IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 989 OF 2015

The Commissioner of Income Tax,]
having office at Aayakar Bhavan,]
Patto – Plaza, Panaji – Goa.] ... Appellant

Versus

V.S. Dempo & Co. Pvt. Ltd.]
Dempo House, Campal, Panaji, Goa.] ... Respondent

WITH
INCOME TAX APPEAL NO. 991 OF 2015

The Commissioner of Income Tax,]
having office at Aayakar Bhavan,]
Patto – Plaza, Panaji – Goa.] ... Appellant

Versus

V.S. Dempo & Co. Pvt. Ltd.]
Dempo House, Campal, Panaji, Goa.] ... Respondent

WITH
INCOME TAX APPEAL NO. 948 OF 2015

Sesa Goa Limited.,]
having his office at "Seas Ghor"]
Patto -Plaza, Panaji -Goa.] ... Appellant

Versus

The Commissioner of Income Tax,]
having office at Aayakar Bhavan,]
Patto – Plaza, Panaji – Goa.] ... Respondent

WITH
INCOME TAX APPEAL NO. 957 OF 2015

Sesa Goa Limited.,]
having his office at "Seas Ghor"]
Patto -Plaza, Panaji -Goa.] ... Appellant
Versus
The Commissioner of Income Tax,]
having office at Aayakar Bhavan,]
Patto – Plaza, Panaji – Goa.] ... Respondent

WITH
INCOME TAX APPEAL NO. 978 OF 2015

Sesa Goa Limited.,]
having his office at "Seas Ghor"]
Patto -Plaza, Panaji -Goa.] ... Appellant
Versus
The Commissioner of Income Tax,]
having office at Aayakar Bhavan,]
Patto – Plaza, Panaji – Goa.] ... Respondent

Mr. J.D. Mistry, senior counsel with Ms. Fereshte Sethna, Mr.Mrunal Parekh, Ms. Khushboo Shah, Mr. Vijendra Vatsa, Mr.Manan Shukla, Mr. Adhiraj Malhotra and Mr. Shantanu Singh i/b Duttmenon Dunmorrset for the Appellants in Income Tax Appeal Nos. 948 of 2015, 957 of 2015 and 978 of 2015.

Mr. Mihir Naniwadekar for the Respondents in Income Tax Appeal Nos.989 of 2015 and 991 of 2015.

None for the Respondents in ITXA Nos. 948 of 2015, 957 of 2015 and 978 of 2015.

CORAM : S.C. DHARMADHIKARI,
R.D. DHANUKA &
B.P. COLABAWALLA, JJ.

RESERVED ON : 27th NOVEMBER, 2015

PRONOUNCED ON: 5th FEBRUARY, 2016

JUDGMENT : [Per S.C. Dharmadhikari]

1. On 8th September, 2015, a Division Bench of this Court hearing Income Tax Appeal No. 989 of 2015 and Income Tax Appeal No. 991 of 2015 was unable to agree with the view taken by another Division Bench of this Court in the case of *Commissioner of Income-tax vs. Orient (Goa) Private Limited reported in 3 Vol. 325 Income Tax Reporter Pg. 554*. It, therefore, came to the conclusion that judicial discipline demands that instead of taking a contrary view it should request that a larger bench be constituted so as to resolve the disagreement. It, therefore, directed the Registry to place the papers and proceedings of the two Appeals before the Hon'ble The Chief Justice so as to obtain suitable directions for placing the following question of law for opinion of a larger bench.

"Q. Whether, while dealing with the allowability of expenditure under section 40(a)(i) of the Income Tax Act, 1961, the status of a person making the expenditure has to be a non-resident before the provision to section 172 of the Act can be invoked ?"

2. The Registry placed the papers before the Hon'ble The Acting Chief Justice on 8th October, 2015, and on 9th October, 2015, the Hon'ble The Acting Chief Justice directed constitution of this larger Bench. Accordingly, the question has been placed before us for our opinion and answer.

3. Before that question is answered it would be necessary to refer to the facts. A reference to the same is made only to appreciate the contentions of both sides. Income Tax Appeal No.989 of 2005 was filed by Commissioner of Income Tax under section 260A of the Income Tax Act, 1961, aggrieved and dissatisfied with the order of the Income Tax Appellate Tribunal , Panaji Bench, dated 11th December, 2005, passed in Income Tax Appeal Nos. 240/PN/2004 and 273/PN/2004. The Assessment

Year is 1999-2000.

4. The assessee-respondent before this Court is a company engaged in the business of mining and export of processed iron ore as also in construction business.

5. The assessee filed its return of income on 31st December, 1999, declaring taxable income of Rs.6,19,82,540/-. The assessee claimed deduction u/s 80-HHC of Rs.12,78,82,552/-. The case was selected for scrutiny and notices u/s. 143(2) were issued to the assessee. Assessee, in response, filed details. The assessee declared other income at Rs.9,67,50,252/-. The main item of this is interest income on Bank deposits and others. The basic issue which arises is whether the entire interest income as claimed by the assessee could be said to be business income, to which explanation (baa) to section 80HHC, is applicable or whether the said interest income is income from other sources. The assessee also claimed income received from 'Lease income', 'income from transfer of vessels', 'Barge freight', 'proceeds from other services' and 'miscellaneous income', as gross receipts received in the course of its business and therefore there is no

question of applying Explanation (baa) to it. The assessee also charged the demurrage charges under the head export expenses to profit and loss account on which no tax has been deducted during the year under consideration. The Assessing Officer held that in view of section 40(a)(i) r/w section 195, the amount paid as demurrage charges are liable for addition under section 40(a). The assessee also claimed miscellaneous expenses, which has been disallowed by the Assessing Officer. On scrutiny, the Assessing Officer passed an assessment order on 26th March, 2002, and allowed deductions under section 80HHC to the extent of Rs.8,07,35,598/-. A copy of the Assessment Order dated 26th March, 2002, is annexed as Annexure-A to the appeal paper-book. Being aggrieved by the said order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals). The CIT (A) by order dated 2nd August, 2008, partly allowed the assessee's appeal. A copy of the order dated 2nd August, 2004, passed by the CIT (Appeals) is annexed as Annexure-B to the appeal paper-book. Being aggrieved by the CIT(A)'s order dated 12th March, 2002, the assessee as well as the Revenue filed appeals before the Income Tax Appellate Tribunal, Panaji. The Tribunal, by an order dated 11th December, 2006, partly allowed

both assessee's as well as the Revenue's appeal, directing the Assessing Officer to exclude 90% of the net income eligible for inclusion for the purpose of computing profits of the business for the purpose of determining 80HHC deductions. A copy of the order dated 11th December, 2006, passed by the Income Tax Appellate Tribunal is annexed as Annexure-C to the appeal paper-book.

6. That is how the Revenue requested this Court to admit this appeal as it raises substantial questions of law. The appeal together with other Tax Appeals was placed before a Division Bench of this Court and it came to be admitted on the following substantial questions of law :

(I) Whether in facts and circumstances of the case, the ITAT has erred in applying the provision of Section 172 in holding that section 40(a)(i) is not applicable, particularly when section 172 concerned with levy and recovery of tax in a case of any ship, as against section 195 r/w 40(a)(i) of the IT Act, refers to non-resident

assessee as in the present case ?

