in our bank on his own or ask me to collect these drafts from his office at Nehru Place or from his resident at Sainik Farms. In his absence, I used to get phone calls from his brother Rajan Sitani or his nephew Shammi".

56. In response to two other questions, Mr. Ravinder Singh stated as under:

> "Q 22. As, I understand, all the decision in respect of investment of the money of the 5 companies registered in Sikkim when you were the Managing Director, were taken by Shri Anurag Dalmia and introduce by you. On the basis of the answers given by you, is this a facts?
>
> Ans. There was no managing director in the companies. I was only a director responsible to the shareholders. It is a fact that from May 86 onwards all decisions regarding investment were taken by Shri Anurag Dalmia and also communicated to me.
>
> Q. 23. Shri Ravinder Singh, please remember and let me know whether in your meetings with Shri Anurag Dalmia regarding these 5 Sikkim based companies, you also found Shri U.S. Sitani in the same meeting? Remember you are in oath.
>
> Ans. Sir, I had take strong objection to your saying that I have to remember that I am on oath. I know it very clearly that I am giving a statement on oath. I do remember that sometimes Shri Uma Shankar Sitani used to be present during and at the time of my meetings with Shri Anurag Dalmia."

57. Two persons he identified as having handled the business and supervised it are Mr. H. L. Verma and Mr. Uma Shankar Sitani. Significantly, neither of these persons were produced by the Assessees for their statements to be recorded.

Other statements

58. In his statement, Mr. R.K. Goswami, who was Director of SCPL, *inter alia,* stated "As per advised by Mr. Rattan Gupta I become the director in this company". Mr. Rakesh Maggo, also when asked how he became a Director of MCPL, he stated "Shri Rattan Gupta asking me" and it was only on account of "Shri Rattan Gupta" that he became a Director. When asked

whether he had done any work for MCPL, he stated "I did nothing except signing some papers" and further clarified that it was Mr. Rattan Gupta who asked him to sign those papers.

59. Mr. Vedant Mehta, a Director associated with SCPL and TCPL also stated that he did nothing except signing documents and that he did this only on asking Mr. Rattan Gupta.

60. The statement of Mr. Rajiv Jain who was another partner of Mr. Rattan Gupta & Co. became Director of SCPL, TCPL, PCPL and MCPL. He clearly stated "I agreed to become a director on a request of Mr. Rattan Gupta, my senior partner and no work was performed by me in these companies except signing some papers on different occasions".

'Control and Management'

61. The earliest formulation of the 'control and management test' for determining where a company could be said to be resident, in preference to the place of incorporation was in the decision of the House of Lords in ***De Beers Consolidated Mines, Limited v. Howe (Surveyor Of Taxes) [1905] 2 K.B. 612***. The Assessee company was incorporated and registered in South Africa. The denominated head office was in Kimberley in the Cape Colony, and there was an office in London. The essential part of the company's business was the sale of the diamonds from its mines to a syndicate of diamond merchants of London. The contracts of sale, which were annual contracts dealing with a year's output, were executed in London. The control of the company was vested in three life governors and sixteen ordinary directors, of whom four had to reside in England. The majority of the

directors was always in London. The chairman and six ordinary directors resided in the Cape Colony. Meetings of the directors were held weekly in Kimberley and London with an interchange of minutes between the two places. Company by laws provided that directors in London were to be consulted on matters of exceptional importance. Further, certain decisions were only taken in London. However, general meetings of shareholders were always held at Kimberley. In the above factual background, the 'place of incorporation' test for determining residence of the company was rejected. Since the Commissioners recorded a finding of fact that "the head and seat and directing power of the affairs of the Appellant Company were at the office in London from whence the chief operations of the Company, both the UK and elsewhere, were in fact, controlled, managed and directed," it was held by the House of Lords that the company was resident in the UK. The control and management test was laid down as under:

> "The real business is carried on where the central management and control actually abides. This is a pure question of fact to be determined, not according to the construction of this or that regulation or byelaw but upon a scrutiny of the course of business and trading"

62. In ***Mitchell (Surveyor of Taxes) v. Egyptian Hotels Ltd [1915] UKHL 2*** the Assessee, whose registered office was located in England, carried on its operations in Egypt. A special resolution was passed by the company that the Egyptian business of the Assessee should be carried on and managed by a local board, to the exclusion of the board of directors of the company, and that such local board should be wholly independent of any other directors and board of the company and of general meetings of the company (not being general meetings held in Egypt), and in no way under the control

thereof. Holding that the business was carried on in the U.K., it was observed:

> "A trade or business cannot be said to be wholly carried on abroad if it be under the control and management of persons resident in the United Kingdom, although such persons act wholly through agents and messengers resident abroad. Where the brain which controls the operations from which the profits and gains arise is in this country, the trade or business is, at any rate partly, carried on in this country.'

