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

% Judgement delivered on: 13.05.2025

\+ **ITA 758/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SMT. SNEH LATA SAWHNEY ..... Respondent

AND

\+ **ITA 216/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SMT. SNEH LATA SAWHNEY
(L/H LATE SH. B.L. SAWHNEY) ..... Respondent

AND

\+ **ITA 694/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SMT. SNEH LATA SAWHNEY ..... Respondent

AND

\+ **ITA 706/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SMT. SNEH LATA SAWHNEY ..... Respondent

AND

\+ **ITA 707/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SMT. SNEH LATA SAWHNEY ..... Respondent

AND

\+ **ITA 781/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SMT. SANGEETA SAWHNEY ..... Respondent

AND

\+ **ITA 782/2023**

THE PR. COMMISSIONER OF INCOME

TAX -CENTRAL -1 ..... Appellant

versus

SH. PRAVEEN SAWHNEY ..... Respondent

AND

\+ **ITA 783/2023**

THE PR. COMMISSIONER OF INCOME
TAX -CENTRAL -1 ..... Appellant

versus

SH. PRAVEEN SAWHNEY ..... Respondent

AND

\+ **ITA 784/2023**

THE PR. COMMISSIONER OF INCOME
TAX -CENTRAL -1 ..... Appellant

versus

SH. PRAVEEN SAWHNEY ..... Respondent

AND

\+ **ITA 786/2023**

THE PR. COMMISSIONER OF INCOME

TAX -CENTRAL -1 ..... Appellant

versus

SH. PRAVEEN SAWHNEY ..... Respondent

AND

\+ **ITA 787/2023**

THE PR. COMMISSIONER OF INCOME
TAX -CENTRAL -1 ..... Appellant

versus

SMT. SANGEETA SAWHNEY ..... Respondent

AND

\+ **ITA 788/2023**

THE PR. COMMISSIONER OF INCOME
TAX -CENTRAL -1 ..... Appellant

versus

SMT. SANGEETA SAWHNEY ..... Respondent

AND

\+ **ITA 790/2023**

THE PR. COMMISSIONER OF INCOME
TAX -CENTRAL -1 ..... Appellant

versus

SMT. SANGEETA SAWHNEY ..... Respondent

AND

\+ **ITA 791/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SH. PRAVEEN SAWHNEY ..... Respondent

AND

\+ **ITA 794/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SMT. SANGEETA SAWHNEY ..... Respondent

AND

\+ **ITA 796/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SMT. SANGEETA SAWHNEY ..... Respondent

AND

\+ **ITA 799/2023**

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL -1 ..... Appellant

versus

SH. PRAVEEN SAWHNEY ..... Respondent

AND

\+ **ITA 69/2024**

PR. COMMISSIONER OF INCOME TAX, CENTRAL-1, DELHI .....Appellant

versus

SMT. SANGEETA SAWHNEY .....Respondent

AND

\+ **ITA 72/2024**

PR. COMMISSIONER OF INCOME TAX, CENTRAL-1, DELHI .....Appellant

versus

SMT. SANGEETA SAWHNEY .....Respondent

AND

\+ **ITA 73/2024**

PR. COMMISSIONER OF INCOME TAX, CENTRAL-1, DELHI .....Appellant

versus

SMT. SANGEETA SAWHNEY .....Respondent

AND

\+ **ITA 74/2024**
PR. COMMISSIONER OF INCOME TAX,
CENTRAL-1, DELHI .....Appellant

versus

SMT. SANGEETA SAWHNEY .....Respondent

AND

\+ **ITA 76/2024**
PR. COMMISSIONER OF INCOME TAX,
CENTRAL-1, DELHI .....Appellant

versus

SMT. SANGEETA SAWHNEY .....Respondent

AND

\+ **ITA 75/2024**
PR. COMMISSIONER OF INCOME TAX,
CENTRAL-1, DELHI .....Appellant

versus

SMT. SANGEETA SAWHNEY .....Respondent

AND

\+ **ITA 88/2024**
PR. COMMISSIONER OF INCOME TAX,
CENTRAL-1, DELHI .....Appellant
versus
SH. PRAVEEN SAWHNEY .....Respondent

AND

\+ **ITA 89/2024**
PR. COMMISSIONER OF INCOME TAX,
CENTRAL-1, DELHI .....Appellant
versus
PRAVEEN SAWHNEY .....Respondent

AND

\+ **ITA 90/2024**
PR. COMMISSIONER OF INCOME TAX,
CENTRAL-1, DELHI .....Appellant
versus
SH. PRAVEEN SAWHNEY .....Respondent

AND

\+ **ITA 94/2024**
PR. COMMISSIONER OF INCOME TAX,
CENTRAL-1, DELHI .....Appellant
versus

SH. PRAVEEN SAWHNEY .....Respondent

AND

\+ **ITA 92/2024**
PR. COMMISSIONER OF INCOME TAX,
CENTRAL-1, DELHI .....Appellant
versus
SH. PRAVEEN SAWHNEY .....Respondent

AND

\+ **ITA 93/2024**
PR. COMMISSIONER OF INCOME TAX,
CENTRAL-1, DELHI .....Appellant
versus
SH. PRAVEEN SAWHNEY .....Respondent

Advocates who appeared in this case

For the Appellant : Mr. Mr Puneet Rai, SSC, Mr Ashvini Kumar and Mr Rishabh Nangia, SCs and Mr Nikhil Jain, Advocates for the Revenue.

For the Respondent : Dr Rakesh Gupta, Mr Somil Agarwal and Mr Dushyant Agarwal, Advocates for the Assessee.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

JUDGMENT

VIBHU BAKHRU, J.

INTRODUCTION

1. The Revenue has filed the present appeals under Section 260A of the Income Tax Act, 1961 [**the Act**] assailing the orders passed by the learned Income Tax Appellate Tribunal [**ITAT**] allowing the respective appeals preferred by the respondents [**Assessees**].

2. The present batch of appeals concerns three Assessees namely Smt. Sneh Lata Sawhney, Smt. Sangeeta Sawhney and Sh. Praveen Sawhney. ITA No.216/2023 concerns Late Sh. B.L. Sawhney and Smt. Sneh Lata Sawhney is arrayed as the respondent in the said appeal being the legal heir of the deceased assessee, Sh. B.L. Sawhney.

3. The Assessees had filed their respective appeals against the orders of the Commissioner of Income Tax (Appeals) [**CIT(A)**] in respect of appeals emanating from the assessment orders [**quantum appeals**] as well as the orders passed in the penalty proceedings [**penalty appeals**]. It is material to note that the assessments made in the case of Smt. Sneh Lata Sawhney and Smt. Sangeeta Sawhney were made on protective basis. However, in the case of Sh. Praveen Sawhney and in the case of Sh. B.L. Sawhney (since deceased), the assessment has been made on substantive basis.

4. The Assessees are related and the questions involved are identical and therefore, the present appeals have been taken up together. It is also material to note that the orders impugned in the batch of these appeals (twenty-nine in numbers) are three separate orders passed by the learned ITAT – the order dated 01.06.2021 is the subject matter of ITA No. 216/2023; the order dated 22.07.2022 is a common order in four appeals

[being ITA Nos 694/2023, ITA 706/2023, ITA 707/2023, ITA 758/2023] and the subject matter of the remaining appeals (twenty-four in numbers) is the common order dated 18.05.2023 passed by the learned ITAT.