(II) Whether in the facts and in the circumstances of the case, the ITAT has erred while referring the issue to the file of A.O., to exclude 90% of 'net' interest income excess of interest received or paid provided there is direct nexus between interest earned and paid after establishing the fact that all the interest income except the interest on income tax is forming part of the profits of the business and not income from other sources ?

(III) Whether the findings of the ITAT while restoring the issue of interest income to the file of A.O., to exclude 90% of 'net' interest income is valid in law. ?

(IV) Whether in the facts and in the circumstances of the case, the ITAT is right in law in taking into account the 'interest on bank

deposits', 'interest on intercorporate deposits', 'interest on debentures', and 'interest from sister concerns' and 'other interest' is forming the part of the head “Profits and gains of business or profession”?

(V) Whether the findings of the ITAT that the receipts on account of 'professional services' and 'proceeds electronic data processing' are not income falling within the exclusionary provisions of clause (baa) of Explanation to section 80HHC, is right in law ?

(VI) Whether the findings of the ITAT, that 90% of the net income from receipts on account of 'stevedoring agency business' and 'travel agency business' are falling within the exclusive provision of clause (baa) of explanation to section 80HHC, is right in law ?

(VII) Whether the findings of the ITAT, that only

90% of 'net' income from the 'transfer of vessel' and 'barge freight' has to be excluded for the purpose of computing profits of the business under clause (baa) of Explanation to section 80HHC, is right in law?

(VIII) Whether the findings of the ITAT that only 90% of the 'net' income from the 'lease hire charges' received by the assessee apart from depreciation has to be excluded for the purpose of computing profits of the business under clause (baa) of Explanation to Section 80HHC, is right in law ?"

7. Out of the above substantial questions, we are concerned with Question No. I.

8. After admission, the present appeal and the other appeals came to be placed for final hearing before a Division Bench of this Court and the Division Bench noted the stand of the assessee in paragraph 4 of its order. In paragraph 5, the Division Bench

noted the reference by the Tribunal to its decision in *Deputy Commissioner of Income Tax vs. Orient (Goa)* and following it, the Tribunal allowed the assessee's appeal. The order passed by the Tribunal holds that section 40(a)(i) of the Income Tax Act, 1961 (for short "IT Act") would apply only when there is an obligation to deduct tax at source. Reliance was placed upon the Circular No.723 issued by the Central Board of Direct Taxes to support the conclusion that there was no obligation to deduct tax at source in respect of payment made towards demurrage charges in cases where section 172 of the IT Act applies. The Revenue did not dispute in the present case that section 172 applied. The Tribunal held that section 172 is a charging as well as machinery provision in respect of non-resident shipping companies. It provides for determination and collection of tax. Thus, Chapter XVI of the Act in respect of deducting tax at source would not apply in such cases. Consequently, the disallowance of expenditure on account of section 40(a)(i) of the Act was deleted.

9. The Revenue placed reliance, before the Division Bench hearing present appeals, on the decision of Orient (Goa) by which this Court reversed the Tribunal's order in that assessee's case.

In other words, the Tribunal's view taken in the case of *DGIT vs. Orient (Goa)* was expressly rejected by this Court was the submission of the Revenue. On the other hand, the assessee contended that this decision requires reconsideration. In dealing with these contentions, the Division Bench in the order referring the question held as under :

> *"8. The substantial question interalia which arose for consideration of this Court in Orient (Goa) (P) Ltd. (supra) was as under :*
>
> > *"(B) Whether on the facts and in the circumstances of the case, the assessee was entitled to claim deduction of the demurrage charges of Rs.1,08,53,980/- paid to foreign company, without deducting tax on it, under s. 40(a)(i) of the IT Act, in view of the Circular No. 723 dt. 19th September 1995 [(1995) 128 CTR (St) 61], issued by CBDT?"*
>
> *9. The above question arose for consideration by this Court on the following facts :*
>
> *(a) M/s. Orient (Goa) (P) Ltd. (assessee) had for A.Y. 1997-98 declared an income of Rs.2.10 crores. It had paid an amount of Rs.1.08 crores as demurrage charges to a non-resident shipping company viz. M/s. Mitsui & Co. Ltd. However as the assessee had not deducted tax at source on the demurrage charges paid, the Assessing Officer disallowed the expenditure of demurrage charges in view of Section 40(a)(i) of the Act.*
>
> *(b) In appeal, the CIT(A) held that demurrage charges had been paid by assessee. However in the hands of recipient M/s. Mitsui & Co. Ltd. it was in the nature of profits of a non-resident from occasional shipping business. Placing reliance upon the CBDT*

Circular No.723 and Section 172 of the Act, the CIT (A) allowed the appeal.

(c) The revenue's appeal to the Tribunal was dismissed.

10. This Court held that Section 172 of the Act is applicable only in respect of non-resident carrying on shipping business while assessee i.e. Orient (Goa) (P) Ltd. is admittedly a resident and therefore Section 172 of the Act cannot be applied. Thus the expenditure of demurrage charges cannot be allowed in the absence of tax being deducted at source. The relevant observations of this Court is found in paragraph 8 as under :

> *"8. Sec. 172 of the Act 1961 is carefully considered by us. Chapter XV titles as "Liability in special cases". We have no concern with sections, starting from s. 159, till s. 171 from this Chapter XV. Sec. 172 comes under sub-title "H.-Profits of non-residents from occasional shipping business". Title of s. 172 is "Shipping business of non-residents". For bringing a case under Chapter XV-H of the Act 1961, one has to establish a case of profits of non-residents from occasional shipping business. "Non-resident" is defined u/s. 2(30), as a person who is not a "resident" and for the purpose of ss. 92, 93 and 168, includes a person who is not ordinarily resident within the meaning of cl. (6) of s. 6. The respondent assessee is a company, incorporated under the provisions of Indian Companies Act, 1956, is fairly an admitted position. The assessee cannot be said to be non-resident. We have also taken notice of s. 6 i.e. "residence in India". In short, respondent assessee cannot be said to be non-resident. The present appeal pertains to the respondent assessee. In our view, in the facts of the present case, the respondent assessee cannot lay fingers on s. 172, since we are not dealing with profits of non-residents. The other aspect is that such profits of non-residents should be from occasional shipping business. It is*

not the case that the respondent assessee has earned some profit from occasional shipping and is a non-resident. In our view, s. 172 does not have application in relation to the respondent assessee and in the facts and circumstances of the present case. The company from Japan viz., Mitsui & Co. Ltd., Japan, recipient of demurrage amount is not before us. In other words, we are not examining the tax liability of the foreign company i.e., Mitsui & Co. Ltd., Japan. ... ... Provisions of s. 172 are to apply notwithstanding anything contained in the other provisions of the Act. Therefore, in such cases, the provisions of ss. 194C and 195 relating to TDS, are not applicable. The recovery of tax is to be regulated for voyage undertaken from any port in India by a ship, under the provisions of s. 172. In this view, these observations of the learned Vice President of Tribunal have no concern with the factual aspect that it is a case of occasional shipping, pleaded or raised by assessee. There is no dispute about interpretation of s. 172 or s. 195. Crucial point is as to how s. 172 applies to the facts of the present case wherein the respondent assessee is an Indian company, incorporated under the provisions of Indian Companies Act, 1956. In our view, the learned Vice President of the Tribunal has recorded a perverse observation/finding in para 3 regarding application of ss. 44B and 172 of the Act 1961."

