

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

**I.T.T.A. NOS.55 AND 71 OF 2014
AND
W.P.NO.41469 OF 2015**

I.T.T.A. NOS.55 AND 71 OF 2014

Between:

The Director of Income-tax
(International Taxation), Hyderabad

.. Appellant

and

M/s. Vanenberg Facilities BV

.. Respondent

W.P.NO.41469 OF 2015

Between:

Vanenburg Facilities BV

.. Petitioner

and

The Assistant Director of Income Tax,
(International Taxation)-II, Hyderabad
and others

.. Respondents

DATE OF THE ORDER PRONOUNCED: 16.06.2017

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND**

THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

1. Whether Reporters of Local newspapers
may be allowed to see the judgment? Yes/No
2. Whether the copies of judgment may be
marked to Law Reporters/Journals Yes/No
3. Whether Their Lordships wish to
see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

U.DURGA PRASAD RAO, J

*** THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**

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% DATED 16th JUNE, 2017

I.T.T.A. NOS.55 AND 71 OF 2014

# The Director of Income-tax (International Taxation), Hyderabad	.. Appellant
Vs.	
\$ M/s. Vanenberg Facilities BV	.. Respondent

W.P.NO.41469 OF 2015

# Vanenburg Facilities BV	.. Petitioner
Vs.	
\$ The Assistant Director of Income Tax, (International Taxation)-II, Hyderabad and others	.. Respondents

<Gist:

>Head Note:

! Counsel for the Appellants in ITTA Nos.55 and 71 of 2014 and the Respondents in WP No.41469 of 2015	: Ms. K.Mamata Choudary
^Counsel for the Respondents in ITTA Nos.55 and 71 of 2014 and the Petitioner in WP No.41469 of 2015	: Mr. Nishanth Thakkar and Mr. T.Bala Mohan Reddy

? CASES REFERRED:

1. [2007] 107 ITD 367 (Ahmedabad)
2. (2012) 6 SCC 613
3. ITA No.4672/Mum/2003 and batch dated 08.02.2012 of the
Income Tax Appellate Tribunal, Mumbai Bench "J", Mumbai.
4. [2008] 115 ITD 167 (Mumbai)
5. [2010] 122 ITD 216 (Mumbai)
6. [2014] 365 ITR 560 (Bombay)

7. [2011] 133 ITD 543 (Mumbai)
8. ITA Nos.692 and 693 of 2012 dated 22.08.2014
9. [2002] 256 ITR 1 (Delhi)
10. [2010] 320 ITR 561 (SC)
11. 2006 (3) ARBLR 159 (Delhi)
12. 2008 (3) ARBLR 283 (Delhi)
13. AIR 1979 SC 381
14. [2002] 256 ITR 395 (Bombay)
15. [2012] 204 Taxman 363 (Delhi)
16. [2001] 248 ITR 447 (Patna)
17. [2010] 325 ITR 139 (Karnataka)
18. Income Tax Appeal No.2277 of 2013 dated 01.02.2016
19. [2012] 344 ITR 37 (Delhi)
20. [2015] 362 ITR 272 (Delhi)
21. AIR 1963 SC 677
22. [1993] 201 ITR 674 (Karnataka)
23. [2009] 309 ITR 434 (SC)
24. [1967] 63 ITR 232 (SC)
25. [2013] 219 Taxman 19 (Delhi)
26. [2010] 323 ITR 130 (Delhi)
27. (2000) 2 SCC 718
28. (2007) 15 SCC 401



**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**

I.T.T.A. NOS.55 AND 71 OF 2014

AND

W.P.NO.41469 OF 2015

COMMON JUDGMENT
(Per Hon'ble Sri Justice Sanjay Kumar)

The two appeals by the revenue under Section 260A of the Income-tax Act, 1961 (*for brevity*, 'the Act') arise out of the common order dated 15.03.2013 passed by the Income Tax Appellate Tribunal, "A" Bench, Hyderabad (*hereinafter*, 'the Tribunal'), allowing I.T.A.Nos.739 and 2118/Hyd/2011 filed by Vanenburg Facilities B.V. (*hereinafter*, 'the assessee company') pertaining to the assessment year 2005-06. I.T.T.A.No.55 of 2014 relates to I.T.A.No.2118/Hyd/2011, while I.T.T.A.No.71 of 2014 arises out of I.T.A.No.739/Hyd/2011. W.P.No.41469 of 2015 was filed by the assessee company *seeking* a direction to the revenue to refund the amount of Rs.49,00,73,615/- along with future interest pursuant to the aforesaid common order dated 15.03.2013 and the consequential order dated 28.05.2013 of the Assistant Director of Income Tax (International Taxation)-II, Hyderabad.

The assessee company is incorporated in the Kingdom of Netherlands. It has its registered office at Vanenburgerallee, Putten of Netherlands, and is a resident of Netherlands as per Article 4 of the 'Convention between the Republic of India and the Kingdom of Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital' (*hereinafter*, 'the DTAA'). The assessee company made investments in the equity share capital of an Indian company,

Baan IT Park India Pvt Ltd., which was incorporated on 02.04.1997. The assessee company invested, in all, a sum of Rs.55,95,12,000/- in the said company from 14.08.1997 to 23.03.2000. The Indian company was renamed as Vanenburg IT Park India Private Limited (*hereinafter*, 'VITP Limited') on 13.12.1999 and became a wholly owned subsidiary of the assessee company. The assessee company made the aforesaid investments in the Indian company basing on the approval dated 12.06.1997 granted by the Foreign Investment Promotion Board, Government of India. VITP Limited commenced the business of developing, maintaining and operating an industrial park at Madhapur in Hyderabad after obtaining requisite approvals from the Secretariat for Industrial Assistance, Department of Industrial Policy and Promotion, Government of India. The first phase of the project was completed in June, 2000, and the second phase in August, 2002.

During the financial year 2004-05, the assessee company sold all its shares in VITP Limited to Ascendas Property (Fund) India Pte Limited (*hereinafter*, 'Ascendas') for a consideration of Rs.224.50 crore in terms of the Share Purchase Agreement dated 17.12.2004. However, the Memorandum of Understanding dated 20.09.2004 entered into earlier by the assessee company with Ascendas mentioned the sale consideration as Rs.228.00 crore. In any event, the assessee company earned income by way of capital gains upon the sale of the aforesaid shares. Before the payment of the entire sale consideration and during the pendency of the application of the assessee company under Section 197 of the Act, order dated 03.01.2005 was passed by the revenue under Section 195(2) of the Act directing Ascendas to deduct tax at source from

the remittance of sale consideration and to deposit the same. Consequently, a sum of Rs.35.24 crore was withheld by Ascendas on 02.03.2005 from the payment of Rs.224.50 crore and deposited with the revenue. Further, as a sum of Rs.49,43,750/- was paid to the assessee company by Ascendas towards interest on delayed payment of sale consideration, a sum of Rs.20,67,476/- was deposited by Ascendas with the revenue on 22.03.2005 as tax deducted at source thereon. The assessee company filed its return of income claiming refund of the entire amount deducted towards tax at source and deposited into the Government account.

The case of the assessee company before the Assistant Director of Income Tax (International Taxation)-II, Hyderabad, the Assessing Officer (*hereinafter*, 'the AO'), was that the transaction giving rise to the aforestated capital gains was not taxable in India as it was covered by Article 13 of the DTAA, which would override the local law, in terms of Section 90 of the Act. In the alternative, the assessee company claimed that as VITP Limited was registered under Section 10(23G) of the Act, the capital gains arising from transfer of its shares were exempt from taxation under the Act. As regards taxability of the interest paid to it by Ascendas, the assessee company claimed that payment and receipt thereof was in Netherlands and could not therefore be said to have accrued or arisen through or from any property in India or from any asset or source of income in India or through transfer of a capital asset situated in India.

By assessment order dated 25.02.2008 under Section 143(3) of the Act, the AO rejected all the three claims of the assessee company. As regards the first claim relating to the exemption

claimed under the DTAA, the AO examined Article 13 thereof.

Article 13 of the DTAA reads as under:

‘CAPITAL GAINS

1. Gains derived by a resident of one of the States from the alienation of immovable property referred to in Article 6 and situated in the other State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of one of the States has in the other State or of movable property pertaining to a fixed base available to a resident of one of the States in the other State for the purpose of performing independent personal services, including such gains from the alienation of such permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.
3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft, shall be taxable only in the State in which the place of effective management of the enterprise is situated. For the purposes of this paragraph, the provisions of paragraph 3 of Article 8A shall apply.
4. Gains derived by a resident of one of the States from the alienation of shares (other than shares quoted on an approved stock exchange) forming part of a substantial interest in the capital stock of a company which is a resident of the other State, the value of which shares is derived principally from immovable property situated in that other State other than property in which the business of the company was carried on, may be taxed in that other State. A substantial interest exists when the resident owns 25 per cent or more of the shares of the capital stock of a company.

5. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State of which the alienator is a resident.

However, gains from the alienation of shares issued by a company resident in the other State which shares form part of at least a 10 per cent interest in the capital stock of that company, may be taxed in that other State if the alienation takes place to a resident of that other State. However, such gains shall remain taxable only in the State of which the alienator is a resident if such gains are realised in the course of a corporate organization, reorganization, amalgamation, division or similar transaction, and the buyer or the seller owns at least 10 per cent of the capital of the other.

6. The provisions of paragraph 3 shall not affect the right of each of the States to levy according to its own law at tax on gains from the alienation of shares or 'jouissance' rights in a company, the capital of which is wholly or partly divided into shares and which under the laws of that State is a resident of that State, derived by an individual who is a resident of the other State and has been a resident of the first-mentioned State in the course of the last five years preceding the alienation of the shares or 'jouissance' rights.'

The claim of the assessee company was that Article 13(4) and Article 13(5) of the DTAA dealt specifically with capital gains arising from transfer of shares and therefore, unless the transaction fell within the inclusive clauses therein, it could not be taxed in India. The assessee company claimed that in the light of the specific provisions made for capital gains arising out of transfer of shares in Articles 13(4) and 13(5), the same would override the general provisions in the other paragraphs of Article 13.

While agreeing with this latter proposition, the AO opined that in the present case the issue related to taxability of capital

gains arising from alienation of shares, the value of which was principally derived from immovable property used in the business of such company, whereas Article 13(4) of the DTAA dealt with taxability of gains arising from alienation of company shares, the value of which was principally derived from immovable property other than that used in the business of such company. The AO further observed that there was no dispute regarding non-applicability of Article 13(4), which provided for taxation in India of capital gains in respect of transfer of shares where the value mainly comprised non-business immovable property located in India. The AO further observed that in case the value of the transferred shares comprised mainly business-purpose immovable property located in India, then Article 13(4) would not be applicable and for deciding the taxability of such capital gains, other paragraphs of Article 13 had to be examined.

The AO categorically observed that the provisions of Article 13(4) of the DTAA were not applicable to the present facts and that Article 13(5) of the DTAA, being the residuary clause, would be applicable only if the capital gains were not taxable under any other paragraph of Article 13. Holding so, the AO opined that Article 13(1), relating to capital gains arising from alienation of immovable property referred to in Article 6 of the DTAA, would be applicable. Referring to Article 6, the AO observed that immovable property thereunder was to have the same meaning which it would have under the law of the State in which the property in question is situated. The AO then referred to Section 2(47) and Section 269UA(d) of the Act and on the strength of these provisions, she concluded that the shares of VITP Limited partake the character of

immovable property under the Act and, therefore, the capital gains arising from alienation of such shares are chargeable to tax in India under Article 13(1) of the DTAA.

Coming to the second claim of the assessee company, the AO found that the shares in question were transferred on 02.03.2005, long before the approval and notification of VITP Limited under Section 10(23G) of the Act on 09.12.2005. Though this approval was granted with retrospective effect from 01.04.2002, the AO observed that as the investments made by the assessee company in VITP Limited were between August, 1997 and March, 2000, it could not claim exemption under Section 10(23G) of the Act. Further, she found that, to claim the benefit of Section 10(23G) of the Act, the concern has to be notified under Section 80-IA(4)(iii) of the Act, but industrial parks were included in the ambit of 'infrastructure facility' under Section 80-IA(12)(ca) only in the year 2000, relevant to the assessment year 2000-01. The AO therefore concluded that any investment made in VITP Limited prior to 01.04.2002 would not be eligible for exemption under Section 10(23G) of the Act. She further held that the benefit under Section 10(23G) was for attracting 'further investment' in the infrastructure sector and thereby, any further investments in old projects were entitled to get benefit thereunder. She therefore limited the applicability of the exemption under Section 10(23G) to 'further investments' in the infrastructure sector and not to past investments. Referring to the decision of another Bench of the Tribunal in **VBC FERRO ALLOYS LTD. V/s. ASSISTANT COMMISSIONER OF INCOME- TAX, CIRCLE 3(4), HYDERABAD**¹,

¹ [2007] 107 ITD 367 (Ahmedabad)

the AO stated that the same was not accepted by the revenue as an appeal was pending before the High Court and refused to apply the *ratio* laid down therein. Similarly, reliance placed by the assessee company on Circular No.772/1998 dated 23.12.1998 was rejected on the ground that the investment should have been made after 01.04.1997, being the date of insertion of Section 10(23G) in the statute, but prior to 01.06.1998 in a specified infrastructure facility and as industrial parks were not covered under the definition of 'infrastructure facility' at that point of time, the circular did not come to the aid of the assessee company. She also rejected the argument of the assessee company that Section 10(23G) of the Act would apply with reference to the 'arising of the capital gain' and not the date of 'making of the investment', for availing exemption thereunder. She held that it was the point of investment which would determine the availability of the benefit under Section 10(23G) and not the point of arising of the income. In effect, the AO held that the capital gains arising from the sale of shares of VITP Limited were chargeable to tax in India under Article 13(1) of the DTAA and such gains were not exempt from taxation under Section 10(23G) of the Act.

As regards the last limb of the assessee company's claim with regard to non-taxability of the interest, the AO opined that the interest arose through a transaction involving sale of a capital asset situated in India and would therefore be deemed to have accrued or arisen in India under Section 9(1)(v) of the Act.

She accordingly determined the income from capital gains at Rs.156,93,64,751.27, taking the sale consideration as Rs.224.50 crore and upon deducting the acquisition cost (Rs.59,95,12,000/-)

and the expenditure incurred in connection with the transfer (Rs.5,27,13,857.87). The total tax payable was quantified at Rs.32,86,48,544/- and after adjusting the tax deducted at source, viz., Rs.35,44,67,476/-, she found Rs.2,58,18,932/- to be refundable to the assessee company.

While so, the Deputy Director of Income Tax (International Taxation)-II, Hyderabad, reopened the aforestated assessment under Section 147 of the Act. By draft assessment order dated 29.12.2010, he opined that the sale consideration for transfer of the shares in VITP Limited should be taken as Rs.228.00 crore and not Rs.224.50 crore, as the assessee company could not satisfactorily explain the reason for reduction in the share value. Further, he directed reduction of the cost of acquisition to Rs.55,95,12,000/- and the expenditure incurred towards transfer to Rs.4,09,48,050/-, as expenditure claimed during earlier years had already been debited to the profit & loss account of those years. He calculated tax on the interest income at 40%, treating it as income from other sources. He accordingly worked out the capital gains at Rs.167,95,39,950/- and held the assessee company liable to pay a sum of Rs.3,37,89,697/-.

Aggrieved by the assessment order dated 25.02.2008 under Section 143(3) of the Act, the assessee company filed an appeal in I.T.A.No.0078/AC(IT)-II/CIT(A)-V/2010-11 before the Commissioner of Income Tax (Appeals)-V, Hyderabad (*hereinafter*, 'the CIT(A)'). As regards the draft assessment order dated 29.12.2010 under Section 147 of the Act, the assessee company raised objections before the Dispute Resolution Panel (DRP), Hyderabad.

The assessee company's appeal was dismissed by the CIT(A) by order dated 25.03.2011. The issues for decision were framed by the CIT(A) as under:

- (1) Whether the transaction in question, i.e., sale of shares of Indian Subsidiary to the Singapore based company was in principle taxable in India or not?
- (2) If it is taxable, then does it fall under any of the clauses of DTAA between India and Netherlands?
- (3) In case, the taxability is still determined then what is the applicability of Section 10(23) in this case?