63. In ***V.V.R.N.M. Subbayya Chettiar v. CIT [1951] 19 ITR 168 (SC)*** it was held by the Supreme Court that in case of dual residence, it is necessary to show that the company performed some of the vital organic functions incidental to its existence as such in both the places, so that in fact there are two centres of management. The Appellant was a *karta* of an HUF and permanently lived in Colombo, with the family domiciled in Ceylon. In the relevant PY he visited India for 101 days to participate in a litigation and certain income tax proceedings in relation to certain properties he owned in India. The question was whether the HUF could be taxed as a resident of India? It was noted that no material evidence was produced to prove the existence of more than one centre of control for the affairs of the family It was held:

> "9. As a general rule, the control and management of a business remains in the hand of a person or a group of persons, and the question to be asked is wherefrom the person or group of persons controls or directs the business.
>
> (2) Mere activity by the company in a place does not create residence, with the result that a company may be "residing" in one place and doing a great deal of business in another.
>
> (3) The central management and control of company may be divided,

and it may keep house and do business in more than one place, and, if so, it may have more than one residence.

(4) In case of dual residence, it is necessary to show that the company performs some of the vital organic functions incidental to its existence as such in both the places, so that in fact there are two centres of management."

64. To the same effect is the decision in ***Narottam and Pereira Ltd. v. CIT [1953] 23 ITR 454 (Bom)*** where the Assessee was carrying on the business of stevedoring in Ceylon. It was registered in Bombay and its registered office was also in Bombay. The meetings of the board of directors are held in Bombay and also the meetings of the shareholders. The question before the Court was whether the company was a resident within the meaning of Section 4A (c) of the Income Tax Act? It was held that "Control and management" was a compendious expression which has acquired a definite significance and connotation. It was observed that the whole of the business may be outside India and yet its control and management may be wholly within India. It was further clarified that the control and management contemplated by this sub-section was not the carrying on of day to day business by servants, employees or agents. It was held that:

"A company or for the matter of that a firm or an undivided Hindu family has got to work through servants and agents, but it is not the servants and agents that constitute the seat of power or the controlling and directing power. It is that authority to which the servants, employees and agents are subject, that controls and manages them".

65. It was further held as under:

"A company may have a dozen local branches at different places outside India, it may send out agents fully armed with authority to deal with and carry on business at these branches, and yet it may

retain the central management and control in Bombay and manage and control all the affairs of these branches from Bombay and at Bombay. It would be impossible to contend that because there are authorised agents doing the business of the company at six different places outside India, therefore the company is resident not only in Bombay but at all these six different places...In order to determine the head and brain of the company we are not to concern ourselves with any other work that the company does except its business which yields profits, and in this particular case we have got to consider where the head and brain of the company is with regard to the stevedoring business in Ceylon which has yielded the income. But even applying that tests, as already pointed out, we do come to the conclusion that the head and brain of the company with regard to this particular business or with regard to its affairs was in Bombay and not in Ceylon."

66. In ***Erin Estate v. CIT (1958) 34 ITR 1a (SC)*** the expression **'c**ontrol and management' was held to signify not *de jure* control and power but that *de facto* control and power actually exercised in the course of the conduct and management of the affairs of the firm. In the context of Section 4A(b) of the Indian Income-tax Act, 1922, it was observed that what would constitute 'control and management' was a mixed question of fact and law. It was observed:

> "The control and management must no doubt be shown to have been actually exercised; and the exercise of the control and management should not be illusory or merely notional. Once it is shown that control and management in the affairs of the firm was exercised by the partners residing in India, it would not be relevant to enquire whether the control and management thus exercised amounted to a substantial part of the control and management of the affairs of the firm."