11. We are unable to agree with the above view of this Court in Orient (Goa)(P) Ltd. (supra). This is for the reason that the respondent-assessee placed reliance upon Section 172 of the Act in respect of payments made by it to a non-resident shipping company by way of demurrage charges. The tax which is deducted at source by the assessee company is on behalf of the recipient of the charges. The issue before the Court was whether demurrage charges which are paid by the respondent-assessee to a non-resident company would be allowed as an expenditure in the absence of deduction of tax at source in view of Section 40(a)(i) of the Act. Although the Court was concerned with the issue in an appeal concerning a

resident company. The introduction of section 172 of the Act by the assessee was to determine whether in view thereof, was there any obligation to deduct tax at source by the payee-assessee. Section 172 of the Act has to be examined through the prism of the non-resident shipping company in respect of it's income. It is in the above view that Section 172 of the Act and Circular No.723 issued by the CBDT was relied upon by the respondent-assessee to point out that as Section 172 of the Act provides a complete code in itself for levy and recovery of tax ship wise and journey wise. Thus there is no occasion to deduct tax under Chapter XVII of the Act.

12. It is a settled position under the law of precedence that it is not open to us (Division Bench) to take a view contrary to the view taken by another Division Bench of this Court. In case, we are unable to agree with the view of the earlier Division Bench and it does not fall within the exclusionary categories of binding precedent by being contrary to and/or in conflict with a decision of the Apex Court or rendered per-incuriam. In such a case it is best that the issue is resolved at the hands of a Larger Bench of this Court. Certainty of law is an important ingredient of Rule of Law."

10. It is in the above circumstances that the question falls for our answer and opinion.

11. After the constitution of the larger Bench, the matter was listed for directions. With the consent of all advocates, we fixed the hearing on 27th November, 2015. It is extremely unfortunate that the advocate engaged by the Revenue chose to inform the Court Registry just a day or two before the hearing that she would

not be appearing. In fact, an e-mail was sent on 26th November, 2015 and prior thereto, there was a message sent by i-phone requesting for rescheduling the hearing before the Full Bench. The learned advocate informed the Registry that the Department / Revenue has expressed its desire to appoint the Additional Solicitor General and, therefore, she would not be appearing before the Bench. Three weeks' time was sought for that purpose.

12. It is indeed unfortunate that when the Bench is constituted to resolve a conflict of opinion between two Division Bench judgments of this Court and answer a question of law that such requests are made by the Revenue. Since we had decided upon this date and with the consent of all the parties, it was not possible to reschedule the hearing and, therefore, this request was rejected. It is in these circumstances that we requested Mr. Mistri, learned senior counsel appearing for some of the assessees and desiring to address this Court that he must assist us in an overall manner. Meaning thereby, the perspective of both sides and on the legal provision and its interpretation ought to be placed before us. In all fairness, Mr. Mistri has taken us

through the scheme of the Act and invited our attention to some of the judgments on the point. We are thankful to him.

13. The emphasis of Mr. Mistri was that section 172 of the IT Act is a complete code that applies to the non-resident Indians. Inviting our attention to section 40 of the Act, Mr. Mistri would submit that the assessee is not liable to deduct the tax at source. Our attention is also invited to section 195 of the Income Tax Act to urge that the status of the recipient is most relevant. Our attention was also invited to the non obstante clause as emerging from sub-section (1) of section 172. Mr. Mistri has also taken us through Chapter XVI of the IT Act to submit that section 195 is part of recovery provisions. Even with regard to Chapter XVI of the IT Act, its title, according to Mr. Mistri, must be noticed as it is extremely relevant. The title is "Collection and Recovery of Tax". Our attention is invited to sections 190, 192, 195 and 199 (1). Mr. Mistri would submit that deduction of tax at source would arise in cases where employees receive salary. To meet the tax liability of the employee the deductions of tax is made. That is at source, meaning while payment. Inviting our attention to sections 202 and 205 of the IT Act it is submitted that such

deduction is clearly a recovery. If tax to be deducted at source is a recovery, then, section 172(1) would prevail over other provisions of the Act. Mr. Mistri would submit that the Revenue's stand, if accepted, would render section 172 otiose and redundant. There is no double payment contemplated. The provisions of the Act, therefore, ought to be construed in such a way as not rendering any part of it otiose or any provision meaningless. It is in these circumstances that Mr. Mistri would submit that even the Circulars referred to in the Division Bench judgment though not binding on the Court, can be given effect to as they bind the Revenue. In other words, the Circular issued by the Revenue is binding upon it and it cannot argue anything contrary to that. Mr. Mistri's attempt is to show that if the interpretation of the Revenue official harmonizes with that placed before the Court, then, even that Circular can be referred to by this Court.

14. All the counsel have adopted the arguments of Mr. Mistri.

15. Mr. Mistri has thus pointed out that the Revenue's stand is that the judgment rendered by this Court's Goa Bench in Orient's

case lays down the correct law. It must be read in its proper perspective and in the backdrop of the controversy before this Court.

16. For properly appreciating the contentions raised before us, it would be necessary to refer to the Income Tax Act, 1961. The arrangement of sections therein commencing from and divided into several Chapters would indicate that Chapter II titled "Basis of charge" is preceded by the preliminary provisions in Chapter I and which also contains some definitions. For the purposes of the Act and unless the context otherwise requires, the term "income" is defined in an inclusive manner. Section 2(24) contains that definition and the term includes all that is enumerated from section 2 clause (24)(i) to (xviii). The term "resident" is defined in section 2 clause (42) to mean a person who is resident in India within the meaning of section 6. The word "tax" is defined in section 2 clause (43) and in relation to the assessment year commencing on the first day of April, 1965, and any subsequent assessment means income tax chargeable under the provisions of this Act, prior to the aforesaid date. The term "total income" is defined in section 2 clause (45) to mean the total amount of

income referred to in section 5 computed in the manner laid down in this Act.

17. Chapter II contains the basis of charge and by section 4 sub-section (1), it is stated that where any Central Act enacts that income tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates will be charged for that year in accordance with and subject to the provisions including provisions of the levy of additional income tax in respect of the total income of the previous year of every person. The proviso thereto is not relevant for our purpose, but sub-section (2) of section 4 states that in respect of income chargeable under sub-section (1), income tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act. The source of the total income is set out in section 6 and we are not concerned with the apportionment of income contemplated by section 5-A. Residents in India is a matter dealt with by section 6 and that reads as under :

> *"6. For the purposes of this Act, -*
>
> *(1) An individual is said to be resident in India in*

any previous year, if he

(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more; or

(b) [* * *]*

(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.

[Explanation. I]. - In the case of an individual -

(a) being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted.

(b) 'being a citizen of India, or a person of Indian origin within the meaning of the Explanation to clause (c) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted.

[Explanation 2.- For the purposes of this clause, in the case of an individual being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.]

(2) A Hindu undivided family, firm or other association of persons is said to be resident in India in any previous year in every case except where during the year the control and management of the affair is situated wholly outside India.

(3) A company is said to be a resident in India in any previous year, if, -

(i) it is an Indian company; or

(ii) its place of effective management, in that year, is in India.