On the first issue, the CIT(A) held that the transaction, being the sale of an Indian asset, was taxable in India. As regards the second issue, the CIT(A) affirmed the finding of the AO that Article 13(1) of the DTAA would be applicable in terms of the definition of 'immovable property' in Section 269UA of the Act and other Indian laws. He observed that he had no hesitation in agreeing with the AO that the transaction in question fell within the purview of Article 13(1) of the DTAA and the capital gains arising out of the transfer of shares in question were taxable in India. As regards the second issue, he agreed with the AO that Section 10(23G) of the Act would not come to the aid of the assessee company. He rejected the applicability of the law laid down in **VBC FERRO ALLOYS LTD.**¹ on the ground that the said judgment did not relate to the specific facts of the appeal before him and could not therefore be applied. He observed that the approval of the Central Board of Direct Taxes was an essential ingredient to claim exemption under Section 10(23G) of the Act and agreed with the AO that such exemption could not be availed by the assessee company as VITP Limited was granted statutory approvals long

after investments were made therein by the assessee company. Dealing with the last ground in the appeal relating to the interest income, the CIT(A) held that the interest payment could not be divorced from the original payment, as both pertained to the same transaction, and accordingly upheld the addition made by the AO in that regard.

Upon the objections raised by the assessee company, the DRP issued directions under Section 144C(5) of the Act on 20.09.2011. While upholding reopening of the assessment under Section 147 of the Act, the DRP found that the sale consideration could not be taken as Rs.228.00 crore when the actual payment was only Rs.224.50 crore, in terms of the Share Purchase Agreement. The DRP rejected the objection of the assessee company with regard to deduction of the expenditure incurred during earlier years. As regards charging of tax at 40% on the interest income, the DRP directed reassessment by the AO by applying the relevant provisions. The AO was further directed to charge interest under Section 234D only on the refund, if any, under Section 143(1) and not on the refund under Section 143(3). The objections of the assessee company were thus partly accepted.

Aggrieved by the dismissal of its appeal by the CIT(A) *vide* the order dated 25.03.2011, the assessee company filed a further appeal in I.T.A.No.739/Hyd/2011 before the Tribunal. It also filed an appeal in I.T.A.No.2118/Hyd/2011 in relation to the reopening of the assessment under Section 147 of the Act and the directions given by the DRP, Hyderabad, upon such reassessment.

Both these appeals were disposed of by the common order dated 15.03.2013 passed by the Tribunal. Perusal thereof reflects

that, having disposed of I.T.A.No.739/Hyd/2011 on merits, the Tribunal opined that there was no need to consider the issues in I.T.A.No.2118/Hyd/2011 and allowed the said appeal for statistical purposes. Dealing with the substantial appeal in I.T.A.No.739/Hyd/2011, the Tribunal observed that the finding of the AO, confirmed in appeal, that Article 13(1) of the DTAA would have application to the transaction in question was unsustainable. Considering the scope of Section 269UA(d) of the Act and the definition of 'transfer' under Section 2(47) of the Act, the Tribunal concluded that the definitions of 'immovable property' under various provisions of the Act differed and the definition under Section 269UD was only for a specific purpose. The Tribunal therefore opined that the said definition could not be held to be the 'law of the State' under Article 6 of the DTAA. Further, the Tribunal held that a share in a company could not be considered to be immovable property in terms of the law laid down by the Supreme Court in **VODAFONE INTERNATIONAL HOLDINGS B.V. V/s. UNION OF INDIA**². The Tribunal also referred to orders passed by the Authority on Advance Rulings relating to the DTAA and concluded that the assessee company had not sold immovable property or any rights directly attached to immovable property. In effect, the Tribunal held Article 13(1) of the DTAA to be inapplicable. As Article 13(4) could not be invoked because the immovable property of VITP Limited was used in its business, the Tribunal held that the only provision which could be invoked in the circumstances was Article 13(5). As the inclusive clause therein, which would make the transaction in relation to sale of shares

² (2012) 6 SCC 613

taxable in India, did not apply, the Tribunal observed that the residuary paragraph to the effect that gains from alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State where the alienator is a resident, would apply. The Tribunal held that as the assessee company sold shares in an Indian company which had business property, Article 13(4) was not applicable and as the assessee company did not sell immovable property or any rights in immovable property in which the shareholders enjoyed ownership as contemplated in Section 269UA(d) of the Act, Article 13(1) was not applicable. Therefore, the assessee company was held entitled, under Article 13(5) of the DTAA, to exemption from taxation of its capital gains in India as the same were taxable in Netherlands.

Dealing with the alternate claim of the assessee company that it would be entitled to exemption under Section 10(23G) of the Act, the Tribunal rejected the finding of the AO that the investments made prior to 01-04-2002 by the assessee company were not eligible for exemption thereunder. The Tribunal pointed out that the Act did not provide that such exemption would be applicable only for 'further investments'. Referring to the objective underlying the introduction of this statutory provision, the Tribunal observed that the provision was an extended benefit for attracting investments in the infrastructure sector and not for attracting 'further investments' in existing old infrastructure projects. The Tribunal observed that the Central Government had formulated the Industrial Park Scheme, 1999, notified under SO No.193(E) dated 30.03.1999 and made operational from 1997 itself, for providing tax exemption under Section 80-IA of the Act

for setting up industrial parks for the period beginning from 01.04.1997. Reference was made to the amendment of Section 80-IA(4)(iii) of the Act, including industrial parks notified by the Central Government in accordance with the scheme framed and notified for the period beginning on 01.04.1997 and ending on 31.03.2002, and the Tribunal observed that VITP Limited was granted approval by the Central Government on 16.09.1999 under the said scheme for setting up an industrial park. Investment by the assessee company in VITP Limited was therefore held to qualify for exemption under Section 10(23G). Referring to the view taken by the co-ordinate Bench of the Tribunal in **VBC FERRO ALLOYS LTD.¹**, the Tribunal observed that the AO and the CIT(A) ought not to have denied relief pursuant to the aforestated judgment merely on the ground that the same was not to the liking of the revenue. Reference was made to the judgment of the Mumbai Tribunal in **CROMPTON GREAVES LIMITED V/s. JOINT COMMISSIONER OF INCOME-TAX, CIRCLE 6(2), MUMBAI³**, which followed **VBC FERRO ALLOYS LTD.¹**, and the Tribunal held that the AO and the CIT(A) erred in not extending the exemption provided under the statute to the assessee company on the ground that investments made prior to 01.04.2002 would not be eligible therefor. The Tribunal therefore upheld the assessee company's claim that its capital gains were exempt from taxation in India, on both counts, i.e., by virtue of the DTAA as well as Section 10(23G) of the Act.

Considering the taxability of the interest paid by Ascendas to the assessee company, the Tribunal disagreed with the opinion of the AO and the CIT(A) in this regard. The Tribunal found that

³ ITA No.4672/Mum/2003 and batch dated 08.02.2012 of the Income Tax Appellate Tribunal, Mumbai Bench "J", Mumbai.

Section 9(1)(v) of the Act had no applicability and therefore, the interest could not be said to have accrued or arisen or deemed to have accrued or arisen in India. The Tribunal accordingly held that the interest paid by the non-resident to the assessee company abroad was ineligible to be brought to tax under Section 9 of the Act. The opinion of the AO that this interest was paid on account of a transaction involving the sale of a capital asset in India was not accepted by the Tribunal as the said interest was paid by Ascendas to compensate for the delay in remitting the sale consideration and it could not be considered to be part of the sale consideration. The Tribunal further opined that even if it were to be considered as part of the sale consideration, it would be exempt under the DTAA and therefore, either way, the interest received by the assessee company abroad from the non-resident could not be brought to tax in India. In the light of these findings, the Tribunal opined that there was no need to consider the issues raised in I.T.A.No.2118/ Hyd/2011 relating to reopening of the assessment under Section 147 of the Act and the directions of the DRP on such reassessment, as they had become academic in nature. The appeal was accordingly allowed for statistical purposes.

It is against the allowing of these two appeals that the present ITTAs were filed by the revenue. In I.T.T.A.No.55 of 2014, the revenue framed the following substantial question of law for consideration:

‘Whether, on the facts and circumstances of the case, the Hon’ble ITAT was correct in allowing the appeal for statistical purposes even without considering on merits the grounds so raised ?’

This appeal is yet to be admitted.

I.T.T.A.No.71 of 2014 was admitted on 20.02.2014 for consideration of the following substantial questions of law:

1. Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was correct in interpreting Article 13(1) and Article 13(4) of India-Netherlands DTAA, as giving rights to Netherlands and not to the source country, India, where the capital gains arise/accrue to the assessee?
2. Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was correct in interpreting the conditions laid out in Section 10(23G) of the Income Tax Act, 1961, by stating that approval from Central Government as brought out in Finance Act, 1998 and clarified in Circular No. 772 of 1998, dated 23.12.1998, is not necessary at the time of bringing in an investment, to be eligible for the exemption under section 10(23G)?
3. Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was correct in holding that the interest paid by the purchaser on account of delayed payment of sale consideration does not accrue/arise or does not deem to accrue/arise in India or does not partake the character of the sale consideration itself?