67. In ***CIT v. Bank of China [1985] 154 ITR 617 (Cal)*** it was held:

> "The question depends on the fact of the management and not on the physical situation of the thing that is managed. A company is managed by the board of directors and if the meetings of the board of directors are held within India, it may be said that the central control and management is situated here. The direction, management and control "the head and seat and directing power" of a company's affairs is, therefore, situate at the place where the directors' meetings are held and, consequently, a non-Indian company, would be a resident in this country if the meetings of the directors who manage and control the business are held here. The word "affairs" means affairs which are relevant for the purpose of the I.T. Act and which have some relation to the income sought to be assessed. It is not the bare possession of powers by the directors, but their taking part in or controlling the affairs relating to the trading, that is of importance in determining the question of the place where the control is exercised."

68. In light of the law explained in the above decisions, when the facts of the present case are examined, it is seen that Mr. Rattan Gupta was not only doing the audit work of the five Assessee companies, but determining who should be the directors of the said companies. This coupled with the fact that the blank signed cheque books of all the five companies together with rubber seals, the letter heads, the blank signed cheques and other records were also found in the office of Rattan Gupta & Co., the factual determination by the AO that the management and the control of the five companies was actually wholly situated in Delhi gets fortified.

69. An attempt was made by Mr. Rattan Gupta to suggest that it was Mr. H.L. Verma or Mr. Uma Shankar Sitani who were actually handling the affairs of the five Assessee companies. That was, however, not made good by offering either of them for examination. Once the documents were seized and the statements of Rattan Gupta, Ranvir Singh, Vedant Mehta and Rajiv

Jain were recorded, the burden shifted upon the Assessees to produce some evidence to counter the picture emerging from his statement regarding management and control of the five Assessee companies wholly located in Delhi. It is extremely unusual that the seals and the signed blank cheque books of the companies would be lying with their CA who was entrusted with the professional work of auditing of the accounts.

70. The above facts have also to be appreciated in the context of the Assessees filing their returns for AYs 1987 to 1990 only in 1990. Despite detailed information being sought under Sections 142(1) and 143(2), no information was provided and according to the Revenue, there was non-cooperation. Further the Assessees have been unable to deny that barring one, all the directors were residents of Delhi. A different list was submitted during assessment proceedings where all were shown to be residents of Delhi. The Revenue is right in the contention that in the circumstances, there can be no presumption in law that control and management is at the registered office.

71. It appears to the Court that the ITAT has not upset the factual finding of the AO, which was confirmed by the CIT(A). The above exhaustive evidence gathered by the Revenue, without being countered by the Assessees despite opportunity being afforded, serves to substantiate the case of the Revenue that the management and the control of the five Assessee companies was in fact located in Delhi. The finding by the ITAT in this regard is plainly perverse and unsustainable in law.

Jurisdiction of the ACIT

72. Once it is held that the management and control of the Assessee companies was in Delhi in the office of Rattan Gupta & Co., the question that would next arise is the jurisdiction of the ACIT which issued the notice under Section 148 of the Act to these companies. The question arises in two contexts. One is regarding the authority of the ACIT to issue the notice and the second is whether Rattan Gupta & Co. could be said to be authorized representatives/agents of the Assessees having authority to receive notices.

73. On the first aspect, the question arises for determination is the jurisdiction of the income tax authority under Section 127 of the Act to transfer the cases from one jurisdiction to the other. In the first place, it is required to be noticed that in the light of the findings of this Court that the management and control of the five Assessee companies was wholly in the office of Ratan Gupta & Co. at his office in Ansari Road, New Delhi, the conclusion is that all the five Assessee companies answered the description of the resident Indian companies within the meaning of Section 6(3) (ii) of the Act and were operating from Delhi.

No income accrued or was earned in Sikkim

74. In terms of Section 5(1) of the Act, the income of such resident would include the income that accrues and arises to such resident anywhere in India. In this regard, the findings of the AO that the Assessees failed to prove that the commission payments were earned by them exclusively in Sikkim has not been dislodged by the Assessees by producing any tangible

material.

75. In support of their plea that they had proved that they earned their income exclusively in Sikkim, the Assessees seek to rely on the fact that they produced the relevant copies of bills and vouchers from the commission agents and the receipt of money from its agents at Sikkim in its bank accounts. It is further submitted that all the agents were identified. The assessments had been made under Sikkim Income Tax Manual whereby the demand originally raised was cancelled and a higher demand was raised, which established that as per the Sikkim Tax authorities the income had been earned in Sikkim and not in India.