Explanation. - For the purposes of this clause "place of effective management" means a place where key managements and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

(4) Every other person is said to be resident in India in any previous year in every case, except where during that year the control and management of his affairs is situated wholly outside India.

(5) If a person is resident in India in a previous year relevant to an assessment year in respect of any source of income, he shall be deemed to be resident in India in the previous year relevant to the assessment year in respect of each of his other sources of income.

(6) A person is said to be "not ordinarily resident" in India in any previous year if such person is -

(a) an individual who has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of or periods amounting in all to, seven hundred and twenty nine days or less; or

(b) a Hindu undivided family whose manager

has been a non-resident in India in nine out of the ten previous years preceding that year or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less."

18. A perusal of this section would indicate as to how an individual can be said to be a resident of India, a Hindu undivided family, firm or association of persons can also be said to be a resident in India, a company also can be a resident of India and equally other persons. The term "not ordinarily resident" in India is also contemplated by section 6(6). By section 7, income stipulated therein is deemed to be received in the previous year. Section 8 deals with dividend income and section 9 deems certain income to accrue or arise in India. Explanation-I which is an explanation for clause (1) sub-clause (b) states that in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export. Then, case of a non-resident engaged in the business of running goods agency or publishing newspaper is dealt with and in case of a non-resident being a company which does not have any shareholder who is a citizen of India or a resident in India no income shall be

deemed to accrue or arise in India to such individual firm or company through or from operations which are confined to the shooting of any cinematographic film in India. The Explanation II for the removal of doubts declares that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident or has no authority and, therefore, from a reading of this section together with the explanations, it is apparent as to income which is deemed to accrue or arise in India may or may not include such income which is not attributable to the operations carried out in India. Therefore, various categories of non-resident Indians and the income that they derive or may derive by control or through somebody who is a resident of India is, accordingly, dealt with. The other part of this section is not relevant for our purpose. We are also not concerned with insertion of section 9A by the Finance Act 2015 with effect from 1st April, 2016.

19. By Chapter III, incomes which do not form part of total

income are dealt with. In that appears section 10 and the clauses thereof do not include the income specified therein in computing the total income of a previous year of any person. Clause 4 deals with the case of a non-resident and the income by way of interest on such securities or bonds as the Central Government may, by Notification in the Official Gazette, specify in this behalf, including income by way of premium on the redemption of such bonds. Section 10(4) (4B) deals with the income by way of interest earned by a non-resident on moneys standing to his credit in a non resident (External) account in any bank in India. Then, we have several clauses in section 10, but we are not concerned with all of them, save and except section 10(6A),(6B), (6BB) and (6C) thereof. After this somewhat longish provision, we have section 10AA which enacts special provision in respect of newly established undertaking in free trade zone etc. By section 10B, there are special provision in respect of newly established 100% export oriented undertakings. Section 10B sets out the meaning of computer programmes in certain cases. Section 10C contains special provision in respect of certain industrial undertakings in North Eastern region. Section 11 deals with income from property held for religious or charitable purposes. Section 12

deals with income of trust or institutions from contributions. By section 12A conditions for applicability of sections 11 and 12 are set out. Section 12AA sets out the procedure for registration. Section 13 states that section 11 will not apply in certain cases. By section 13A, special provision is made relating to incomes of political parties. Section 13B contains special provision relating to voluntary contributions received by electoral trust. After all this comes Chapter IV which is titled as Computation of Total Income. The heads of income classified by section 14 are salaries, income from house property, profits and gains of business or profession, capital gains and income from other sources. By section 14A expenditure incurred in relation to income not includible in total income is set out. We are not concerned in the instant proceedings with all the heads. We are concerned really with profits and gains of business or profession. Therefore, we do not make any reference to sections 15 to 17 and section 22 to 27 which deal with salaries and income from house property.

20. As far as profits and gains of business or profession are concerned by section 28 these are set out. The income therein shall be chargeable to income tax under this head and the clause

thereof would indicate as to how the sub-headings of compensation, income derived by trade, professional or similar association from specific service performed for its members, profits on sale of a licence granted under the Imports and Exports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947, cash assistance, drawback or some other form in which any duty of customs or excise is repaid or repayable. We have, therefore, several such incomes which are derived by Duty Entitlement Pass Book Scheme or otherwise. We also have several incomes which are generated in the form of any benefit or perquisite whether convertible into money or not arising from business or the exercise of a profession, any sum whether received or receivable in cash or kind under an agreement for not carrying out any activity in relation to any business or not sharing any know-how, patent, copyright, trade-mark, licence, franchise etc. Income generated by way of any arrangement or understanding as also derived by rendering of any service received under a Keyman insurance policy are all part of section 28. The income referred to in section 28 shall be computed in accordance with the provisions contained in section 30 to 43D. These provisions enable computation of income after

deducting rent, rates, taxes, repairs and insurance for building repairs and insurance of machinery, plant and furniture, depreciation, investment allowance, investment deposit account, investment in new plant or machinery, investment in new plant or machinery in notified backward areas in certain States, development rebate, development allowance, reserves for shipping business, rehabilitation allowance. The conditions for depreciation allowance and development rebate are set out in section 34 and by section 34A, there is a restriction on unabsorbed depreciation and unabsorbed investment allowance for limited period in case of certain domestic companies. Section 35 deals with expenditure on scientific research, section 35AB deals with expenditure on know-how and section 35ABB deals with expenditure for obtaining licence to operate telecommunication services. Section 35AC deals with expenditure on eligible projects or schemes and section 35AD deals with deduction in respect of expenditure on specified business. We have several expenditures and provided in sections 35CCA, 35CCB, 35CCC and 35CCD. Section 35D deals with amortization of certain preliminary expenses and amortization of expenditure in other cases is dealt with by section 35DD and

35DDA. Section 35E deals with deduction for expenditure on prospecting etc. for certain minerals. Section 36 deals with other deductions. Section 37 deals with general expenditure and not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purposes of the business or profession. That shall be allowed in computing the income chargeable under the head Profits or Gains of Business or Profession. Section 38 deals with building etc., partly used for business etc., or not exclusively so used. Section 39 stands omitted. Then comes section 40 which is titled Amounts Not Deductible. This section reads as under:

> *"40. Notwithstanding anything to the contrary in section 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession:,-*
>
> *(a) in the case of an assessee -*
>
> *(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—*
>
> *(A) outside India; or*
>
> *(B) in India to a non-resident, not being a company or to a foreign company,*
>
> *on which tax is deductible at source under Chapter*

XVII-B and such tax has not been deducted or, after deduction, has not been paid [during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200] :

***Provided** that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.*

The following proviso shall be substituted for the existing proviso to sub-clause (i) of clause (a) of section 40 by the Finance (No. 2) Act, 2014, w.e.f 1-4-2015 :

***Provided** that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.*

Explanation.—For the purposes of this sub-clause,—

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(ia)[any interest, commission or brokerage, [rent, royalty,] fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work)], on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, [has not been paid on or before the due date specified in sub-section (1) of section 139 :]

*[**Provided** that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, [thirty per cent of] such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid :]*

*[**Provided further** that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.]*

Explanation.—For the purposes of this sub-clause,—

(i) "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(iv) "work" shall have the same meaning as in Explanation III to section 194C;

[(v) "rent" shall have the same meaning as in clause (i) to the Explanation to section 194-I;

(vi) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;]

(ib) [* *]]*

[(ic) any sum paid on account of fringe benefit tax under Chapter XIIH;]

(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession

or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.