5. The tabular statement setting out the details of the present appeals is set out below: -

Appeals preferred by the Revenue					
Sr. No.	**Assessee**	**ITA No.**	**AY**	**Date of the Impugned Order**	**Whether emanating from quantum / penalty orders**
1	Smt. Sneh Lata Sawhney (L/H Late B.L. Sawhney)	216/2023	2006-07	01.06.2021	Quantum
2	Smt. Sneh Lata Sawhney	694/2023	2006-07	22.07.2022	Penalty
3	Smt. Sneh Lata Sawhney	706/2023	2011-12	22.07.2022	Quantum
4	Smt. Sneh Lata Sawhney	707/2023	2011-12	22.07.2022	Penalty
5	Smt. Sneh Lata Sawhney	758/2023	2006-07	22.07.2022	Quantum
6	Smt. Sangeeta Sawhney	781/2023	2008-09	18.05.2023	Quantum
7	Sh. Praveen Sawhney	782/2023	2006-07	18.05.2023	Quantum
8	Sh. Praveen Sawhney	783/2023	2009-10	18.05.2023	Quantum
9	Sh. Praveen Sawhney	784/2023	2008-09	18.05.2023	Quantum
10	Sh. Praveen Sawhney	786/2023	2010-11	18.05.2023	Quantum
11	Smt. Sangeeta Sawhney	787/2023	2006-07	18.05.2023	Quantum
12	Smt. Sangeeta Sawhney	788/2023	2009-10	18.05.2023	Quantum
13	Smt. Sangeeta Sawhney	790/2023	2011-12	18.05.2023	Quantum

14	Sh. Praveen Sawhney	791/2023	2007-08	18.05.2023	Quantum
15	Smt. Sangeeta Sawhney	794/2023	2010-11	18.05.2023	Quantum
16	Smt. Sangeeta Sawhney	796/2023	2007-08	18.05.2023	Quantum
17	Sh. Praveen Sawhney	799/2023	2011-12	18.05.2023	Quantum
18	Smt. Sangeeta Sawhney	69/2024	2006-07	18.05.2023	Penalty
19	Smt. Sangeeta Sawhney	72/2024	2011-12	18.05.2023	Penalty
20	Smt. Sangeeta Sawhney	73/2024	2008-09	18.05.2023	Penalty
21	Smt. Sangeeta Sawhney	74/2024	2010-11	18.05.2023	Penalty
22	Smt. Sangeeta Sawhney	76/2024	2007-08	18.05.2023	Penalty
23	Smt. Sangeeta Sawhney	75/2024	2009-10	18.05.2023	Penalty
24	Sh. Praveen Sawhney	88/2024	2006-07	18.05.2023	Penalty
25	Sh. Praveen Sawhney	89/2024	2011-12	18.05.2023	Penalty
26	Sh. Praveen Sawhney	90/2024	2009-10	18.05.2023	Penalty
27	Sh. Praveen Sawhney	94/2024	2007-08	18.05.2023	Penalty
28	Sh. Praveen Sawhney	92/2024	2008-09	18.05.2023	Penalty
29	Sh. Praveen Sawhney	93/2024	2010-11	18.05.2023	Penalty

6. For the purpose of disposal of the present batch of appeals, we refer to the facts as relevant in ITA No. 782/2023. This appeal assails the order dated 18.05.2023 [**impugned order**] passed by the learned ITAT in a batch of appeals including ITA No. 1539/Del/2017, which was preferred by Parveen Sawhney [hereafter **the Assessee**] in respect of the Assessment Year [**AY**] 2006-07.

7. The impugned order passed by the learned ITAT is a common order in the present batch of twenty-four appeals relating to the AY 2006-07 to AY 2011-12 by the connected Assessees – Praveen Sawhney and Smt. Sangeeta Sawhney. The said two Assessees had filed two appeals in respect of each of the assessment year covered by the common order relating to the AY 2006-07 to AY 2011-12; one in respect of the quantum of the additions made, and the other in respect to the penalty imposed under Section 271(1)(c) of the Act.

8. In ITA No.1539/Del/2017, the Assessee [Praveen Sawhney] assails the order dated 29.12.2016 passed by the CIT(A), whereby the Assessee's appeal was dismissed, and the additions made by the AO were sustained. The Assessee preferred the said appeal before the CIT(A) against an assessment order dated 04.03.2015 passed by the Assessing Officer [**AO**] under Section 153A read with Section 143(3) of the Act.

9. The learned ITAT in the present batch of appeals, allowed the respective appeals on the ground that the assessment orders giving rise to the said appeals were barred by limitation as it was passed beyond the period prescribed under Section 153B of the Act.

QUESTIONS OF LAW

10. This court passed a common order dated 13.03.2024 admitting ITA Nos. 706/2023, ITA 758/2023, ITA 781/2023, ITA 782/2023, ITA 783/2023, ITA 784/2023, ITA 786/2023, ITA 787/2023, ITA 788/2023, ITA 790/2023, ITA 791/2023, ITA 794/2023, ITA 796/2023, ITA 799/2023, and

ITA 216/2023, on the following questions of law: -

> "I. Whether on facts and circumstances of the case, the Income Tax Appellate Tribunal ["**ITAT**"] is correct in quashing the assessment order as barred by limitation without going into merits of the case?
>
> II. Whether on facts and circumstances of the case, the ITAT is correct in not allowing extension of the time barring date, when a valid reference was sent by competent authority to Swiss authorities as per the provisions of the Income Tax Act, 1961 ["**Act**"] and DTAA between India and Switzerland and holding the assessment order as being time barred?"

11. By a common order dated 30.01.2024 passed in ITA Nos. 72/2024, 73/2024, 74/2024, 75/2024 and 76/2024 – which are penalty appeals – this court framed the following questions of law:

> "I. Whether on facts and circumstances of the case, the ITAT is correct in quashing the assessment order as barred by limitation without going into merits of the case, thereby deleting the penalty imposed vide penalty order passed under Section 271(l)(c) of the Act?
>
> II. Whether on facts and circumstances of the case, the ITAT is correct in not allowing extension of the time-barring date, when a valid reference was sent by competent authority to Swiss authorities as per the provisions of the Act and DTAA between India and Switzerland, thereby deleting the penalty imposed as assessment order being held as time barred?"

12. By a subsequent order dated 12.11.2024, this court had held that the appeals being [ITA Nos. 69/2024, ITA 72/2024, ITA 73/2024, ITA 74/2024, ITA 76/2024, ITA 75/2024, ITA 88/2024, ITA 89/2024, ITA 90/2024, ITA

92/2024, ITA 93/2024 and ITA 94/2024] would be heard on the questions of law as noted in the order dated 30.01.2024 passed in ITA Nos. 72-76/2024.

PREFATORY FACTS

13. The Assessees have succeeded in their respective appeals before the learned ITAT on the ground that the assessment orders from which the appeals emanate were passed beyond the period as stipulated under Section 153B of the Act. As noted above, unless the context indicates otherwise, we shall refer to the facts as obtaining in ITA No.782/2023, which is a quantum appeal in the case of the Assessee, Parveen Sawhney, in respect of the AY 2006-07.