76. The Assessees may have produced the receipt of the money in their bank accounts. However, none of the five entities named by the Assessees as having paid the commission to them appeared in the course of the assessment proceedings to confirm the payments having been made to the Assessee. The findings in this regard by the AO and the CIT(A), based as they were on preponderance of probabilities, were not able to be explained away by the ITAT. The Revenue's contention that the rate of commission claimed to have been paid was unrealistic and beyond human probabilities. Further no employees existed in Sikkim. The P&L account of the Assessees showed no expenditure corresponding to the carrying on of the business of trading in cardamom. The Assessees indeed failed to provide details and justification regarding the accrual of income exclusively at Sikkim. Further, the balance sheet showed that notwithstanding that the income was from commission, the assets were in the form of investments in the Dalmia group

companies in India.

77. The further finding of the AO that the commission earned is more than the entire turnover of the sales of cardamom even from the accounts produced by the Assessees has again not been dislodged by the Assessees. The repeated assertion during the course of the arguments that no income was accrued to the Assessees or earned by them in India, cannot be accepted in the absence of any tangible material produced before the AO by the Assessees to substantiate such plea. The finding by the ITAT in this regard is contrary to the record and is based on surmises and unsustainable in law.

Service of notice

78. This then brings up a question whether the notices were rightly served on the Assessees by tendering them at the address of Ratan Gupta & Co. at Ansari Road, Daryaganj. A reference has been made to the dictionary meaning of an agent in the Black's Law Dictionary wherein a general agency is described as "that which exists when there is a delegation to do all acts connected with a particular trade, business or employment. It implies authority on the part of the agent to act without restriction or qualification in all matters relating to the business of his principal". The Agent is also described as "one who represents and acts for another under the contract or relation of agency" and "one who deals not only with things, as does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons". This is inconsistent with the definition of agent under the Contract Act, 1872 as well.

79. In the instant case, that the facts that Rattan Gupta & Co. did not merely render professional services but had a vital say in the control and management of the five Assessee companies. This has been more than adequately established by the Revenue through the statements recorded of Mr. Rattan Gupta and Mr. Ravinder Singh and some of the other directors who were erstwhile partners of Mr. Rattan Gupta & Co. Significantly, at no point of time was there any plea that this evidence should be offered for cross-examination.

80. The question concerning the service of notice under Section 282 was not raised before the AO. On the contrary, the AO noted in his order:

> "After the directions of the Hon'ble High Court of Delhi, Notices u/s 143(2) , u/s 142(1) along with questionnaire were issued at the following addresses:
>
> (i) Dorjee Building, Nam Nang Road, Gangtok 737101 (Sikkim).
>
> (ii) Sh. U.P. Kama - H No 24, Tyagi Vihar, Nangloi, New Delhi-l 10041 (present Director)
>
> Notices u/s 143 (2) and 142(1) along with questionnaire were received unserved by the postal department with the remarks "left without information" for Dorjee Building and "No such person exists" from Shri U P Kama respectively. Interestingly, on 7.9.98 Shri Brahma Prakash Sud, FCA and AR of the company appeared and offered to accept the Notices which had come 'unserved'. The counsel was, therefore, given the copy of questionnaire and notices u/s 142(1) & 143(2)."

81. While the CIT(A) rejected the plea of the Assessees on the ground that it

could not be raised in view of the judgment of the High Court of Sikkim, the Court is of the view that this judgment did not preclude the Assessees from raising this issue. However, the ITAT proceeded on the basis that Rattan Gupta could not have been served notices, because he was not authorized to receive notices.

82. The submission of the Revenue is that there was valid service of notice in terms of Section 282 since Mr. Rattan Gupta was the principal officer of the Assessees in terms of Section 282 (2) (c) read with Section 2 (35). The evidence brought on record bear out the submission of the Revenue that "As long as Rattan Gupta is the principal officer of the assessee, notice can be addressed and served upon him, without the need to establish authority to receive notice under Order V Rule 12 of the CPC." In any event the AR of the Assessees appeared before the AO and accepted that notice had been issued.