[Explanation 1.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.]

[Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A;]

(iia) any sum paid on account of wealth-tax.

Explanation.—For the purposes of this sub-clause, "wealth-tax" means wealth-tax chargeable under the Wealth-tax Act, 1957 (27 of 1957), or any tax of a similar character chargeable under any law in force in any country outside India or any tax chargeable under such law with reference to the value of the assets of, or the capital employed in, a business or profession carried on by the assessee, whether or not the debts of the business or profession are allowed as a deduction in computing the amount with reference to which such tax is charged, but does not include any tax chargeable with reference to the value of any particular asset of the business or profession;]

[(iib) any amount—

(A) paid by way of royalty, licence fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called, which is levied exclusively on; or

(B) which is appropriated, directly or indirectly, from,

a State Government undertaking by the State Government.

Explanation.—For the purposes of this sub-clause, a State Government undertaking includes—

(i) a corporation established by or under any Act of

the State Government;

(ii) a company in which more than fifty per cent of the paid-up equity share capital is held by the State Government;

(iii) a company in which more than fifty per cent of the paid-up equity share capital is held by the entity referred to in clause (i) or clause (ii) (whether singly or taken together);

(iv) a company or corporation in which the State Government has the right to appoint the majority of the directors or to control the management or policy decisions, directly or indirectly, including by virtue of its shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

(v) an authority, a board or an institution or a body established or constituted by or under any Act of the State Government or owned or controlled by the State Government;

[(iii) any payment which is chargeable under the head "Salaries", if it is payable—

(A) outside India; or

(B) to a non-resident,

and if the tax has not been paid thereon nor deducted therefrom under Chapter XVII-B;

(iv) any payment to a provident or other fund established for the benefit of employees of the assessee, unless the assessee has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are chargeable to tax under the head "Salaries" ;

[(v) any tax actually paid by an employer referred to in clause (10CC) of section 10;]

[(b) in the case of any firm assessable as such,—

(i) any payment of salary, bonus, commission or remuneration, by whatever name called (hereinafter referred to as "remuneration") to any partner who is not a working partner; or

(ii) any payment of remuneration to any partner who

is a working partner, or of interest to any partner, which, in either case, is not authorised by, or is not in accordance with, the terms of the partnership deed; or

(iii) any payment of remuneration to any partner who is a working partner, or of interest to any partner, which, in either case, is authorised by, and is in accordance with, the terms of the partnership deed, but which relates to any period (falling prior to the date of such partnership deed) for which such payment was not authorised by, or is not in accordance with, any earlier partnership deed, so, however, that the period of authorisation for such payment by any earlier partnership deed does not cover any period prior to the date of such earlier partnership deed; or

(iv) any payment of interest to any partner which is authorised by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as such amount exceeds the amount calculated at the rate of [twelve] per cent simple interest per annum; or

(v) any payment of remuneration to any partner who is a working partner, which is authorised by, and is in accordance with, the terms of the partnership deed and relates to any period falling after the date of such partnership deed in so far as the amount of such payment to all the partners during the previous year exceeds the aggregate amount computed as hereunder :—

(a) on the first Rs. 3,00,000 of the book-profit or in case of a loss	*Rs. 1,50,000 or at the rate of 90 per cent of the book-profit, whichever is more;*
(b) on the balance of the	*at the rate of 60*

book-profit *per cent :]*

Provided *that in relation to any payment under this clause to the partner during the previous year relevant to the assessment year commencing on the 1st day of April, 1993, the terms of the partnership deed may, at any time during the said previous year, provide for such payment.*

Explanation 1.—Where an individual is a partner in a firm on behalf, or for the benefit, of any other person (such partner and the other person being hereinafter referred to as "partner in a representative capacity" and "person so represented", respectively),—

(i) interest paid by the firm to such individual otherwise than as partner in a representative capacity, shall not be taken into account for the purposes of this clause;

(ii) interest paid by the firm to such individual as partner in a representative capacity and interest paid by the firm to the person so represented shall be taken into account for the purposes of this clause.

Explanation 2.—Where an individual is a partner in a firm otherwise than as partner in a representative capacity, interest paid by the firm to such individual shall not be taken into account for the purposes of this clause, if such interest is received by him on behalf, or for the benefit, of any other person.

Explanation 3.—For the purposes of this clause, "book-profit" means the net profit, as shown in the profit and loss account for the relevant previous year, computed in the manner laid down in Chapter IV-D as increased by the aggregate amount of the remuneration paid or payable to all the partners of the firm if such amount has been deducted while computing the net profit.

Explanation 4.—For the purposes of this clause, "working partner" means an individual who is actively engaged in conducting the affairs of the business or profession of the firm of which he is a partner;]

(ba) in the case of an association of persons or body of individuals [other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any law corresponding to that Act in force in any part of India], any payment of interest, salary, bonus, commission or remuneration, by whatever name called, made by such association or body to a member of such association or body.

Explanation 1.—Where interest is paid by an association or body to any member thereof who has also paid interest to the association or body, the amount of interest to be disallowed under this clause shall be limited to the amount by which the payment of interest by the association or body to the member exceeds the payment of interest by the member to the association or body.

Explanation 2.—Where an individual is a member of an association or body on behalf, or for the benefit, of any other person (such member and the other person being hereinafter referred to as "member in a representative capacity" and "person so represented", respectively),—

(i) interest paid by the association or body to such individual or by such individual to the association or body otherwise than as member in a representative capacity, shall not be taken into account for the purposes of this clause;

(ii) interest paid by the association or body to such individual or by such individual to the association or body as member in a representative capacity and interest paid by the association or body to the person so represented or by the person so represented to the association or body, shall be taken into account for the purposes of this clause.

Explanation 3.—Where an individual is a member of an association or body otherwise than as member in a representative capacity, interest paid by the association or body to such individual shall not be taken into account for the purposes of this clause, if such interest is received by him on behalf, or for the benefit, of any other person.]

(c) Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989. Earlier, it was amended by the Finance Act, 1963, w.e.f. 1-4-1963, Finance Act, 1964, w.e.f. 1-4-1964, Finance Act, 1965, w.e.f. 1-4-1965, Finance Act, 1968, w.e.f. 1-4-1969, Finance (No. 2) Act, 1971, w.e.f. 1-4-1972, Finance Act, 1984, w.e.f. 1-4-1985 and Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1988.

(d) Omitted by the Finance Act, 1988, w.e.f. 1-4-1989."

21. A perusal of section 40 reveals that firstly it starts with a non obstante clause. Secondly, it states that notwithstanding anything to the contrary in sections 30 to 38, the amounts as specified in the clauses to section 40 shall not be deducted in computing the income chargeable under the head "Profits or Gains of Business or Profession". In the case of any assessee what sub-clause (i) of this section states is that any interest not falling in the bracket portion, unspecified royalty, fees for technical services or other sum chargeable under the Income Tax Act, which is payable outside India or in India to a non-resident, not being a company or to a foreign company on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid, will be covered by the prohibition enacted as above.

22. The proviso to this sub-clause (i) reveals that where in respect of such sum, tax has been deducted in any subsequent year or has been deducted during the previous year, but paid after the due date specified in sub-section (i) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

23. Then section 40(a)(ia) refers to the thirty per cent of any sum payable on which tax is deductible at source under the same chapter as above and such tax has not been deducted or after deduction has not been paid.