Heard Ms. K.Mamata Choudary, learned senior standing counsel for the revenue, and Sri Nishanth Thakkar, learned counsel representing Sri T.Bala Mohan Reddy, learned counsel for the assessee company.

Sri Nishanth Thakkar, learned counsel, raised a preliminary objection as to the maintainability of the revenue's appeal in I.T.T.A.No.71 of 2014. He would contend that it is not open to the revenue to now claim that Article 13(4) of the DTAA would have application as the AO, and thereafter, the CIT(A) specifically held that Article 13(4) of the DTAA had no application to the transaction in question. He would further contend that once the Tribunal

disagreed with the conclusion of the AO and the CIT(A) that Article 13(1) of the DTAA had application to the transaction, the revenue necessarily has to limit its appeal to this aspect of the matter and could not now claim that Article 13(4) of the DTAA could be invoked to bring the transaction within the Indian taxation regime.

Learned counsel also advanced various contentions on the merits of the matter, including applicability of Section 10(23G) of the Act to the case on hand. However, as the preliminary issue raised by him goes to the very maintainability of this appeal, we deem it appropriate to consider the same at the threshold.

At the outset, it may be noticed that Article 13(4) of the DTAA is in two parts. Firstly, it states that gains derived by a resident of one of the States from alienation of shares, other than shares quoted on an approved stock exchange, forming a substantial interest (25%) in the capital stock of a company which is a resident of the other State, the value of which shares is derived principally from immovable property situated in that other State, would be taxed in that other State. This is the inclusive clause whereby the State in which the property is situated gains ascendance. The exclusionary clause however states that in the event value of such shares is derived principally from immovable property in which the business of the company is carried on, the capital gains arising from the sale thereof would not be taxed in the State where the property is situated.

Significantly, under show-cause notice dated 23.04.2007, while calling upon the assessee company to furnish its reply as regards the exemption claimed by it under the DTAA, the AO stated as under:

VITP is engaged in the business of **‘providing infrastructure facilities for software development companies under STP scheme’** and as part of pursuit of this object VITP has established and the value of the shares of the VITP is derived principally from the said **‘infrastructure facilities of the Software Park’** which are leased out to and used by the 100% EOU software companies and thus the same cannot be said to be **‘the property in which the business of VITP is carried on’**, though the said Software Park is a business asset of VITP. And since the capital gains in question arise from the sale of shares of VITP, the principal value of which is derived **not** from **‘immovable property in which the business of VITP is carried on’**, the same are chargeable to tax in India as per the DTAA. Hence, your claim that the capital gains are not chargeable to tax in India under the Income-tax Act, 1961 is without any merit.’

The import of this notice, therefore, was that the inclusive clause of Article 13(4) of the DTAA would apply, making the capital gains earned by the assessee company taxable in India.

In its reply dated 03.05.2007, the assessee company stated that under Article 13(4) of the DTAA, capital gains arising from the sale of shares of an Indian company would be liable to tax in India only if the value of such shares is derived primarily from immovable property held by such Indian company, other than property in which its business is carried on. It pointed out that VITP Limited was engaged in the business of providing infrastructure facilities for software development companies under the STP scheme and pursuant thereto, the value of its shares was derived principally from the said infrastructure facilities/software park which were leased out to and used by the 100% EOU software companies. The assessee company therefore asserted that the

immovable property owned by VITP Limited was used for the purpose of its business and therefore, the value of its shares was derived principally from the said immovable property. The capital gains arising from sale of such shares was therefore claimed to be exempt as per the exclusionary clause in Article 13(4) of the DTAA.

The assessment order dated 25.02.2008 reflects that this explanation of the assessee company found favour with the AO. This is evident from the fact that the AO observed, time and again, that there was no dispute regarding non-applicability of Article 13(4), which 'merely provided for taxation in India of capital gains in respect of transfer of shares whose value mainly comprised non-business immovable property located in India' and that the provisions of Article 13(4) were therefore not applicable to the present facts. Having opined so, the AO went on to hold that such transfer of shares would fall within Article 13(1) of the DTAA as the shares partake the character of immovable property.

Basing on the initial interpretation of Article 13(4) by the AO and the change in her views, after considering the reply of the assessee company, Sri Nishanth Thakkar, learned counsel, would contend that once the said changed view was confirmed in appeal by the CIT(A), it was not open to the Director of Income-tax, (International Taxation), Hyderabad, the appellant in this appeal, to urge an argument which would result in varying the said finding in the assessment order which was confirmed in appeal. Learned counsel would contend that permitting him to do so at this stage would be nothing short of allowing him to exercise revisionary jurisdiction under Section 263 of the Act. Learned counsel would point out that the same is barred by the law of limitation as the

provision itself indicates that such power could be exercised only within two years from the end of the financial year in which the order was passed. Learned counsel would state that the statutory provisions which permit varying the findings in an assessment order are: (i) Section 147, (ii) Section 154 and (iii) Section 251. As the AO had taken a conscious decision that Article 13(4) had no application to the present case, reversing her initial interpretation of Article 13(4) as set out in the notice dated 23.04.2007, learned counsel would assert that neither Section 147 relating to reopening the assessment nor Section 154 relating to rectification of mistakes had any role to play. Learned counsel would point out that under the Explanation to Section 251(2), the CIT(A) was empowered to consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before him. Learned counsel would further point out that under Section 250(1) of the Act, the AO was given notice of the appeal to be heard by the CIT(A) and had the right to raise this issue, if any doubt was entertained by the AO as regards applicability of Article 13(4) of the DTAA to the present case. He would therefore contend that the AO and the CIT(A) had ample opportunity to seek to undo the finding as regards non-applicability of Article 13(4) of the DTAA to the transaction in question but they failed to do so.

It may be noticed that even in the report submitted to the CIT(A), the AO reiterated that, by transferring shares held in VITP Limited to Ascendas, the assessee company transferred its controlling rights and the rights of enjoyment in respect of immovable property situated in India, whereby Article 13(1) of the

DTAA stood attracted. The CIT(A) accordingly restricted his consideration to whether the income from the transaction in question was taxable within the meaning of Article 13(1) of the DTAA and, while upholding the finding of the AO as regards non-applicability of Article 13(4), he confirmed applicability of Article 13(1) of the DTAA to the transaction. In effect, neither the AO nor the CIT(A) chose to raise the issue as to applicability of Article 13(4) to the transaction, in the place of Article 13(1) of the DTAA. The confirmed finding of both was that the transaction in question was taxable in India only under Article 13(1) of the DTAA.

It may also be noted that Section 253(4) of the Act empowered the AO to file cross-objections before the Tribunal after receipt of notice in the appeals filed by the assessee company and raise the issue as to applicability of Article 13(4) of the DTAA, if any doubt had been entertained in this regard at least at that stage. However, the AO did not choose to do so. It is only before this Court that the issue is sought to be raised now, having been dropped by the AO after the initial notice dated 23.04.2007. No argument in this regard was ever advanced by the departmental representative on behalf of the revenue before the Tribunal. In that view of the matter, the submission of Sri Nishanth Thakkar, learned counsel, that permitting the revenue to argue at this stage that capital gains arising from the transaction in question are taxable under Section 13(4) of the DTAA would amount to circumventing restrictions built into the statute to secure finality to the assessment order, merits serious consideration.

An abundance of case law was cited by Sri Nishanth Thakkar, learned counsel, in support of his contention:

In **ASSISTANT COMMISSIONER OF INCOME-TAX, CIRCLE 16(1), MUMBAI V/s. PRAKASH L.SHAH⁴**, the Mumbai Bench of the Income Tax Appellate Tribunal observed that the power to modify the assessment order to the advantage of the revenue, apart from *suo motu* action by the Assessing Officer under Sections 147 or 154, lies only with the CIT under Section 263, which cannot be usurped by the departmental representative while arguing the appeal. Scope of arguments of the departmental representative is restricted to support the view taken by the Assessing Officer and he can strengthen the view taken by the Assessing Officer from any angle he likes, but cannot bring out an altogether different case *de hors* the view of the Assessing Officer. It was further observed that his area of arguments is unlimited but within the boundary limits marked by the Assessing Officer. This judgment attained finality as no appeal was preferred by the revenue.