83. In the light of the finding of this Court that the management and control was with Mr. Rattan Gupta & Co., there was an implied authority of Mr. Rattan Gupta to receive such notices even in terms of Section 252(2) of the Act, read with Order V Rule 20 CPC. Consequently, the Court is unable sustain the finding of the ITAT that notice was not properly served on the Assessees through Rattan Gupta & Co. There was no need for the Department to have gone in for substituted service and the refusal by Rattan Gupta & Co. to receive the notice was sufficient to consider it as a deemed service of notice. The finding by the ITAT in this regard is contrary to the evidence on record and is unsustainable in law.

Jurisdiction of ACIT Circle 7 (1)

84. The other major ground of objection is regarding authority of the ACIT, Circle 7(1) to issue notice under Section 148 of the Act.

85. At the outset, it requires to be noticed is that in view of the finding that five Assessees are resident in India and whose management and control was in New Delhi, the question of ACIT, West Bengal having jurisdiction over the companies does not arise. Therefore, the issue raised that transfer of the jurisdiction in respect of all these companies could not have been ordered by the CIT, New Delhi, requires to be rejected.

86. The only further question that arises is whether CIT, New Delhi was required to pass specific order, placing the ACIT, Circle 7(10) with jurisdiction to issue notice under Section 282 of the Act, considering that jurisdiction in respect of the Daryaganj area was with the ACIT, Circle 13. The further question was whether the ACIT, who issued the notice i.e.ACIT-7 (10) had to himself pass the assessment order since in the present case it was ACIT Circle -4. In this regard, it must be pointed out that the issue was raised for the first time by the Assessees before the ITAT and not before the AO or the CIT(A). It was improper for the ITAT to have permitted the Assessees to raise this point for the first time. The decision of this Court in ***CIT v. S.S. Ahluwalia (2014)*** does support the case of the Revenue that at best this could be an irregularity and not an illegality that vitiated the orders of the assessment.

Limitation for issuance of notice under Section 147

87. It was urged on behalf of the Assessees that the notices under Section 142(1) and 143(2) of the Act were issued for the first time in 1998 and were time barred. It is submitted that the notice under Section 143(2) of the Act had to be issued within a period of twelve months from the end of the month in which return was filed. In this case return was filed on 17th February 1992 whereas the notice under Section 143 (2) was issued only on 24th August 1998. It is further submitted that the Order sheet entries of the AO show that no such notice was issued other than the one dated 24th August 1998. It is submitted that there can be no acquiescence against validity of the assumption of jurisdiction. Reliance is paced on the decision in ***CIT vs. Hotel Blue Moon 321 ITR 362(SC)***.

88. The Court finds merit in the submission of the Revenue that the above plea was raised for the first time by the Assessees before the ITAT and ought not to have been permitted by it. This objection finds support in the decisions in ***CIT v Indovax (2014) 220 Taxman 164 (Delhi) and CIT v Sushil Modi (2003) 130 Taxman 286 (Delhi).*** Even otherwise, it is seen that the Assessees engaged in protracted litigation first before the High Court of Sikkim and thereafter this Court. There was an interim order staying the assessment proceedings from 10th July 1990 to 13th August 1998. Having benefited by that interim protection, the Assessees cannot be heard to submit that there was delay in the issue of notice under Section 143 (2). For that purpose, the time during which the proceedings were pending in the two

High Courts would have to be accounted for. In that view of the matter, this plea of the Assessees is rejected.

The merits of the reopening of the assessments

89. Turning to the merits of the re-opening of the assessments, the Court is unable to agree with the ITAT that the reasons for reopening the assessment are not valid. The search and seizure operation that took place in March 1990 revealed for the first time that the actual management and control of the five Assessees was in New Delhi and that none of these companies had in fact filed any returns under the Indian Income Tax Act despite earning income in India. There are sufficient grounds for exercising the power under Section 148 of the Act. Admittedly, returns were filed only pursuant to the orders passed by this Court. In any event, even the returns under the Sikkim Income Tax Law were only after the search operations took place in March 1990. The *bona fides* of the Assessees for complying with the laws was certainly not established. Consequently, the Court is of the view that the ITAT was in error in holding that sufficient ground did not exist for exercise of the power under Section 148 of the Act.