24. We have reproduced the entire section for the simple reason that the amount mentioned in section 40(a)(i) shall not be deducted in case it is payable in India to a non-resident, not being a company or to a foreign company. Therefore, in the case of any assessee if any interest, royalty, fees or technical service or other sum chargeable under the Income Tax Act payable outside India or payable in India to a non-resident not being a company or a foreign company on which tax is deductible at source under chapter XVII-B, is covered.

25. Such tax has not been deducted or after deduction has not been paid, then, the deduction shall not be made in computing the total income chargeable.

26. It is for this reason that we have to refer to Chapter XVII–B. Chapter XVII deals with Collection And Recovery of Tax. It contains general provisions with regard to deduction at source and advance payment in section 190 and in section 191 it makes provisions regarding direct payment. It has a separate Chapter under sub-heading "B - Deduction at Source." In the instant case, it is common ground that reference is made to sections 192 to 195. They pertain to salary and, therefore, any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year. If payment of accumulated balance to an employee is made, then also this obligation comes in vide section 192A. If the Interest on Securities is the income

head involved, then, the person responsible for paying to a resident any income of this nature shall make the deduction. The same obligation would arise in the case of dividend vide section 194. Interest other than interest on securities with regard to which any payment is made then that aspect is covered by section 194A. Winnings from lottery or cross-word puzzle and winning from horse races are covered by section 194B and 194BB.

27. Payments to contractors, if made, particularly resident contractors, then the obligation to deduct the income-tax at source flows from section 194C. Similarly, insurance commission, payment in respect of life insurance policy, payments to non-resident sportsmen or sports association, payments in respect of deposits under the National Savings Schemes etc. attract the deduction of tax at source. The other payments including the category of commission or brokerage fall within the obligation to pay tax. Payment for transfer of certain immovable property other than agricultural lands invites deduction of income-tax at source vide section 194IA. Then the fees for professional or technical service invites the same obligation by section 194J.

Several other sections of this nature where amount is paid to a resident or the income is generated or earned by a resident would attract the deduction of tax at source. Section 194LC deals with income by way of interest from Indian company and where any income by way of interest referred to in sub-section (2) of this section is payable to a non-resident, being a company or to a foreign company by a specified company or business trust, the person responsible for making the payment at the time of credit of such income to the account of the payee or at the time of payment in cash or by issue of cheque or draft or by any other mode, whichever is earlier, deduct the income-tax thereon at the rate of five percent. Therefore, the tax is to be deducted at source, the manner of its deduction and the time are specified so also the rate. After section 194LC and 194LD comes section 195 which reads as under:

> *"195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest not being interest referred to in section 194LB or section 194LC or section LD or any other sum chargeable under the head "Salaries" shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force;*
>
> ***Provided** that in the case of interest payable by the*

Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.

Provided further *that no such deduction shall be made in respect of any dividends referred to in section 115-C.*

Explanation 1.—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum

on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the Assessing Officer before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

(6) The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.

(7) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that

proportion of the sum which is so chargeable."

28. The Explanation thereto would indicate as to how the term or expression "non-resident" is understood. We are not referring to other sections simply because we have to appreciate the argument that tax deducted at source is a recovery and section 172(1) will prevail over other provisions of the Act.

29. In the present case, we are concerned with shipping business of non-residents and, therefore, section 172 would have to be referred in extenso. That provision reads as under :

> *"172. (1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India.*
>
> *(2) Where such a ship carries passengers, livestock, mail or goods shipped at a port in India, [seven and a half] per cent of the amount paid or payable on account of such carriage to the owner or the charterer or to any person on his behalf, whether that amount is paid or payable in or out of India, shall be deemed to be income accruing in India to the owner or charterer on account of such carriage.*
>
> *(3) Before the departure from any port in India of any*

such ship, the master of the ship shall prepare and furnish to the [Assessing] Officer a return of the full amount paid or payable to the owner or charterer or any person on his behalf, on account of the carriage of all passengers, livestock, mail or goods shipped at that port since the last arrival of the ship thereat:

Provided *that where the [Assessing] Officer is satisfied that it is not possible for the master of the ship to furnish the return required by this sub-section before the departure of the ship from the port and provided the master of the ship has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the [Assessing] Officer may, if the return is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the master as sufficient compliance with this sub-section.*

(4) On receipt of the return, the [Assessing] Officer shall assess the income referred to in sub-section (2) and determine the sum payable as tax thereon at the rate or rates [in force] applicable to the total income of a company which has not made the arrangements referred to in section 194 and such sum shall be payable by the master of the ship.

[(4A) No order assessing the income and determining the sum of tax payable thereon shall be made under sub-section (4) after the expiry of nine months from the end of the financial year in which the return under sub-section (3) is furnished:

Provided *that where the return under sub-section (3) has been furnished before the 1st day of April, 2007, such order shall be made on or before the 31st day of December, 2008.]*

(5) For the purpose of determining the tax payable under sub-section (4), the [Assessing] Officer may call for such accounts or documents as he may require.

(6) A port clearance shall not be granted to the ship until the Collector of Customs, or other officer duly authorised to grant the same, is satisfied that the tax assessable under this section has been duly paid or

that satisfactory arrangements have been made for the payment thereof.

(7) Nothing in this section shall be deemed to prevent the owner or charterer of a ship from claiming before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment be made of his total income of the previous year and the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and if he so claims, any payment made under this section in respect of the passengers, livestock, mail or goods shipped at Indian ports during that previous year shall be treated as a payment in advance of the tax leviable for that assessment year, and the difference between the sum so paid and the amount of tax found payable by him on such assessment shall be paid by him or refunded to him, as the case may be.

(8) For the purposes of this section, the amount referred to in sub-section (2) shall include the amount paid or payable by way of demurrage charge or handling charge or any other amount of similar nature."

30. A perusal thereof would reveal as to how the provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident which carries passengers etc. shipped at a port in India. Thus, the provisions are made to take care of the income of shipping business of non-residents and for purpose of levy and recovery of tax thereon.

31. Section 195 deals with other sums. It falls under Chapter XVII titled as Collection and Recovery – Deduction at Source. It has several sub-headings styled as A-General, B-Deduction at Source, BB-Collection at source, C-Advance Payment of Tax, D-Collection and Recovery, E-Tax Payable Under Provisional Assessment (which is deleted now) and F and G titled as Interest Chargeable in Certain Cases and Levy of Fee in Certain Cases.

32. In the case at hand, we are not concerned with deduction at source of tax on payment of salary, payment of accumulated balance due to an employee, interest on securities, dividends and such of the payments and incomes which are dealt with by section 194-A to 194-LD. We are concerned with a provision dealing with other sums.

33. A perusal thereof would indicate as to how any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest not being interest referred to in sections 194LB or 194LC or 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit

of such income to the account of the payee or at the time of payment in cash or by cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force.

34. The question before us is if section 172 deals with shipping business of non-residents and contains a non-obstante clause and applies for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident which carries passengers etc. shipping at a port in India, then, is there any obligation to deduct the tax at source in terms of section 195.