In **MAHINDRA & MAHINDRA LTD. V/s. DEPUTY COMMISSIONER OF INCOME-TAX, TDS RANGE 1(1), MUMBAI⁵**, the Mumbai Bench of the Income Tax Appellate Tribunal was dealing with the issue as to whether an additional ground as to the order passed by the Assessing Officer being void *ab initio* as it was barred by limitation could be raised for the first time before it. Observing that it is the settled legal position that there can be no embargo on any party raising a legal ground for the first time, provided relevant material for deciding that question already exists on record and no further investigation of facts is required, the Mumbai Bench held that the question of limitation would go to the very jurisdiction and the right of the assessee to raise an additional

⁴ [2008] 115 ITD 167 (Mumbai)

⁵ [2010] 122 ITD 216 (Mumbai)

ground of limitation before it for the first time could not be curtailed as it involved a question of law and no fresh investigation of facts was called for. The additional ground of appeal was therefore admitted for consideration on merits. As regards the contention of the revenue that the double taxation avoidance agreement between India and the United Kingdom had no application to the payments made by the assessee, the Bench found that at no stage did the Assessing Officer deny that the said agreement was not applicable. In such a situation, the Bench held that it is impermissible for the departmental representative to come out with a submission contrary to the finding of the Assessing Officer. The Bench observed that it could not permit the departmental representative to take a contrary stand from the one taken by the Assessing Officer as he had no jurisdiction to go beyond the order passed by the Assessing Officer and raise a point different from that considered by the Assessing Officer or the CIT(A). The Bench further observed that the scope of his arguments was confined to supporting or defending the impugned order and the departmental representative could not set up an altogether different case and allowing him to take up a new contention *de hors* the view taken by the Assessing Officer would mean that the departmental representative was stepping into the shoes of the CIT exercising jurisdiction under Section 263. In appeal, the Bombay High Court in ***DIRECTOR OF INCOME-TAX (INTERNATIONAL TAXATION) V/s. MAHINDRA & MAHINDRA LTD.***⁶ confirmed this judgment. Significantly, the only issue raised before the High Court was with regard to the limitation aspect and

⁶ [2014] 365 ITR 560 (Bombay)

not with regard to the power of the revenue to raise a ground in appeal contrary to the assessment order.

In **ASSISTANT COMMISSIONER OF INCOME-TAX, CIRCLE 6(3) V/s. MAERSK GLOBAL SERVICE CENTRE (INDIA) (P.) LTD.**⁷, the Mumbai Bench of the Income Tax Appellate Tribunal observed that the departmental representative has a duty to defend the order of the Assessing Officer while arguing the appeal filed by the revenue and is fully competent and free to support the reasoning of the Assessing Officer from any other angle so as to put forward a strong case for the revenue. The Bench however pointed out that there is a marked distinction between supporting the order of the Assessing Officer on the one hand and in finding flaws in the order of the Assessing Officer in an attempt to show that the Assessing Officer had failed to do what was required to be done by him. The Bench observed that, in its considered opinion, if the departmental representative was allowed to fill in the gaps left by the Assessing Officer, it would amount to conferring jurisdiction of the CIT under Section 263 upon the departmental representative, which is not permitted by the statute. The Bench therefore concluded that the departmental representative could not be allowed to argue contrary to what has been done by the Assessing Officer as the same is not permissible within the framework of the statutory provisions. This order was confirmed by the Bombay High Court in **THE COMMISSIONER OF INCOME TAX-6, MUMBAI V/s. M/S. MAERSK GLOBAL SERVICE CENTRE (I) PVT. LTD.**⁸. The Bombay High Court observed that the Income Tax Appellate Tribunal had not allowed the revenue's representative to travel beyond the order of

⁷ [2011] 133 ITD 543 (Mumbai)

⁸ ITA Nos.692 and 693 of 2012 dated 22.08.2014

the Transfer Pricing Officer and the Assessing Officer so as to make out a different case and held that it was fully justified in doing so.

In **COMMISSIONER OF INCOME-TAX V/s. KELVINATOR OF INDIA LTD.**⁹, a Full Bench of the Delhi High Court observed that when the Assessing Officer considered the matter in detail and the view taken is a possible one, the order cannot be changed by way of exercising jurisdiction for rectification of a mistake under Section 154. It was further observed that it is well settled that what cannot be done directly cannot be done indirectly and if the Assessing Officer did not possess the power of review, he cannot be permitted to achieve the said objective by taking recourse to initiating a proceeding of reassessment or by way of rectification of a mistake. It was further pointed out that in a case of this nature, the revenue is not without remedy as Section 263 of the Act empowered the Commissioner to review an order which is prejudicial to the revenue. This judgment was confirmed by the Supreme Court in **COMMISSIONER OF INCOME-TAX, DELHI V/s. KELVINATOR OF INDIA LTD.**¹⁰. Therein, the Supreme Court observed that reopening of the assessment under Section 147 could be done under the conditions mentioned therein, i.e., if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment. The Supreme Court further observed that one needs to give a schematic interpretation to the words 'reason to believe', failing which, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of a mere change of opinion, which cannot be, *per se*, a reason to reopen. The Supreme Court pointed out that one must

⁹ [2002] 256 ITR 1 (Delhi)

¹⁰ [2010] 320 ITR 561 (SC)

keep in mind the conceptual difference between power to review and power to reassess, and as the Assessing Officer has no power of review but only has the power to reassess, it must be based on fulfillment of certain preconditions and in the garb of reopening the assessment, a review cannot be permitted to take place. This judgment was cited in the context of the Assessing Officer himself being bound by his finding that Article 13(4) had no application and, therefore, what could not be done by him could not be achieved indirectly in the present appeal.

In **MORGAN SECURITIES AND CREDITS PVT. LTD. V/s. MOREPEN LABORATORIES LTD.**¹¹, a learned Judge of the Delhi High Court observed that allowing a judgment-debtor to raise objections to an Award despite failing to file an application under Section 34 of the Arbitration and Conciliation Act, 1996 within time, would be to allow him to indirectly do something which he could not do directly. This view was confirmed in appeal by a Division Bench of the Delhi High Court in **MOREPEN LABORATORIES LTD. V/s. MORGAN SECURITIES AND CREDITS PVT. LTD.**¹². These judgments are pressed into service in support of the contention that it is no longer open to the revenue to exercise revisional power under Section 263 of the Act after expiry of the prescribed limitation period.

In **JAGIR SINGH V/s. RANBIR SINGH**¹³, the Supreme Court was considering whether revisional jurisdiction under Section 397 CrPC could be exercised by the High Court. The Supreme Court observed that the object of Section 397(3) CrPC was to prevent

¹¹ 2006 (3) ARBLR 159 (Delhi)

¹² 2008 (3) ARBLR 283 (Delhi)

¹³ AIR 1979 SC 381

multiple exercises of revisional powers so as to secure finality to the order. A person aggrieved by an order of an inferior Criminal Court is given the option to approach either the Sessions Judge or the High Court and once he exercises the option, he is precluded from invoking the revisional jurisdiction of the other authority. This judgment is relied upon to support the contention that it is too late in the day for the revenue to seek to exercise revisional jurisdiction under Section 263 of the Act, having failed to do so at the appropriate time.

Sri Nishanth Thakkar, learned counsel, would further contend that under Section 260A (6) of the Act, this Court is empowered to determine any issue which has not been determined by the Tribunal or has been wrongly determined by the Tribunal. He would point out that as applicability of Article 13(4) of the DTAA to the transaction was never raised before the Tribunal, it cannot be permitted to be raised before this Court for the first time in third appeal. Learned counsel would point out that no arguments were advanced by the revenue on the applicability of Article 13(4) and therefore, the Tribunal proceeded on the basis that it could not be invoked, as the immovable property of the Indian company was used in its business, and only considered applicability of Article 13(1). Learned counsel would therefore argue that applicability of Article 13(4) does not arise for consideration out of the order under appeal. Reliance in this regard is placed by him upon the following precedents:

In **COMMISSIONER OF INCOME-TAX V/s. TATA CHEMICALS LTD.**¹⁴, a Division Bench of the Bombay High Court

¹⁴ [2002] 256 ITR 395 (Bombay)

was dealing with the contention that though a question was not raised before the Income Tax Appellate Tribunal, Section 260A(6)(a) of the Act empowered the High Court to determine any issue which was not determined by such Tribunal. The Division Bench observed that a careful reading of the section would show that the High Court can decide only that question which was raised but not determined by such Tribunal and therefore, it is necessary that the question sought to be raised ought to have been raised before such Tribunal and then, if it has not determined it, one can say that it has not been determined by such Tribunal and the High Court should look into it. On facts, the Bench found that the issue was not raised before the Income Tax Appellate Tribunal and therefore did not choose to dwell on the same.