14. Search and seizure operations were conducted under Section 132 of the Act in the case of Sh. Bhushan Lal Sawhney and other related persons on 28.07.2011. In connection with the said operations, warrant of authorization under Section 132 of the Act was also issued in the name of the Assessee [Praveen Sawhney].

15. Thereafter, the notices under Section 153A of the Act were issued including the notice dated 16.05.2012 to the Assessee [Praveen Sawhney] requiring him to file the return for AY 2006-07. In response to the said notice, the Assessee furnished his return of income on 25.06.2012, declaring the total income of ₹4,54,001/-. Thereafter, various notices were issued to the Assessee to respond to certain queries and clarifications sought by the AO. During the course of the search operations, statement of the Assessee was also recorded.

16. The Revenue had information regarding the Assessee maintaining a

bank account with HSBC Bank, Geneva, Switzerland and the Assessee was confronted with the same during the course of the proceedings.

17. At the instance of the AO, on 11.06.2013, the competent authority [Joint Secretary, FT & TR- I] made a request for administrative assistance to the Switzerland Tax Authorities under the provisions of 'Exchange of Information' Article of Indo-Switzerland Double Taxation Avoidance Agreement [**Indo-Swiss DTAA**].

18. The information sought related to the period prior to 01.04.2011. The Swiss authorities sent a communication dated 02.07.2019 denying the request for information on the ground that the Indo-Swiss DTAA did not entail any obligation to provide information for a period prior to 01.04.2011.

19. According to the Revenue, the Assessee admitted maintaining the account with HSBC Bank, Geneva. The reassessment proceedings culminated in the assessment order dated 04.03.2015 passed under Section 153A read with Section 143(3) of the Act, whereby certain additions were made in the income from other sources and unexplained expenditure under Section 69C of the Act.

20. The Assessee appealed the said decision before the learned CIT(A). However, the said appeal was dismissed by the order dated 29.12.2016.

21. Aggrieved by the said dismissal, the Assessee preferred the appeal before the learned ITAT raising several grounds including that the assessment order had been passed beyond the period of limitation as prescribed under Section 153B of the Act. The learned ITAT accepted the

said contention and allowed the appeals on 18.05.2023. In view of its decision that the assessment order dated 04.03.2015 was barred by the limitation, the learned ITAT did not examine the other grounds as raised by the Assessee on merits of the said issues.

RIVAL STANDS

22. It was the Revenue's case before the learned ITAT that the assessment order was not barred by limitation as the period for passing the assessment order under Section 153B of the Act was extended in terms of Clause (ix) of the Explanation to Section 153B of the Act. The Revenue contends that in terms of Clause (ix) of the Explanation to Section 153B of the Act, the period commencing from the date on which a reference was made for request for information by an authority competent under the agreement referred to in Section 90 or Section 90A of the Act – in this case the Indo-Swiss DTAA – and ending with the date on which the information is last received or a period of one year, whichever is less, is required to be excluded.

23. The Revenue claims that the request for information in terms of the Indo-Swiss DTAA was made to the concerned authority of the Swiss Confederation and no response was received within the period of one year from the date of the making such request. Therefore, the period of one year is required to be excluded for the purpose of computing the limitation under Section 153B of the Act.

24. The Assessee contends to the contrary. The Assessee claims that the reference made was not valid as the Revenue had sought information in

respect of the period prior to 01.04.2011 being the beginning of the fiscal year next following the date on which Article 26 of the Indo-Swiss DTAA was substituted.

25. The learned ITAT accepted the Assessee's contention and thus, concluded that the benefit of Clause (ix) of the Explanation to Section 153B of the Act was not available to the Revenue as the reference made to the Swiss authorities was invalid. Accordingly, the appeals preferred by the Assessees were allowed.

REASONS AND CONCLUSION

26. As is apparent from the above, the question whether the period of one year is required to be excluded for the purpose of computing the period of limitation for passing the assessment order, is the heart of the dispute. There is no dispute that if the said period is excluded from the time available under Section 153B of the Act for making the assessment / reassessment order on account of the Revenue making a reference in terms of the Agreement under Section 90 of the Act, the assessment orders were passed within the period of limitation. The AO had passed the assessment order on 04.03.2015 and the time period of passing the assessment order was available till 31.03.2015.

27. It is relevant to refer to Clause (ix) of the Explanation to Section 153B of the Act, which was numbered as Clause (viii) at the material time. The same is set out below:

> "Explanation - In computing the period of limitation under this.–

*** *** ***

(ix) the period commencing from the date on which a reference or first of the references for exchange of information is made by an authority competent under an agreement referred to in Section 90 or Section 90-A and ending with the date on which the information requested is last received by the Principal Commissioner or Commissioner or a period of one year, whichever is less; or

*** *** ***

shall be excluded"

28. In the present case, there is no dispute that in fact the Revenue had made a reference under Section 90 of the Act to the concerned Swiss authorities. The impugned order sets out the letters dated 14.05.2013 and 11.06.2013, which were relied upon by the Revenue to establish that such a reference was made.

29. The letter dated 14.05.2013 is addressed by the Commissioner of Income Tax (Central)-1, New Delhi to the Under Secretary of the Foreign Tax and Tax Research Division-IV [**FT&TR**] of the Central Board of the Direct Taxes, [**CBDT**], Department of Revenue forwarding the proforma/checklist for seeking information to the FT&TR Section of the CBDT in relation to "Swiss Tax Authority under DTAA".

30. We consider it apposite to refer to the letter dated 11.06.2013 sent by the Under Secretary of FT&TR-III(2) confirming that the request for information as sought by the AO was made to the concerned authorities of the Swiss Confederation under "*Exchange of Information Article of Indo-Switzerland Double Taxation Avoidance Agreement*". The same is set out

below: -

> "Sir / Madam,
>
> Sub: Request for information under 'Exchange of Information' Article of Indo-Switzerland Double Taxation Avoidance Convention – Enquiry into the tax affairs of Mr. Praveen Sawhney - Reg.
>
> Your request for administrative assistance from received on 2013-05-20 on the above mentioned subject has been received in Exchange of Information Cell, Foreign Tax & Tax Research Division of Central Board of Direct Taxes.
>
> 2. A request for administrative assistance has been made to the Switzerland Tax Authorities on the 11 June, 2013 by the Joint Secretary, FT & TR- I, the competent authority of India, under the provisions of 'Exchange of Information' Article of Indo-Switzerland Double Taxation Avoidance Agreement.
>
> 3. Efforts are being made for the timely response to your request for administrative assistance and the information will be made available to you as soon as the Exchange of Information Cell receives any response from Competent Authority office.
>
> 4. This information is requested under 'Exchange of Information' Article of Indo-Switzerland Double Taxation Avoidance Agreement and its use and disclosure is strictly governed by it.
>
> Yours faithfully,
> Sd /-
> P.S.SIVASANKARAN
> US (FT &TR-III) (2)"

31. The aforesaid letter clearly establishes that the request for administrative assistance and available information was received on

20.05.2013 and the request was made to the concerned Swiss authority under the Exchange of Information Article of the Indo-Swiss DTAA - Article 26. The learned ITAT also accepted the aforesaid fact and summarized the controversy as under: -

> "11. Now the entire controversy boils down to the issue whether the aforementioned reference is a valid reference and, if not, then can an invalid reference extend the period of limitation?"