35. It is stated on behalf of the assessee that tax deducted at source is a recovery and, therefore, section 172(1) will prevail over the provisions of the Act. Reliance is also placed upon the Circular in that behalf. That Circular reads as under :

> *"**916. Clarification regarding treatment of tax paid under section 172(3)(4) by a non-resident engaged in shipping business***
>
> ***1.** The Board had earlier issued Circular No. 730 regarding treatment of tax paid under section 172(3) by a non-resident engaged in the shipping business. Under the provisions of section 172, every time a ship belonging to or chartered by a non-resident makes a voyage from a port in India, carrying passengers,*

livestock, mail or goods shipped at a port in India, 7.5 per cent of the amount paid or payable on account of the carriage of the passengers etc. is deemed as the income and tax is levied on such income at a rate applicable to a foreign company. The assessment and the payment is to be made before the ship is granted the port clearance. The exception is that, in suitable cases the ship may be allowed to leave provided satisfactory arrangements are made to ensure that the return of income if filed and payment of tax is made within 30 days of the departure of the ship.

2. *Under the provisions of section 172(7), the non-resident owner or charterer is allowed an option to be assessed on his total income of the previous year in accordance with other provisions of the Act. When such option is exercised and an assessment is made accurately, the tax already paid under the provisions of section 172(4) by the non-resident owner or charterer would be treated as tax paid in advance for that assessment year before determining the amount of tax finally due.*

3. *The question that arose for consideration of the Board at the time of issue of Circular No. 730 was that when a regular assessment is made under section 143(3), read with the provisions of section 172(7), whether such an assessee would liable to levy of interest under sections 234B and 234C or not. On the other hand, in case of a refund, the question of entitlement of interest under section 244A would also rise. The Board, vide Circular No. 730, dated 14-12-1995 clarified that the assessee, who exercises his option under section 172(7) to get his total income assessed in accordance with the other provisions of the Act, is neither liable to pay interest under sections 234B and 234C, nor entitled to receive interest under section 244A of the Income-tax Act, 1961.*

4. *This issue has subsequently been discussed and decided by the Supreme Court in the case of A. S. Glittre D/5 I/S Garonne vs. CIT [1997] 225 ITR 739. It has been held that the payment of tax under*

> *section 172(3)/(4) is at par with advance tax instalments. Hence, in case of a regular assessment under section 172(7) the assessee is entitled to refund, as well as interest on such refund.*
>
> ***5.*** *The Circular No. 730 issued by the Central Board of Direct Taxes on this issue is, under the circumstances, no longer legally tenable and is, therefore, withdrawn. It is clarified that in case of regular assessment under section 172(7), the non-resident assessee is liable to pay interest under sections 234B and 234C and also entitled to receive interest under section 244A of the Income-tax Act, 1961 as the case may be.*
>
> **Circular** *No. 9/2001, dated 9-7-2001.*"

36. It is vehemently contended that the Revenue cannot argue anything contrary to this Circular. This Circular even otherwise states the position in law correctly. It is then urged that the judgment in the case of *Orient (Goa)* (supra) does not lay down the correct law.

37. A closer look at the judgment is, therefore, necessary.

38. The appeal before this Court raised four questions which are reproduced hereinbelow :

> (A) Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in holding that in view of circular issued by the Central

Board of Direct Taxes, disallowance under section 40(a)(i) of the Act was not warranted?

(B) Whether on the facts and in the circumstances, the assessee was entitled to claim deduction of the demurrage charges of Rs.1,08,53,980 paid to foreign company, without deducting tax on it, under section 40(a)(i) of the Income-tax Act, in view of Circular No. 723 dated September 19, 1995 ([1995] 215 ITR (St) 116), issued by the Central Board of Direct Taxes ?

(C) Whether on the facts and in the circumstances of the case, the assessee was entitled to claim deduction of the demurrage charges of Rs.1,08,53,980 payable to foreign shipping company on which tax has not been deducted, in view of the provisions of section 172(8) introduced by the Finance Act, 1997 with retrospective effect from April 1, 1976 ?

(D) Whether the circular issued by the Central Board of Direct Taxes dated September 19, 1995, has any relevance in apply the provisions of section 40(a)(i) for the purpose of computation of income ?"

39. The respondent-assessee Orient (Goa) in that appeal had filed its return of income on December 1, 1997. It declared a taxable income at a certain figure and after claiming deduction. That deduction was once again of a certain sum on account of Section 80HHC of the Income-tax Act. This return of income was processed and the assessment was completed. Certain additions were made on account of foreign tour expenses of partners being personal expenses of the partners of the assessee-company. A notice under section 148 of the Act was issued by the Revenue to the assessee pursuant to which an order of assessment was passed by the Deputy Commissioner of Income-tax, Circle 1, Panaji. That came to be challenged before the Commissioner (Appeals), Goa. Before the First Appellate Authority, the ground regarding disallowance of foreign tour expenses was not pressed. However, before the First Appellate Authority, the disallowance made by the Assessing Officer under section 40(ai) was raised and the First Appellate Authority found the disallowance to be correct. This disallowance was directed to be deleted. In substance, therefore, the appeal succeeded. The Revenue challenged this order before the Income Tax Appellate Tribunal, in Appeal and which came to be dismissed.

40. Therefore, in paragraph 3 the contention of the Revenue was noted and it was urged that the assessee was under an obligation to deduct the tax in view of section 40(a)(i) in relation to the amount payable outside India. The assessee relied upon the non-obstante clause in section 172 (1) in meeting this contention. It was urged that this section is a code by itself.

41. The Division Bench noted that the contentions arise in the backdrop of a deduction of tax on a sum payable or paid on account of demurrage. The demurrage is payable to a non-resident company based in Japan. It was not disputed that no tax had been deducted on the amount of demurrage. When the assessee was called upon to explain why no tax had been deducted and, therefore, the claim as a whole should be treated as non deductible and the sum added back, it was urged that tax was not deducted in view of section 40(a)(i) of the Act. A contention was raised that the assessee being allowed such deduction as and when payment was made. The Assessing Officer recorded his agreement in the order that deduction would be admissible on the basis of actual payment of tax on the above demurrage. The First Appellate Authority referred to the relevant provisions and

observed that the demurrage debited by the assessee in the hands of the recipient are in the nature of profits of the non-resident from the occasional shipping business under section 44B read with section 172 of the Income-tax Act. The First Appellate Authority referred to sub-section (8) of section 172 and the Circular reproduced above by us. That is how the appeal came to be allowed.

42. The Division Bench referred to a judgment of a learned single Judge of the Karnataka High Court and in paragraphs 8, 9, 10, 11 and 12 held as under :

> *"8. We have given anxious consideration to the submission of the learned Senior Counsel. On reading of the entire judgment of the learned Single Bench, it is not possible for us to countenance the submission of the learned Senior Advocate that the ratio of the Judgment is applicable to the facts of the case on hand. In our view, this Judgment does not help the present respondent i.e. the assessee.*
>
> *9. Another Judgment relied on by the learned Senior Advocate Mr. Usgaonkar for the respondent assessee is in the matter of CBDT vs. Chowgule and Co. Ltd. and others, reported in (1991) 192 ITR 40 (Karn). There the learned Division Bench observed that "The question for consideration is whether demurrage payable to a non-resident owner or charterer of a ship for the delay in loading the ore sold to the foreigner is liable to be taxed under the provisions of the Income-tax Act." We have seen the facts obtaining in that case. In our view, the facts are distinguishable. The ratio of this judgment also does not help the present assessee i.e. the respondent in*

this appeal. We have noticed the various dates in the cited judgment. We have also considered the definition of word "demurrage" to which our attention was invited by learned Senior Advocate Shri Usgaonkar. Learned Senior Advocate also invited our attention to dictionary meaning of the word "demurrage" (Black's Law Dictionary).