In **C & C CONSTRUCTION (P.) LTD. V/s. COMMISSIONER OF INCOME-TAX**¹⁵, a Division Bench of the Delhi High Court was dealing with the issue as to whether a contention which was not raised before the Income Tax Appellate Tribunal could be decided by the High Court by taking recourse to Section 260A(6)(a) of the Act. The Bench observed that the word 'determined' means that the issue was not dealt with though it was raised before such Tribunal as the word 'determined' presupposes that an issue was raised or argued but there was failure on the part of such Tribunal in deciding or adjudicating the same. The Bench further observed that in a given case, a substantial question of law may arise because of the facts and findings recorded by the Income Tax Appellate Tribunal, but the said issue/question is not determined.

¹⁵ [2012] 204 Taxman 363 (Delhi)

In such cases, the Bench observed that an appeal under Section 260A of the Act can be entertained.

In **COMMISSIONER OF INCOME-TAX V/s. PRABHAT ZARDA FACTORY¹⁶**, a Division Bench of the Patna High Court upheld the plea that a contention raised before it was never raised by the department at any stage, be it before the Assessing Officer or the Income Tax Appellate Tribunal, and therefore, it was not open to the revenue to raise the same in appeal.

In **DAVANGERE MAGANUR BASSAPPA V/s. INCOME-TAX OFFICER¹⁷**, a Division Bench of the Karnataka High Court found that the ground sought to be raised before it had not been raised by the assessee before the Income Tax Appellate Tribunal and held that if the assessee failed to raise the question before the said Tribunal, he could not raise it for the first time in appeal.

In **COMMISSIONER OF INCOME TAX-11, MUMBAI V/s. M/S. KANGA & CO.¹⁸**, a Division Bench of the Bombay High Court observed that it was unable to understand how an additional question of law could arise from the impugned order of the Income Tax Appellate Tribunal, when no foundation had been laid for the same before the authorities or the said Tribunal. The Bench observed that the question did not arise from the order of the said Tribunal and therefore, such a question could not be urged in the appeal under Section 260A of the Act. The Bench further observed that there are questions of fact which ought to be raised before the authorities and in the absence thereof, the additional question of law sought to be raised by the revenue could not be considered.

¹⁶ [2001] 248 ITR 447 (Patna)

¹⁷ [2010] 325 ITR 139 (Karnataka)

¹⁸ Income Tax Appeal No.2277 of 2013 dated 01.02.2016

In **COMMISSIONER OF INCOME-TAX V/s. EICHER LTD.**¹⁹, a Division Bench of the Delhi High Court rejected a new contention urged by the revenue on the ground that no such plea had been taken before the Income Tax Appellate Tribunal and the entire case was argued on a different basis. The Bench observed that even before the Commissioner (Appeals), the matter proceeded on the same basis and once no such plea, as was being advanced before it, was taken by the department before the Commissioner (Appeals) or before the Income Tax Appellate Tribunal, it could not be raised for the first time in the appeal filed under Section 260A of the Act.

In **COMMISSIONER OF INCOME-TAX V/s. JAYSHREE GEMS & JEWELLERY**²⁰, a Division Bench of the Delhi High Court was dealing with disallowance of certain expenses by the Assessing Officer. The claim for allowing such expenses was upheld by the Income Tax Appellate Tribunal. The Bench observed that the grounds of appeal urged before the said Tribunal did not disclose that the revenue had ever argued that the claim for reduction of these amounts itself evidenced that the appellant did not carry on any manufacturing activity. The Bench therefore concluded that the revenue could not be permitted to urge this new aspect for the first time under Section 260A of the Act.

As applicability of Article 13(4) of the DTAA was never put in issue before the Tribunal, Sri Nishanth Thakkar, learned counsel, would contend that there was no determination by the Tribunal of the same, whereby the revenue could now ask this Court to sit in appeal over such determination and examine the validity thereof.

¹⁹ [2012] 344 ITR 37 (Delhi)

²⁰ [2015] 362 ITR 272 (Delhi)

Reliance is placed on **JASWANT SUGAR MILLS LTD., MEERUT V/s. LAKSHMICHAND**²¹ in this regard. Therein, the Supreme Court observed that the expression ‘determination’ signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal and the expression ‘order’ must also have a similar meaning, except that it need not end the dispute.

Sri Nishanth Thakkar, learned counsel, would advert to the arguments advanced by the departmental representative on behalf of the revenue before the Tribunal, referred to in paragraph 16 of the common order under appeal, and point out that the entire emphasis was only on applicability of Article 13(1) of the DTAA and no arguments whatsoever were urged as to applicability of Article 13(4) thereof. In consequence, he would point out that the Tribunal recorded in paragraph 32 of the order that since the assets of the Indian company are immovable property but were used in its business, Article 13(4) cannot be invoked. Learned counsel would therefore contend that as this issue was treated as a foregone conclusion, no opportunity was ever given to the assessee company to establish, on facts, as to how it would fall within the exclusionary part of Article 13(4), whereby the capital gains earned by it would not be subject to taxation in India.

Learned counsel would further submit that even if the Tribunal had determined an issue which was not in dispute before it, such determination would be liable to be struck down. He placed reliance on **KARNATAKA STATE FOREST INDUSTRIES**

²¹ AIR 1963 SC 677

CORPN. LTD. V/s. COMMISSIONER OF INCOME-TAX²², wherein a Division Bench of the Karnataka High Court held that the power of the Income Tax Appellate Tribunal in an appeal arising under Section 254 can be exercised only in relation to the grounds arising in the appeal and it cannot go beyond its scope and decide a question which did not form the subject matter of the appeal.

In **MCORP GLOBAL (P.) LTD. V/s. COMMISSIONER OF INCOME-TAX, GHAZIABAD²³**, the Supreme Court, relying on **HUKUMCHAND MILLS LTD. V/s. CIT²⁴**, reiterated that the Income Tax Appellate Tribunal is not authorized to take back the benefit granted to an assessee by the Assessing Officer and that it has no power to enhance the assessment.

In **ESTER INDUSTRIES LTD. V/s. COMMISSIONER OF INCOME-TAX²⁵**, a Division Bench of the Delhi High Court observed that the assessee therein, in fourth appeal maintainable only on the ground of a substantial question of law under Section 260A of the Act, could not be allowed to raise a contention afresh so as to set the ball rolling back once again to the Assessing Officer after a lapse of several years.

In **VAN OORD ACZ INDIA (P.) LTD. V/s. COMMISSIONER OF INCOME-TAX²⁶**, a Division Bench of the Delhi High Court was concerned with the plea of the assessee that it was not liable to pay any tax in India, a plea which had been accepted by the income-tax authorities. The return filed by the assessee was processed under Section 143(a)(i) of the Act. But it was sought to be contended by the revenue before the High Court that there was no

²² [1993] 201 ITR 674 (Karnataka)

²³ [2009] 309 ITR 434 (SC)

²⁴ [1967] 63 ITR 232 (SC)

²⁵ [2013] 219 Taxman 19 (Delhi)

²⁶ [2010] 323 ITR 130 (Delhi)

determination of the issue involved. The Bench observed that the fact remained that by accepting the return as filed, the assessee had been refunded tax at source and the implication thereof was that it was not liable to pay tax. In case a higher authority passes an order to the contrary, it would be open to the authorities to treat the assessee as in default but without the same, the position was that the assessee could not be treated as liable to pay any tax.

Learned counsel would therefore contend that it is not open to this Court, in exercise of appellate jurisdiction under Section 260A of the Act, to do what the Tribunal itself could not have done in the light of the aforestated judgments. He would vigorously contend that it is not open to the revenue to now argue that Article 13(4) of the DTAA would have application, contrary to the findings recorded by the AO and the CIT(A).

Answering the aforestated preliminary objections as to the maintainability of this appeal, Ms. K.Mamata Choudary, learned senior standing counsel, would contend that Article 13(4) of the DTAA would be applicable on facts to the present case and in terms thereof, the assessee company is liable to be taxed in India. She would assert that the interpretation and applicability of the correct provision of the DTAA is purely a question of law and not of fact and could therefore be determined in the present appeal. She would point out that Article 13(4) of the DTAA was put in issue by the assessee company itself right from the stage of the show-cause notice dated 23.04.2007 and therefore, it cannot be said that the issue is being raised for the first time. She would point out that by virtue of the reopening of the assessment under Section 147 of the Act, the AO could not have introduced Article 13(4) of the DTAA as

it would amount to a change in opinion, which is impermissible in exercise of Section 147 jurisdiction. She would further state that revisional power under Section 263 of the Act could not have been exercised as the order of the AO was not prejudicial to the interests of the revenue. She would argue that it is well within the power of this Court to entertain this issue for consideration in the present appeal by exercising power under Section 260A(6) of the Act. She would point out that the grounds of appeal filed by the assessee company before the CIT(A) specifically raised this issue, as is evident from paragraph 3 of the order dated 25.03.2011 passed by the CIT(A). She would also point out that the Tribunal took note of the contention of the AO that the subject capital gains were taxable in India under Article 13(1) whereas the assessee claimed exemption by virtue of Article 13(4) and (5) of the DTAA and contend that it is not open to the assessee company to now state that Article 13(4) was never in issue.