32. On plain term of Clause (ix) of the Explanation to Section 153B of the Act, the period of one year is required to be excluded for the purpose of computing the period of limitation for making an assessment under Section 143A of the Act.

33. The learned ITAT's decision that the said period is unavailable rests essentially on the ground that the reference made for information under Indo-Swiss DTAA was invalid. This in turn rests on the ground that in terms of the Indo-Swiss DTAA, request for information could not be made for the period prior to 01.04.2011. According to the learned ITAT, the reference made by the Revenue was invalid as it was not covered under Article 26 of the Indo-Swiss DTAA and the benefit of Clause (ix) of the Explanation to Section 153B of the Act was not available in case of any invalid reference.

34. The learned ITAT noted that the Notification dated 27.12.2011 [Notification No. S.O. 2903(E)] is clear that the Indo-Swiss DTAA can be made applicable only for the information that relates to fiscal year beginning on or after 01.04.2011. Since the information sought by the Revenue was relevant to the period from 01.04.1995 to 31.03.2012, the learned ITAT held that the reference was invalid.

35. The learned ITAT referred to the decision of the Rajasthan High Court in ***Commissioner of Income-tax v. Bajrang Textiles***[1] and the decision of the Allahabad High Court in ***Sadana Electric Stores v. CIT***[2] and on the strength of these decisions held that the invalid reference would not extend the period of the limitation as prescribed under Section 153B of the Act. The learned ITAT also referred to earlier decision of its coordinate bench in ***Consulting Engineering Services (India) Pvt. Limited & Another v. The ACIT & Another***[3].

36. It is material to note that the said decisions were rendered in the context of extension of period of limitation on account of the orders for special audit passed under Section 142(2A) of the Act. In the decisions as relied, direction issued by the AO for conduct of the special audit was faulted. Therefore, the exclusion of period under Clause (i) of Sub-section (2A) of Section 142 of the Act was denied.

37. In view of the above, we consider it apposite to first address the question whether the request for information made by the Indian authorities to the concerned Swiss authorities for information pertaining to the previous years relevant to the assessment years, AY 2006-07 to AY 2011-12, was valid [second question as framed on 30.01.2024 in ITA Nos.72/2024 to 76/2024].

38. It was contended by Mr. Rai, the learned counsel appearing for the

[1] (2007) 294 ITR 561
[2] (2013) 219 Taxman 294
[3] ITA No. 1734/Del/2014 decided on 05.02.2019

Revenue, that although the Indo-Swiss DTAA as amended was notified on 27.12.2011, the Indo-Swiss DTAA as existing prior to amendment also contained obligations for exchange of information. Thus, the request for information for the period prior to 01.04.2011, was also maintainable.

39. It is material to note that the Government of India had issued a Notification dated 21.04.1995 [G.S.R. No. 375(E)] in exercise of its powers under Section 90 of the Act directing the provisions of the Indo-Swiss DTAA would be given effect to in the Union of India. Article 24 of the said Indo Swiss DTAA, as notified, contained provisions regarding exchange of information. The relevant extract of the said Notification is set out below:

> "**Notification G.S.R. NO. 357(E), dtd. 21.4.1995.**
>
> Whereas the annexed Agreement between the Government of the Republic of India and the Government of the Swiss Confederation for the avoidance of double taxation with respect to taxes on income has entered into force on 29th December, 1994 after the notification by both the Contracting States to each other of the completion of the procedures required under their laws for bringing into force of the said Agreement in accordance with paragraph 1 of Article 26 of the said Agreement;
>
> Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that all the provisions of the said Agreement shall be given effect to in the Union of India.
>
> **AGREEMENT BETWEEN THE REPUBLIC OF INDIA AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME--THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE SWISS FEDERAL COUNCIL**
>
> Desiring to conclude an Agreement for the avoidance of double taxation with respect to taxes on income,
>
> Have agreed as follows:

*** *** ***

Article 24

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information (being information which is at their disposal under their respective taxation laws in the normal course of administration) as is necessary for carrying out the provisions of this Agreement in relation to the taxes which are the subject of this Agreement. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those concerned with the assessment and collection of the taxes which are the subject of this Agreement. No information as aforesaid shall be exchanged which would disclose any trade, business, industrial or professional secret or trade process.

2. In no case shall the provisions of this Article be construed as imposing upon either of the Contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either Contracting State or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application."

40. The Indo-Swiss DTAA was subsequently amended by a Notification dated 07.02.2001 [G.S.R. 74(E)] annexing therewith the Protocol amending the Indo-Swiss DTAA ["Protocol Amending the Agreement Between the Republic of India and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income", hereafter **Supplementary Protocol**]. The relevant extract of the said Notification is set out below:

"MINISTRY OF FINANCE

(Department of Revenue)

(FOREIGN TAX DIVISION)

NOTIFICATION

New Delhi. the 7th February, 2001

INCOME TAX

G.S.R. 74(E). – Whereas the annexed Protocol amending the Agreement between the Government of the Republic of India and the Government of the Swiss Federal Council for the Avoidance of Double Taxation With Respect To Taxes on Income has come into force on 20th December, 2000, the date of the later of the notifications by both the Contracting States to each other, under Article 16 of the Protocol Amending the Agreement, of the satisfaction of all the legal requirements and procedures for giving effect to the said Protocol.

Now, therefore, in exercise of the powers conferred by section 90 of the Income tax Act, 1961 (43 of 1961), the Central Government hereby directs that al1 the provisions of the said Protocol Amending the Agreement, shall be given effect to in the Union of India –

[Notification No. 35/F. No.501/7/73-FTD]
VIJAY MATHUR, Jt. Secy."

"**ANNEXURE**

PROTOCOL

AMENDINO THE AGREEMENT

BETWEEN

THE REPUBLIC OF INDIA

AND

THE SWISS CONFEDERATION

FOR THE AVOIDANCE OF DOUBLE TAXATION

WITH RESPECT TO TAX ON INCOME

THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE SWISS FEDERAL COUNCIL

DESIRING to amend the Agreement between the Republic of India and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income, signed at New Delhi on 2

November 1994 (hereinafter referred to as "the Agreement"), have agreed as follows:

*** *** ***

Article 14

Article 23 to 27 of the Agreement shall become Articles 25 to 29."

41. The Supplementary Protocol did not amend the contents of Article 24 of the Indo-Swiss DTAA, as notified by the Notification dated 21.04.1995. However, Article 24 was re-numbered as Article 26 in terms of Article 14 of the Supplementary Protocol.