Interest

90. The ITAT's conclusion that the interest under Section 234A and 234B would not be charged since a specific notice in that behalf was not issued by the AO, was based on the decision in ***Ranchi Club v. CIT (1996) 222 ITR 66 (Patna)***. That view has since been overruled by the decisions in ***CIT v. Bhagat Constructions [2012] 279 CTR 185 (SC)*** and ***CIT v Anjum [2001] 252 ITR 1 (SC)***. The decision of the ITAT in this regard is therefore

overruled.

Summary of conclusions

91. To summarize the conclusions of the Court:

(i) The Assessees, incorporated under the company law of Sikkim, are resident Indian companies. If any income accrued to them or was earned by them in India prior to 1st April 1990, then such income is taxable under the Act.

(ii) The Revenue is justified in contending that the Assessees not having raised such objection at the first available opportunity should not be permitted to urge the ground of lack of jurisdiction of the Delhi officers to issue notices to them under Sections 147/148 of the Act.

(iii) Mr. Rattan Gupta was not only doing the audit work of the five Assessee companies, but determining who should be the directors of the said companies. This coupled with the fact that the blank signed cheque books of all the five companies together with rubber seals, the letter heads, the blank signed cheques and other records were also found in the office of Rattan Gupta & Co., the factual determination by the AO that the management and the control of the five companies was actually wholly situated in Delhi gets fortified. The exhaustive evidence gathered by the Revenue, without being countered by the Assessees despite opportunity being afforded, serves to substantiate the case of the Revenue that the management and the control of the five Assessee companies was in fact located in Delhi.

(iv) The findings of the AO that the Assessees failed to prove that the

commission payments were earned by them exclusively in Sikkim has not been dislodged by the Assessees by producing any tangible material.

(v) There was an implied authority of Mr. Rattan Gupta to receive such notices even in terms of Section 252(2) of the Act, read with Order V Rule 20 CPC. Consequently, the Court is unable sustain the finding of the ITAT that notice was not properly served on the Assessees through Rattan Gupta & Co. There was no need for the Department to have gone in for substituted service and the refusal by Rattan Gupta & Co. to receive the notice was sufficient to consider it as a deemed service of notice.

(vi) The plea of the Assessees that the proceedings under Section 148 of the Act gets vitiated in the absence of a specific order vesting the ACIT with the powers under Section 127 of the Act to issue notice under Section 148 of the Act is rejected.

(vii) The plea of the Assessees that the notices under Section 142(1) and 143(2) of the Act were issued for the first time in 1998 and were time barred is rejected.

(viii) On merits there were sufficient grounds for exercising the power under Section 148 of the Act.

(ix) The ITAT's conclusion that the interest under Sections 234 A and 234 B of the Act could not be charged since a specific notice in that behalf was not issued by the AO is unsustainable in law and is overruled.

Answers to the Questions framed

92. To answer the questions framed, Question (1) viz., "Whether the Tribunal was right in holding that the ACIT exceeded his jurisdiction in issuing notices under Section 148 of the Act and the notices were not served in accordance with law?" is answered in the negative i.e. in favour of the Revenue and against the Assessees.

93. Question (2) viz. "Whether the order made by the ITAT is perverse based on conjectures and surmise and ignorance of evidence and material and has relied upon incorrect facts?" is answered in the affirmative, i.e. in favour of the Revenue and against the Assessees.

94. Question (3) viz. "Whether the income of the assessee is taxable in India?" is answered in the affirmative i.e. in favour of the Revenue and against the Assessees.

95. Question (4) viz., "Whether the ITAT was right in law in holding that the assessee is not a resident of India within the meaning of Section 6 (3) (ii) of the Income-Tax Act, 1961 and whether the said finding of the ITAT is not also vitiated and perverse as it ignores relevant admissible evidence and materials and relies upon incorrect facts and has not given due consideration to several important materials and evidence relevant for determination of residence of the assessee" is answered in the negative i.e. in favour of the Revenue and against the Assessees.

96. The impugned common order dated 8th January 2002 passed by the

ITAT for AYs 1987-88, 1988-89 and 1989-90 is hereby set aside and the corresponding orders of the AO as upheld by the CIT(A) are restored. The appeals are allowed with costs of Rs. 50, 000 in each appeal which will be paid by the respective Respondent Assessees to the Revenue.

S.MURALIDHAR, J.

VIBHU BAKHRU, J.

FEBRUARY 22, 2016
b'nesh/mg