In response to the aforestated contentions of the learned senior standing counsel, Sri Nishanth Thakkar, learned counsel, would contend that the grounds of appeal filed by the assessee company merely asserted that the AO erred in law and on facts in applying Article 13(1) of the DTAA as the provisions of Article 13(4) and Article 13(5) were specifically applicable to the case, as they dealt with capital gains arising from alienation of shares.

Having considered the rival submissions in the light of the case law cited, we are of the opinion that the question as to whether applicability of Article 13(4) of the DTAA was raised before the CIT(A) or the Tribunal is only one facet of the matter. The fact remains that the AO, having initially opined that the inclusive

clause in Article 13(4) of the DTAA would be applicable to the transaction thereby making it taxable in India, thereafter accepted the plea of the assessee company that it was not applicable. This acceptance by the AO is explicit from the assessment order. Having agreed with the assessee company on this aspect, the AO held that Article 13(1) of the DTAA would be applicable to the transaction. This finding, which was confirmed in appeal by the CIT(A), is now sought to be discarded by the revenue. The learned senior standing counsel fairly concedes that Article 13(1) was wrongly applied by the authorities to the transaction and contends that it is Article 13(4) which would have application, as the exclusionary clause therein would not apply. The record however reflects that this issue was never raised by the revenue before the Tribunal.

That apart, we are at a loss to understand as to why the revenue did not choose to exercise revisionary power under Section 263 of the Act at the appropriate time in the event this error on the part of the AO in applying Article 13(1) of the DTAA was noticed. It is relevant to note that Section 263 of the Act permits revision of any order of the Assessing Officer if the Principal Commissioner/Commissioner considers such order to be erroneous in so far as it is prejudicial to the interests of the revenue.

In **MALABAR INDUSTRIAL COMPANY LIMITED V/s. COMMISSIONER OF INCOME TAX, KERALA**²⁷, the Supreme Court held that a bare reading of Section 263 made it clear that the pre-requisite for exercise of revisional jurisdiction was that the order of the Assessing Officer should be erroneous in so far as it

²⁷ (2000) 2 SCC 718

was prejudicial to the interests of the revenue. Therefore, the revisional authority had to be satisfied that (i) the order of the Assessing Officer was erroneous and (ii) it was prejudicial to the interests of the revenue. The Supreme Court further observed that the phrase 'prejudicial to the interests of the revenue' has to be read in connection with the erroneous order passed by the Assessing Officer and in the event, the Assessing Officer adopted one of the courses permissible in law, which had resulted in loss of revenue, or where two views were possible, and the Assessing Officer had taken one view with which the Commissioner did not agree, it could not be treated as an erroneous order prejudicial to the interests of the revenue, unless the view taken by the Assessing Officer was unsustainable in law. This view was reiterated in **COMMISSIONER OF INCOME TAX V/s. MAX INDIA LIMITED**²⁸. It is therefore clear that in the event the order of the Assessing Officer is erroneous, being unsustainable in law, it can be revised in exercise of power under Section 263 of the Act.

In the present case, it is fairly conceded by the learned senior standing counsel that the finding of the AO, which was confirmed thereafter in appeal, that Article 13(1) of the DTAA would apply to the alienation of shares by the assessee company treating the same as sale of immovable property, was erroneous being contrary to the settled legal position, both as regards application of the definition of 'immovable property' in the Act, as well as the 'legal status' of a corporate entity when juxtaposed to its shareholders. That being so, it was well within the power of the Commissioner to exercise jurisdiction under Section 263 of the Act

²⁸ (2007) 15 SCC 401

at the right time so as to set right this misconceived notion of the AO. However, no such exercise was undertaken within time. Notwithstanding the same, it was still open to the CIT(A) to exercise jurisdiction under the Explanation to Section 251(2) of the Act and set right this wrong. However, neither the AO, who did not choose to amend her blunder by raising this issue when called upon to submit a report, nor the CIT(A), who blindly accepted the finding of the AO that Article 13(1) of the DTAA would govern the transaction while approving her finding that Article 13(4) of the DTAA had no application, took remedial steps at the right time. Even thereafter, it was open to the revenue to raise the issue before the Tribunal by filing cross-objections. Alas, at that stage also, the revenue did not choose to wake up. It is only before this Court that the issue as to whether the transaction in question would fall within Article 13(4) of the DTAA was raised, in the substantial questions of law framed in the grounds of appeal. In effect, the revenue now wants to fall back on the initial view taken by the AO in the show-cause notice dated 23.04.2007. Much water has flown under the bridge since that date as the AO, being satisfied with the reply of the assessee company under its letter dated 03.05.2007, accepted its plea that the exclusionary clause under Article 13(4) would apply to the transaction, contrary to her initial view and, thereupon, went on to arrive at the misconceived opinion that Article 13(1) of the DTAA would be applicable, by treating the sale of shares as equivalent to sale of immovable property. Therefore, notwithstanding the stray mention of Article 13(4) of the DTAA in the proceedings before the CIT(A) and thereafter, before the Tribunal, the irrefutable fact remains that the AO arrived at the

considered conclusion that Article 13(4) would not apply to the transaction and that it would be taxable in India only under Article 13(1). This finding was confirmed in appeal and was never challenged before the Tribunal by way of cross-objections. It is therefore too late in the day for the revenue to introduce this new element in the third appeal before this Court.

We are not inclined to agree with the learned senior standing counsel for the revenue that the question as to applicability of Article 13(4) of the DTAA would be a pure question of law. Whether immovable property from which the company's shares principally derived their value was property in which the business of the company was carried on or not is a question of fact. As rightly pointed out by Sri Nishanth Thakkar, learned counsel, this aspect of the matter was never put in issue, be it before the CIT(A) or before the Tribunal. The assessee company was therefore never put on notice that it had to tender evidence on this aspect. Without a factual finding as to whether the immovable property of VITP Limited was property in which its business was carried on, the question of applying one or the other parts of Article 13(4) at this stage would not arise. In consequence, the contention of the learned senior standing counsel that interpretation of Article 13(4) of the DTAA is purely a question of law does not merit acceptance. Therefore, the issue of applicability of Article 13(4) of the DTAA to the subject transaction, so as to make it taxable in India, cannot be permitted to be raised at this late stage.

Thus, the appeal would necessarily have to be restricted to the finding of the Tribunal that Article 13(1) of the DTAA had no application to the transaction.

As already pointed out, the learned senior standing counsel concedes this position and accepts that the finding of the Tribunal to this effect is valid and correct. Even otherwise, we are not inclined to disturb this finding of the Tribunal.

In **VODAFONE INTERNATIONAL HOLDINGS B.V.**², the Supreme Court pointed out that a company is a separate legal persona and the fact that all its shares are owned by one person has nothing to do with its separate legal existence. This being the settled legal position, the ridiculous analogy adopted by the AO that by virtue of their shareholding in the company, the shareholders acquire rights in the property owned by such company does not withstand judicial scrutiny. Further, the AO and the CIT(A) failed to note the difference between alienation of the company's immovable property, falling under Article 13(1) of the DTAA, and alienation of the company's shares by a shareholder, attracting Article 13(4) or (5) thereof. The legal distinction between the concept of a 'share sale' as opposed to an 'asset sale', succinctly summed up by the Supreme Court in **VODAFONE INTERNATIONAL HOLDINGS B.V.**², was completely ignored by the AO and the CIT(A). Further, the AO and the CIT(A) erred in equating alienation of a company's shares to alienation of its immovable property, by applying the ludicrous logic that shares partake the character of immovable property. Thus, on both counts, the finding of the Tribunal does not warrant interference. As the learned senior standing counsel fairly concedes this point, we need not belabour further.

As we are not inclined to entertain the new issue as to applicability of Article 13(4) of the DTAA to the transaction, so as

to make it taxable in India, the arguments advanced by both sides as well as the case law cited need no further discussion.