42. Subsequently, the Government of India and the Swiss Confederation entered into an agreement [**Amending Protocol**] on 30.08.2010, whereby the Indo-Swiss DTAA, as amended by the Supplementary Protocol signed at New Delhi on 16.02.2000 was amended. Thereafter, a Notification dated 27.12.2011 [S.O. 2903 (E)] was published by the Government of India in exercise of its powers under Section 90 of the Act. The relevant extract of the said notification is set out below:

"**MINISTRY OF FINANCE**
(Department of Revenue)
NOTIFICATION
New Delhi, the 27th December, 2011
(INCOME-TAX)

S.O. 2903 (E). – Whereas a Protocol amending the Agreement between the Republic of India and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income with Protocol, signed at New Delhi on the 2nd day of November, 1994, as amended by the supplementary Protocol signed at New Delhi on the 16th day of February, 2000, was signed at New Delhi on the 30th day of August, 2010;

And whereas the date of entry into force of the said Protocol

is the 7th day of October, 2011, being the date of later of the notifications of satisfaction of all legal requirements and procedures as required by the respective laws for entry into force of the said Protocol, in accordance with Paragraph 2 of Article 14 of the said Protocol;

And whereas sub-paragraph (a) of Paragraph 2 of Article 14 of the said Protocol provides that the provisions of the said Protocol shall have effect in India in respect of income arising in any fiscal year beginning on or after the first day of April next following the calender year in which the Amending Protocol entered into force;

And whereas Paragraph 3 of Article 14 of the said Protocol provides that with respect to Article 26 of the Agreement, the exchange of information provided for in the said Protocol will be applicable for information that relates to any fiscal year beginning on or after the first day of January of the year next following the date of signature of the said Protocol;

Now, therefore, in exercise of the powers conferred by Section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby directs that all the provisions of the said Protocol, as set out in the Annexure hereto, shall be given effect to in the Union of India in respect of income arising in any fiscal year beginning on or after the 1st day of April, 2012 and with respect to Article 26 of the Agreement, the exchange of information provided for in the said Protocol will be applicable for information that relates to any fiscal year beginning on or after the 1st day of April, 2011.

PROTOCOL

AMENDING THE AGREEMENT BETWEEN THE REPUBLIC OF INDIA AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME WITH PROTOCOL, SIGNED AT NEW DELHI ON 2 NOVEMBER, 1994, AS AMENDED BY THE SUPPLEMENTARY PROTOCOL SIGNED AT NEW DELHI ON 16 FEBRUARY, 2000.

The Government of the Republic of India

And

the Swiss Federal Council;

Desiring to conclude a Protocol (hereinafter referred to as "Amending Protocol") to amend the Agreement between the Contracting Parties for the Avoidance of Double Taxation with respect to Taxes on Income, signed at New Delhi on 2 November 1994, as amended by the supplementary Protocol signed at New Delhi on 16 February, 2000 (hereinafter referred to as "the Agreement");

Have agreed as follows:

*** *** ***

ARTICLE 8

Article 26 (Exchange of information) of the Agreement shall be deleted and replaced by the following Article:

"Article 26

Exchange of information

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes covered by the Agreement insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for

other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (order public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. In order to obtain such information, the tax authorities of the requested Contracting State shall, therefore, have the power to enforce the disclosure of information covered by this paragraph, notwithstanding paragraph 3 or any contrary provisions in its domestic laws."

******** ********* *********

ARTICLE 14

1. The Government of the Contracting States shall notify each other through diplomatic channels that all legal requirements and procedures for giving effect to this Amending Protocol have been satisfied.

2. The Amending Protocol, which shall form an integral part of the Agreement, shall enter into force on the date of the later of the notifications referred to in paragraph 1 and its provisions shall have effect:

(a) in India,

In respect of income arising in any fiscal year beginning on or after the first day of April next following the calender year in which the Amending Protocol entered into force; and

(b) in Switzerland,

in respect of income arising in any fiscal year beginning or or after the first day of January next following the calender year in which the Amending Protocol entered into force. :

3. Notwithstanding paragraph 2 of this Article, with respect to Article 26 of the Agreement, the exchange of information provided for in this Amending Protocol will be applicable for information that relates to any fiscal year beginning on or after the first day of January of the year next following the date of signature of this Amending Protocol.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Amending Protocol.

Done in duplicate at New Delhi this 30th day of August, 2010 in the English, German and Hindi languages, all texts being equally authentic. In the case of any divergence, the English text shall prevail.

For the Government of the Republic of India:	For the Swiss Federal Council:
(Shri Pranab Mukherjee)	(Micheline Calmy-Rey)

Finance Minister	Head of the Swiss Federal Department of Foreign Affairs

[Notification No. 62/2011/F. No. 501/01/1973-FTD-I]

SANJAY KUMAR MISHRA, Jt. Secy."

43. It is apparent from the above that the Indo-Swiss DTAA did exist between the Republic of India and the Swiss Confederation as the same was signed on 02.11.1994 and was notified under Section 90 of the Act on 21.04.1995. The said Indo-Swiss DTAA also included provision for exchange of information being Article 24, which was subsequently renumbered as Article 26 by the Supplementary Protocol, and was substituted by the Amending Protocol executed on 30.08.2010.

44. In terms of paragraphs 2 and 3 of Article 14 of the Amending Protocol executed on 30.08.2010, the obligation relating to exchange of relevant information is applicable only for information that relates to a fiscal year beginning after the first day of January, 2011 which under the Act would commence on 01.04.2011. However, according to the learned counsel appearing for the Revenue, Article 26 of the Indo-Swiss DTAA as it existed prior to the amendment by virtue of Article 8 of the Amending Protocol would continue to be operative.

45. In view of the aforesaid contention, we are required to examine the import of substitution of Article 26 of the Indo-Swiss DTAA by virtue of Article 8 of the Amending Protocol. And, whether the said Article, as it existed prior to 30.08.2010, survived for the purposes of exchange of information relating to the period prior to 01.04.2011.

46. It is clear from Article 8 of the Amending Protocol that Article 26 of the Indo-Swiss DTAA as amended by the Supplementary Protocol stood deleted and was replaced by Article 26 as set out in the Amending Protocol. Further, paragraph 2 of Article 14 of the Amending Protocol expressly stipulated that the Amending Protocol would form an integral part of the Indo-Swiss DTAA and would be applicable on the date of the notifications confirming that all legal requirement for giving effect to the Amending Protocol were satisfied. However, paragraph 3 of Article 14 of the Ameding Protocol makes it explicitly clear that notwithstanding anything contained in paragraph 2 of Article 14 of the Amending Protocol, Article 26 of the Indo-Swiss DTAA would be applicable only for information that relates to any fiscal year beginning on or after first day of January of the year following the date on which the Amending Protocol was executed. Since the Amending Protocol was signed on 30.08.2010, Article 26 would be effective only for exchange of information that relates to the following fiscal year, that is, commencing 01.04.2011. Thus, Mr Rai's contention that the Indo-Swiss DTAA contained provisions regarding exchange of information even prior to the Amending Protocol and therefore, the request for information relating to a period prior to 01.04.2011 would be valid, is unmerited.

47. It is material to note that by virtue of Article 8 of the Amending Protocol, Article 26 of the Indo-Swiss DTAA as amended by the Supplementary Protocol was deleted. Thus, Article 26 (which was earlier numbered as Article 24) of the Indo-Swiss DTAA as it existed prior to 30.08.2010 ceased to exist, any request under that Article cannot be made after 30.08.2010. The only agreement that existed between the Swiss

Confederation and India in respect of exchange of information under the Indo-Swiss DTAA is embodied in Article 26 as was substituted by the Amending Protocol.

48. By virtue of the Amending Protocol, the Indo-Swiss DTAA stood novated insofar as the provision regarding exchange of information is concerned. It is well settled that novation discharges the original contract. Thus, for all intents and purposes, Article 26 as it existed prior to 30.08.2010, ceased to exist. It is also well settled that the effect of substitution of an agreement obliterates the existing agreement and replaces the same. Thus, after 30.08.2010, the Revenue had no recourse to Article 26 as it was operative prior to 30.08.2010.