That being so, as the Tribunal rightly held that alienation of shares by the assessee company to Ascendas did not fall under Article 13(1) of the DTAA and that the residuary clause in Article 13(5) thereof would have application, we confirm the finding of the Tribunal that the capital gains earned by the assessee company from the subject transaction are covered by the exemption afforded by Article 13(5) of the DTAA and the same would therefore not be taxable in India.

In the light of our aforestated finding, we are not required to go into the alternate claim of the assessee company that it is also entitled to exemption from taxation under Section 10(23G) of the Act. The arguments advanced in this regard as well as the case law cited are accordingly eschewed from further consideration.

The last issue is as to whether the interest paid to the assessee company by Ascendas is taxable in India. The finding of the AO, as confirmed by the CIT(A), was that the same was liable to be taxed in India by virtue of Section 9(1)(v) of the Act. However, as rightly pointed out by the Tribunal, the provisions of the aforestated section cannot be stretched beyond what has been spelt out therein in clear terms. The relevant part of the section merely states that income by way of interest payable by a person who is a non-resident, where such interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India, would be deemed to be income accruing or arising in India. On the face of it, Section 9(1)(v) has no applicability whatsoever to the

interest paid to the assessee company by Ascendas as there is no evidence of a debt being incurred or monies being borrowed for any business purposes in the present case.

While so, it is contended by Ms. K.Mamata Choudary, learned senior standing counsel, that the provision of law which is actually applicable is Section 9(1)(i) and not Section 9(1)(v). This provision reads to the effect that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India would be deemed to have accrued or arisen in India. Ms. K.Mamata Choudary, learned senior standing counsel, would contend that as the interest arose out of the transaction involving transfer of a capital asset in India, it would be taxable in India. She would further contend that Article 11 of the DTAA has no application to this payment of interest, as it stood excluded therefrom being penal interest.

Per contra, Sri Nishanth Thakkar, learned counsel, would assert that the subject payment of interest was not by way of a penalty. He would rely on the letter dated 15.02.2005 addressed by Ascendas to the assessee company. Thereunder, Ascendas referred to the Share Purchase Agreement dated 17.12.2004 and the closing date recorded therein and stated that, notwithstanding the satisfaction or waiver of the conditions precedent set forth in Schedule VIII of the said agreement, the parties had agreed to defer the closing date in consideration of payment of interest as follows: Ascendas undertook that it would pay interest at 7% per annum on INR 169.50 crore with effect from 15.02.2005 and the same

would be payable until completion of the transaction. Learned counsel would state that it was by virtue of this agreement between the parties to defer the closing date that Ascendas undertook to pay interest for such delayed payment of the sale consideration. Further, he would rely on Article 11 of the DTAA.

Article 11(1) states that interest arising in one of the States and paid to a resident of the other State would be taxed in that other State. Therefore, the interest arising out of sale of shares of VITP Ltd. but paid to the assessee company in Netherlands would normally be taxable in Netherlands. However, Article 11(6) makes it clear that the term 'interest' as used in the Article means income from debt-claims of every kind, but penalty charges for late payment shall not be regarded as interest for the purpose of the said Article.

Sri Nishanth Thakkar, learned counsel, would contend that as both the parties to the sale of shares had mutually agreed to defer the closing date and Ascendas voluntarily undertook to pay interest for such late payment of the sale consideration, the same does not partake the character of penalty charges. We find merit in this contention.

It is significant to note that the AO opined that the interest arose through a transaction involving sale of a capital asset situated in India and would therefore be deemed to have accrued or arisen in India. But the CIT(A) found in appeal that this interest was inextricably linked to the original transaction of sale of shares and therefore, payment of interest arose as a part of the said transaction. He therefore concluded that the payment for the sale of shares of VITP Limited involved two components, i.e., the

original payment and the penal payment on account of delay, and therefore the interest payment could not be divorced from the original payment, as both pertained to the same transaction. In effect, the CIT(A) held it to be part of the sale consideration itself. The Tribunal, on the other hand, held that Section 9(1)(v) had no application whatsoever and if the interest payment was construed to be part of the sale consideration, it would stand exempted from taxability in India by virtue of the DTAA.

Before us, the question of law raised in relation to this aspect is that the interest either accrued or arose or is deemed to have accrued or arisen in India. Even if so, such interest income would not be taxable in India by virtue of Article 11 of the DTAA unless it is covered by the exclusion in Article 11(6) thereof. The issue, therefore, is whether the interest paid qualifies as penalty charges for late payment as per Article 11(6), whereby the exemption afforded by the said Article would stand excluded. If not, the exemption afforded by Article 11(1) would squarely apply and the interest paid by Ascendas to the assessee company in Netherlands owing to the sale of shares of VITP Ltd. would not be taxable in India.

Perusal of the Share Purchase Agreement dated 17.12.2004 reflects that the closing date was stipulated under Clause 4.1 thereof to be no later than 90 days from the effective date, being the date of execution of the agreement. It was further provided that in the event the conditions precedent under Clause 5 were not fulfilled or not waived by the buyer on or before 90 days from the effective date or the extended date mutually agreed, the parties would have the right to rescind the agreement without any liability

towards each other. Significantly, no penalty charges for late payment were envisaged in the aforestated agreement. On the other hand, the agreement contemplated extension of the closing date by the parties. It appears that the closing date, which could be mutually extended, was so extended as recorded in the letter dated 15.02.2005 addressed by Ascendas to the assessee company. As consideration for such extension of the closing date, Ascendas undertook to pay interest at 7% per annum on the sale consideration, payment of which stood deferred consequent to the extension of the closing date. In effect, payment of the said interest did not partake the nature of penalty charges as it was not penal in character, in any manner. Therefore, Article 11(1) of the DTAA applied on all fours, and irrespective of whether such interest accrued or arose or is deemed to have accrued or arisen in India under Section 9(1)(i) of the Act, it stood exempted from taxation in India under the DTAA. The finding of the Tribunal to this effect therefore does not warrant interference.

The questions of law arising in this appeal are answered accordingly. In consequence, I.T.T.A.No.71 of 2014 is dismissed.

As we have upheld the order of the Tribunal holding that the capital gains arising out of the sale of shares by the assessee company of VITP Limited to Ascendas stood exempted from taxation in India under Article 13(5) of the DTAA, we agree with the Tribunal that the directions for reassessment by the DRP, the subject matter of I.T.T.A.No.55 of 2014, are rendered purely academic and do not warrant further consideration on merits. In consequence, the said appeal shall also stand dismissed as no question of law, much less a substantial one, is raised therein.

W.P.No.41469 of 2015 was filed by the assessee company contending that, pursuant to the common order dated 15.03.2013 passed by the Tribunal, the Assistant Director of Income-tax (International Taxation)-II, Hyderabad, issued order dated 28.05.2013, quantifying the amount refundable to it at Rs.49,00,73,615/-, but despite the same, the Deputy Commissioner of Income Tax-2, International Taxation, Hyderabad, issued letter dated 30.11.2015 informing it that as the revenue's stay petition in I.T.T.A.No.71 of 2014 was yet to be disposed of by this Court, the issue of refund to the assessee company was kept on hold. The assessee company therefore sought a consequential direction to the revenue to refund the said amount along with further interest.

As we have now dismissed I.T.T.A.No.71 of 2014 along with I.T.T.A.No.55 of 2014, there is no reason for the revenue to continue to withhold the refund payable to the assessee company pursuant to the order of the Tribunal, which now stands confirmed. Be it noted that Section 240 of the Act requires the Assessing Officer, except as otherwise provided in the Act, to refund the amount due as a result of any order passed in appeal to the assessee without his having to make a claim in that behalf. The revenue shall therefore endeavour to give effect to the order passed by the Tribunal in I.T.A.No.739/Hyd/2011, which now stands confirmed by virtue of the dismissal of I.T.T.A.No.71 of 2014, and refund the amount payable in consequence thereof expeditiously and in any event, not later than twelve weeks from the date of receipt of a copy of this order.

To sum up, I.T.T.A.Nos.55 of 2014 and 71 of 2014 are dismissed, confirming the common order dated 15.03.2013 of the Income Tax Appellate Tribunal, 'A' Bench, Hyderabad, in I.T.A.Nos.739/Hyd/2011 and 2118/Hyd/2011. W.P.No.41469 of 2015 is allowed to the extent indicated above. In the circumstances, parties shall bear their own costs.

SANJAY KUMAR, J

U.DURGA PRASAD RAO, J

16th JUNE, 2017

**Note: L.R. copy to be marked
B/o Svv**