49. The principle that the substitution of a provision has the effect of removing the existing provision is also applicable to legislative instruments. Unless there is an appropriate saving clause, all rights and liabilities under a law that is substituted, would ceases to exist.

50. In ***Koteswar Vittal Kamath v. K. Rangappa Baliga & Co.***[4], the Supreme Court had explained that "*Once the old rule has been substituted by the new law, it ceases to exist and does not automatically get revived when the new rule is held to be invalid*". Thus, unless the rights and liabilities under the law as prior to substitution are saved by a savings clause, or by virtue of Section 6 of the General Clauses Act, 1897, or by necessary intent, a clause that is substituted would cease to be effective.

[4] (1969) 1 SCC 255

51. In ***Zile Singh* v. *State of Haryana & Ors.***[5], the Supreme Court had explained the practice of amendment by substitution and observed as under:

> "*24.* The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. "Substitution" has to be distinguished from "supersession" or a mere repeal of an existing provision.
>
> *25.* Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see *Principles of Statutory Interpretation, ibid*., p. 565). If any authority is needed in support of the proposition, it is to be found in *West U.P. Sugar Mills Assn.* v. *State of U.P.* [*West U.P. Sugar Mills Assn.*v. *State of U.P.*, (2002) 2 SCC 645] , *State of Rajasthan* v. *Mangilal Pindwal* [*State of Rajasthan* v. *Mangilal Pindwal*, (1996) 5 SCC 60] , *Koteswar Vittal Kamath* v. *K. Rangappa Baliga & Co.* [*Koteswar Vittal Kamath* v. *K. Rangappa Baliga & Co.*, (1969) 1 SCC 255] and *A.L.V.R.S.T. Veerappa Chettiar* v. *I.S. Michael* [*A.L.V.R.S.T. Veerappa Chettiar* v. *I.S. Michael*, 1962 SCC OnLine SC 318 : 1963 Supp (2) SCR 244 : AIR 1963 SC 933] . In *West U.P. Sugar Mills Assn. case* [*West U.P. Sugar Mills Assn.* v. *State of U.P.*, (2002) 2 SCC 645] , a three-Judge Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In *Mangilal Pindwal case* [*State of Rajasthan* v. *Mangilal Pindwal*, (1996) 5 SCC 60], this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In *Koteswar case* [*Koteswar Vittal Kamath* v. *K. Rangappa Baliga & Co.*, (1969) 1 SCC 255] a

[5] (2004) 8 SCC 1

> three-Judge Bench of this Court emphasised the distinction between "supersession" of a rule and "substitution" of a rule and held that the process of substitution consists of two steps : first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place."

52. In a recent decision in ***Pernod Ricard (India) Private Limited v. State of Madhya Pradesh & Ors.***[6]**,** the Supreme Court once again took note of the distinction between supersession and substitution. The relevant observations of the said decision are set out below**:**

> **"14.** Questioning the legality and validity of the decision [*State of M.P.* v. *Pernod Ricard (India) (P) Ltd.*, 2017 SCC OnLine MP 1572] of the Division Bench of the High Court, the present appeals are filed. Mr Pratap Venugopal, learned Senior Advocate, appearing on behalf of the appellant argued that the effect of substitution is to repeal the existing provision from the statute book in its entirety and to enforce the newly substituted provision. He would further submit that even for incidents which took place when the old Rule was in force, it is the substituted Rule that would be applicable, and therefore, the demand notice dated 22-11-2011 seeking payment of penalties under the old Rule is illegal.
>
> **15.** There is no difficulty in accepting the argument of Mr Pratap Venugopal on principle. In *Koteswar Vittal Kamath* v. *K. Rangappa Baliga & Co.* [*Koteswar Vittal Kamath* v. *K. Rangappa Baliga & Co.*, (1969) 1 SCC 255] , this Court brought out the distinction between *supersession* of a rule and *substitution* of a rule, and held that the process of substitution consists of two steps — first, the old rule is repealed, and next, a new rule is brought into existence in its place…."
>
> > "*8.* On that analogy, it was argued that, if we hold that the Prohibition Order of 1950, was invalid, the previous Prohibition Order of 1119, cannot be held to be revived. This argument ignores the distinction between supersession of a rule, and substitution of a rule. In *A.T.B. Mehtab Majid & Co. (Firm)* [*A.T.B.*

[6] (2024) 8 SCC 742

> *Mehtab Majid & Co. (Firm)* v. *State of Madras*, (1963) 14 STC 355 : 1962 SCC OnLine SC 51] , the new Rule 16 was substituted for the old Rule 16. The *process of substitution* consists of two steps. First, the old rule it made to cease to exist and, next, the new rule is brought into existence in its place. Even if the new rule be invalid, the first step of the old rule ceasing to exist comes into effect, and it was for this reason that the court held that, on declaration of the new rule as invalid, the old rule could not be held to be revived."
>
> (emphasis in original)"

53. We may also note the decision of the Supreme Court in ***Firm A.T.B. Mehtab Majid & Co. v. State of Madras & Another***[7]. In its decision, the Supreme Court had observed as under:

> "……It has been urged for the respondent that if the impugned rule be held to be invalid, old rule 16 gets revived and that the tax assessed on the petitioner will be good. We do not agree. Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid….."

54. Although the said decisions were rendered in the context of legislative amendments; the enunciated principles of construction are instructive. In the case of agreements, substitution of a covenant would novate the agreements and unless the intention of the parties to preserve the rights and obligations under the agreement prior to novation is expressly preserved, the same cannot be inferred. It is trite that novation discharges the prior agreement.

55. There is no clause in the Amending Protocol that has an effect of saving any rights and obligations under Article 26 (numbered as Article 24

[7] 1962 SCC OnLine SC 51

prior to 16.02.2000), or one which could be read as expressing the intention of the treaty partners to save any rights and obligations regarding exchange of information as extant prior to 30.08.2010. On the contrary, paragraph 3 of Article 14 of the Amending Protocol contains a *non-obstante* clause that makes it abundantly clear that Article 26 of the Indo-Swiss DTAA regarding exchange of the information would be applicable only for the information that relates to a fiscal year beginning or after the first day of January of the year following the date of the signing of the Amending Protocol, that is, a fiscal year commencing on or after 01.01.2011, which in the case of this country would be 01.04.2011.

56. In view of the above, we are unable to accept that any request made by the Revenue after 30.08.2010 for information relating to period prior to 01.04.2011 could have been made in terms of the Indo-Swiss DTAA.

57. We may also note the decision of Tribunal Administratif Fédéral, Switzerland [*decision A-4232/2013 of 12th December* 2013] rendered in the context of maintainability of a request made by the competent Indian authority on 22.06.2012 under Article 26 of the Indo-Swiss DTAA seeking information pertaining to the financial years 2005-06 to 2012-13. The order does not disclose the identity of the appellant in that case, being person in respect of which information was sought has been concealed in the said order and refers to him as X. The Revenue Authority had requested for information regarding the bank account of 'X' in connection with an investigation conducted in India. Pursuant to the said request, on 10.04.2013, the Federal Revenue Administration (FRA) had made a request to the bank to furnish the relevant documents and also informed 'X' of the

same. 'X' had opposed the request and on 23.07.2013, referred the matter to the Federal Administrative Court. The rough and ready translation[8] of the relevant extract of the said decision is set out below:

> **"6.2.4.2** It follows that Art. 26 para. 1 CDI IN-CH[9], as amended by the Protocol of 30 August 2010, applies – pursuant to Art. 14 para. 3 of the Protocol – at most the reports relating to the "fiscal year" ("fiscal year") beginning on first January of the civil year following the signing of the Memorandum of Review. … CDI IN-CH is defined, the "fiscal year" ("fiscal year") corresponds to the previous year ("previous year"), excluding the "financial year immediately preceding the assessment year". By virtue of Indian law, the tenure of which is confirmed by Art. 14 para. 2 of the Protocol of 30 August 2010, the "previous year" beginning on 1st April of each civil year.
>
> This therefore means that the new art. 26 CDI CH-IN is applicable at the earliest to reports relating to the "previous year" having commenced on 1st April 2011 (corresponding to the "fiscal year" 2011/2012), which will be taxed during the "assessment year" 2012/2013.
>
> This provision shall remain without retroactive effect. More specifically, the retroactive effect of the new Art. 26 of IN-CH CDI is limited to the fiscal year in which followed the date of signature of the Protocol of 30 August 2010, while the amendments entered into force after ratification by both countries on 7 October 2011. Contracting States thus provided for a certain date of entry into force, pending revocation of the report to that intended purpose for the other provisions of the Protocol dated 30 August 2010, which apply – for India – to income realized during tax years commencing on 1st April of the civil year following the entry into force of the Review Protocol or after that date (cf. Art. 14 par. 2 let. a of the Protocol of 30 August 2020), with respect to revenues realized from 1st April 2012, with respect

[8] Freely translated through https://www.onlinedoctranslator.com/en/translate-french-to-english_fr_en
[9] Indo-Swiss DTAA

> to revenues realised from 1st April 2012, accounting for the fact that the instruments of ratification were exchanged on October 7, 2011. That being the case, this retroactivity remains very limited.
>
> **6.2.5** The result of the foregoing is that international administrative assistance may at most be entered in a line of account for the fiscal year ("fiscal year") beginning on 1st April 2011 (2011/2012) and the following ("fiscal year" 2012/2013), subject to the examination of other relevant conditions (cf. hereinafter considered. 6.3). It may not in retroactively be granted for tax years ("fiscal year[s]") 02/02, 2002/03, 2003/04, 2004/05, 2005/06, 2006/07, 208/02, 07/2007 2010/11, as required by the requesting authority. These tax years do not fall within the temporal scope of the new Art. 26 CDI IN-CH. The application for administrative assistance must in this regard be dismissed."

58. The Tribunal Administratif Fédéral ruled that only the request for financial year 2011-12 would be admissible after examining in some detail provisions of Article 26 of the Indo-Swiss DTAA substituted by virtue of Article 8 of the Amending Protocol as well as the provisions of Article 14 of the Amending Protocol.

59. Thus, we find no infirmity with the view of the learned ITAT that the request made by the competent authorities under Article 26 of the Indo-Swiss DTAA for information, which was prior to 01.04.2011, was not maintainable.

60. Having stated the above, the next question required to be addressed is whether by virtue of Clause (ix) of the Explanation to Section 153B of the Act, the period for completion of the assessment would stand extended notwithstanding that the request for information made by the Revenue Authority for a period prior to 01.04.2011, was not maintainable.

61. The learned ITAT had referred to the earlier decisions in the context of extension of limitation under Clause (ii) of Explanation to Section 153B of the Act. In terms of the said Clause as was in force prior to Amendment Act, 17 of 2013 coming into force, the period commencing from the date when the Assessing Officer directs an assessee to get his accounts audited under Section 142(2A) of the Act and ending on the day on which the assessee is required to furnish the audit report, is required to be excluded for the purposes of computing the time limit as provided under Section 153B of the Act for completion of the assessment under Section 153A of the Act.

62. It is material to note that Clause (ii) of Explanation was amended by virtue of the Amendment Act [Act 17 of 2013] to also cater to a situation where the direction issued by the AO for conduct of a special audit was challenged before a court. The amended clause also provided that where the direction was challenged before a court, the period commencing from the date of the direction and ending on the date on which the order setting aside such direction is received by the Principal Commissioner or Commissioner, would also be excluded. Clause (ii) of Explanation to Section 153B of the Act as it was existed prior to the Amendment Act [Act 17 of 2013] and as amended, thereafter, is set out below:

> "**Prior to Amendment of Finance Act, 2013 [Act 17 of 2013]**
> *Explanation – In computing the period of limitation for the purposes of this section –*
> *** *** ***
> (ii) the period commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited under subsection (2A) of section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that subsection; or"

After the amendment of Finance Act, 2013 [Act 17 of 2013]

"Explanation.— In computing the period of limitation under this section—

(*i*) the period during which the assessment proceeding is stayed by an order or injunction of any court; or

(*ii*) the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2-A) of Section 142 and—

(*a*) ending with the last date on which the assessee is required to furnish a report of such audit under that sub-section; or

(*b*) where such direction is challenged before a court, ending with the date on which the order setting aside such direction is received by the Principal Commissioner or Commissioner; or"

63. It is apparent from the above that the legislature recognised that, in cases where the directions to conduct a special audit had been set aside, the time for completing the assessment under Section 153B of the Act may have elapsed. But for the legislative amendment, which also excludes such a period, the assessments would be time barred.

64. The decisions rendered by the courts in the context of Explanation (ii) to Section 153B of the Act do shed light on the controversy as raised in the present appeal.

65. In ***VLS Finance Limited and Anr. v. Commissioner of Income Tax and Anr.***[10], the Supreme Court considered a case where the Assessing Officer had issued a direction under Section 142(2A) of the Act for conduct of a special audit on 29.06.2000, which was received by the assessee on

[10] (2016) 12 SCC 32

19.07.2000. The assessee had challenged the same by filing a writ petition and had secured an interim order dated 24.08.2000 staying the directions for conduct of a special audit. Thereafter, the assessee succeeded in its petition and the directions to conduct a special audit, which were issued on 29.06.2000 were set aside by a judgment dated 15.12.2006. In the aforesaid context, one of the questions that arose for consideration of the Supreme Court was whether the period between 24.08.2000 (the date on which the interim order was granted) and 15.12.2006 (the date on which the petition was allowed) was required to be excluded for calculation of the period of limitation for framing the assessment order. The said question was considered in the context of Explanation (1) to Section 158BE of the Act, which is *para materia* to Clause (ii) of the Explanation to Section 153B of the Act. The said explanation provides for an exclusion of the period during which the assessment proceedings are stayed by any order or injunction of any court. In the aforesaid context, the Supreme Court observed as under:

> "21. We, therefore, agree with the High Court that the special audit was an integral step towards assessment proceedings. The argument of the appellants that the writ petition of the appellant was ultimately allowed and the Court had quashed the order directing special audit would mean that no special audit was needed and, therefore, it was not open to the respondent to wait for special audit, may not be a valid argument to the issue that is being dealt with. The assessing officer had, after going through the matter, formed an opinion that there was a need for special audit and the report of special audit was necessary for carrying out the assessment. Once such an opinion was formed, naturally, the assessing officer would not proceed with the assessment till the time the special audit report is received, inasmuch as in his opinion, report of the special audit was necessary. Take a situation where the order of special audit

> is not challenged. The assessing officer would naturally wait for this report before proceeding further. Order of special audit followed by conducting special audit and report thereof, thus, become part of assessment proceedings. If the order directing special audit is challenged and an interim order is granted staying the making of a special report, the assessing officer would not proceed with the assessment in the absence of the audit as he thought, in his wisdom, that special audit report is needed. That would be the normal and natural approach of the assessing officer at that time. It is stated at the cost of repetition that in the estimation of the assessing officer special audit was essential for passing proper assessment order. If the court, while undertaking judicial review of such an order of the assessing officer directing special audit ultimately holds that such an order is wrong (for whatever reason) that event happens at a later date and would not mean that the benefit of exclusion of the period during which there was a stay order is not to be given to the Revenue. Explanation 1 which permits exclusion of such a time is not dependent upon the final outcome of the proceedings in which interim stay was granted."

66. It is material to note that Clause (ii) of Explanation 1 to Section 158BE of Act was also similar to Clause (ii) of the Explanation to Section 153B of the Act. The Supreme Court directed that the period during which a stay order was granted, that is, from 24.08.2000 till 15.12.2006 when the judgment setting aside the direction issued under Section 142(2A) of the Act was delivered, was to be excluded for computing the period available for passing the assessment order. However, it is material to note, that the period from 29.06.2000 till 24.08.2000; that is, the date of issuance of the order till the date of passing the stay order was not excluded. Although there is no discussion on this issue, it is implicit that the exclusion on account of direction to conduct a special audit, would not be applicable if the said

direction is found to be invalid.

67. In ***Sahara India (Firm), Lucknow v. CIT & Anr.***[11]**,** the Supreme Court considered the question whether an assessee was required to be afforded a hearing before issuance of a direction for conduct of a special audit under Section 142(2A) of the Act. The Supreme Court held in the affirmative. However, pending consideration of the challenge to orders issued without following the rule of *audi alteram partem*, the time period for passing the assessment order had lapsed. In the aforesaid back drop, the Supreme Court also issued directions for saving the period of limitation. The relevant extract of the said decision is set out below:

> **"36.** The next crucial question is that keeping in view the fact that the time to frame fresh assessment for the relevant assessment year by ignoring the extended period of limitation in terms of Explanation 1(*iii*) to sub-section (3) of Section 153 of the Act is already over, what appropriate order should be passed. As noted above, the learned Additional Solicitor General had pleaded that if we were not inclined to agree with him, the interpretation of the provision by us may be given prospective effect, otherwise the interest of the Revenue will be greatly prejudiced.
>
> **37.** There is no denying the fact that the law on the subject was in a flux in the sense that till the judgment in *Rajesh Kumar* [(2007) 2 SCC 181: (2006) 287 ITR 91] was rendered, there was divergence of opinion amongst various High Courts. Additionally, even after the said judgment, another two-Judge Bench of this Court had expressed reservation about its correctness. Having regard to all these peculiar circumstances and the fact that on 14-12-2006 [*Sahara India (Firm)* v. *CIT*, (2008) 14 SCC 168], this Court had declined to stay the assessment proceedings, we are of the opinion that this Court should be loathed to quash the impugned orders. Accordingly,

[11] (2008) 14 SCC 151

> we hold that the law on the subject, clarified by us, will apply prospectively and it will not be open to the appellants to urge before the appellate authority that the extended period of limitation under Explanation 1(*iii*) to Section 153(3) of the Act was not available to the assessing officer because of an invalid order under Section 142(2-A) of the Act. However, it will be open to the appellants to question before the appellate authority, if so advised, the correctness of the material gathered on the basis of the audit report submitted under sub-section (2-A) of Section 142 of the Act."

68. It is apparent from the above, that but for the specific directions issued by the Supreme Court to treat this decision as settling the law prospectively – the effect of which was to save the orders issued under Section 142(2A) of the Act that were issued prior to the court handing down its ruling – the assessments made would have to be set aside as fresh assessments would be barred by limitation. It is in the aforesaid view that the learned ASG had made a request for prospective ruling, which was acceded to by the Supreme Court. It is implicit that if the directions issued under Section 142(2A) of the Act were held to be invalid, the benefit of exclusion of the period under Clause (ii) of the Explanation to Section 153B of the Act would not be available.

69. In ***Principal Commissioner of Income-tax v. Vilson Particle Board Industries Limited***[12], the Bombay High Court following the decision in ***Sahara India (Firm), Lucknow v. CIT & Anr.***[11] upheld the decision of the learned ITAT setting aside the assessment order as barred by limitation, a consequence of the directions under Section 142(2A) of the Act being vitiated. The relevant extract of the ITAT's order as noted by the Bombay High Court is reproduced below:

> "8. …..Applying the principles laid down by the Apex Court in Sahara India (Firm) Vs. CIT and Another (supra), we hold that where no show cause notice was given to the assessee before making the order proposing conduct of special audit under section 142(2A) of the Act, in the present case and the CIT having approved the said proposal though after giving opportunity of hearing to the assessee is vitiated because of non-compliance with the principles of natural justice. Accordingly, the assessment order passed in the facts of present case is beyond the period of limitation and hence, the same is invalid and bad in law."

70. In ***K.M. Sharma v. Income Tax Officer, Ward 13(7), New Delhi***[13], the Supreme Court had observed that "*a fiscal statute, more particularly on a provision such as a present one regulating the period of limitation must receive strict construction. The law of limitation is intended to give certainty and finality to legal proceedings and to avoid exposure to risk of litigation to a litigant for an indefinite period of future unforeseen events*". There is no cavil that the period of limitation as prescribed under Section 153B of the Act is required to be construed strictly. On a plain reading of the language of Explanation (ix) to Section 153B of the Act, the period commencing from the date on which a reference (or first of the reference) for exchange of information is made by an authority competent "*under the Agreement referred to in Section 90 or Section 90A*" of the Act and ending with the date on which the information is last received, by the Principal Commissioner or Commissioner over a period of one year, whichever is less is required to be excluded.

71. Thus, on a plain reading of Clause (ix) of the Explanation to Section

[12] (2020) 423 ITR 227
[13] (2002) 4 SCC 339

153B of the Act, the exclusion of time taken for obtaining the information (or one year) for completion of the assessment under Section 153A of the Act is applicable only if a reference for exchange of information has to be made as per the Agreement under Section 90/90A of the Act. It is necessary that reference be made in terms of the agreement. In this case, the benefit of exclusion of time by virtue of Explanation (ix) of Section 153B of the Act would, thus, be available only if the reference was made in terms of Indo-Swiss DTAA. However, as noted above, the request as made was not in terms of the Indo-Swiss DTAA. It was contrary to the limitations as expressly specified under Article 14 of the Amending Protocol.

72. In view of the above, the questions to law as framed are answered against the Revenue and in the negative; that is, against the Revenue and in favour of the Assesses.

73. The appeals are, accordingly, dismissed. The pending applications, if any, stand disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J

MAY 13, 2025
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