10. Section 172 of the Act 1961 is carefully considered by us. Chapter XV titles as "Liability in Special cases". We have no concern with sections, starting from Section 159, till section 171 from this Chapter XV. Section 172 comes under sub-title "H.- Profits of non-residents from occasional shipping business". Title of Section 172 is "Shipping business of non-residents." For bringing a case under Chapter XV, H of the Act 1961, one has to establish a case of profits of non-residents from occasional shipping business. "Non-resident" is defined under section 2(30), as a person who is not a "resident" and for the purpose of Sections 92, 93 and 168, includes a person who is not ordinarily resident within the meaning of clause (6) of Section 6. The respondent assessee is a company, incorporated under the provisions of Indian Companies Act, 1956, is fairly an admitted position. The assessee cannot be said to be non-resident. We have also taken notice of section 6 i.e. "Residence in India". In short, respondent assessee cannot be said to be non-resident. The present appeal pertains to the respondent assessee. In our view, in the facts of the present case, the respondent assessee cannot lay fingers on section 172, since we are not dealing with profits of non-residents. The other aspect is that such profits of non-residents should be from occasional shipping business. It is not the case that the respondent assessee has earned some profit from occasional shipping and is a non-resident. In our view, Section 172 does not have application in relation to the respondent assessee and in the facts and circumstances of the present case. The company from Japan viz. Mitsui & Co. Ltd., Japan, recipient of demurrage amount is not before us. In other words, we are not examining the tax liability of the foreign company i.e. Mitsui & Co. Ltd., Japan. On our query

to the learned Senior Advocate Shri Usgaonkar as to material on record for occasional shipping, part of para 3 from the Judgment of the learned Commissioner of Income-tax has been pointed out to us. His observations are in very few lines. We may reproduce the said portion herein below. " 3. We have heard the rival submissions in the light of material placed before us. Assessee claimed deduction of Rs.1,08,53,980/- being the amount of demurrage payable to Mitsui Co. Ltd., Japan. The Assessing Officer opined that since the assessee did not deduct tax at source, as such the case of the assessee falls within the mischief of section 40(a)(i) of the Income Tax Act, 1961." Provisions of Section 172 are to apply notwithstanding anything contained in the other provisions of the Act. Therefore, in such cases, the provisions of Section 194C and 195 relating to tax deduction at source, are not applicable. The recovery of tax is to be regulated for voyage undertaken from any port in India by a ship, under the provisions of Section 172. In this view, these observations of the learned Vice President of Income Tax Appellate Tribunal have no concern with the factual aspect that it is a case of occasional shipping, pleaded or raised by assessee. There is no dispute about interpretation of Section 172 or Section 195. Crucial point is as to how Section 172 applies to the facts of the present case wherein the respondent assessee is an Indian company, incorporated under the provisions of Indian Companies Act, 1956. In our view, the learned Vice President of the ITAT has recorded a perverse observation/finding in para 3 regarding application of Section 44B and 172 of the Act 1961.

11. We may notice that the Judgment of the learned Appellate Tribunal is unreasoned and cryptic one. This judgment runs in around 20 to 25 lines. We are not oblivious of the fact, that not the form, but substance is material. The learned appellate Tribunal seems to have referred to the Circular of Central Board of Direct Taxes, No.723 dated September 19, 1995. ([1995] 215 ITR (St.)116).

12. We have considered the submission of the learned Counsel appearing for the parties pertaining to the Circular No.723 dated 19.9.1995 by CBDT (Annexure "C"). Section 119 empowers the Central Board of Direct Taxes to give instructions to subordinate authorities. We have considered Section 119 of the Act 1961. We have also perused the Circular Annexure C. This Circular seems to have been issued by the CBDT , clarifying the scope of Sections 172, 194C and 195 of the Act 1961. Advocate on behalf of the Revenue points out from para 4 of the Circular and submit s that Section 172 operates in the area of computation of profits from shipping business of non-residents and there is no overlapping in the areas of operation of these sections. Learned Senior Advocate Shri Usgaonkar, appearing on behalf of the respondent assessee, also drew our attention to the Judgment of the Hon'ble Supreme Court in the matter of Commissioner of Sales Tax vs. Indra Industries, reported in (2001) 248 ITR 338 (SC). It is a three Bench Judgment of the Honourable Supreme Court. It has been held by the Honourable Supreme Court that the circulars issued by Commissioner of Sale Tax not binding on assessee or Court, however, binding on the Department. In the case on hand, in our view, learned Commissioner of Income-tax (Appeals) and the learned appellate Tribunal have wrongly interpreted the Circular dated September 19, 1995, issued by the CBDT. This circular, in our opinion, cannot be considered in the facts and circumstances of the present case, in aid to the respondent assessee. The learned Assessing Officer, in fact, has passed a legal, proper and reasoned order, holding that the provisions laid down under Section 40(a)(i) of the Act 1961 apply to the case on hand."

43. The sub-headings of Chapter XV which is titled as Liability in Special Cases – Profits Of Non-residents are referred by the Division Bench. In sub-heading "H – Profits of Non-residents From Occasional Shipping Business" appears section 172. The

Division Bench understood the matter and as reflected from the above reproduced paragraphs by identifying the assessee before it whose income was being assessed. The Division Bench held that the respondent-assessee, a company incorporated under the provisions of the Indian Companies Act, 1956, cannot be said to be a non-resident. The appeals pertained to the respondent-assessee. It, therefore, could not rely on section 172 since the Court was not dealing with profits of non-residents. The other aspect is that such profits of non-residents should be from occasional shipping business. The respondent-assessee before the Division Bench, as admitted, did not earn some profits from occasional shipping business nor is it a non-resident. Therefore, section 172 did not have any application in relation to the respondent-assessee in the facts and circumstances of that case. However, in paragraph 10, the Division Bench accepted the legal position that section 172 would apply notwithstanding anything contained in the other provisions of the Act. Therefore, in such cases, the provisions of section 194C and 195 relating to tax deduction at source are not applicable. The Division Bench held that there is no dispute about interpretation of sections 172 or 195. The crucial point, according to the Bench, was how section

172 applies to the facts of the case before it wherein the respondent-assessee is an Indian company, incorporated under the provisions of the Indian Companies Act, 1956.

44. The legal provisions have been referred by us extensively only for the purpose of understanding the scheme of the Act. Section 40 deals with amounts not deductible. The amounts which cannot be deducted in computing the income chargeable under the head Profits and Gains of Business or Profession in the case of an assessee are set out in clause (a) and sub-clause (i) refers to any interest, royalty, fees for technical services or other sum chargeable under the Income-tax Act which is payable outside India or in India to a non-resident, not being a company, or to a foreign company on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or after deduction has not been paid. Section 172 has application to shipping business of non-residents and the provisions of that section have application notwithstanding anything contained in the other provisions of the Act for the purpose of levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident which carries passengers, livestock, mail or

goods shipped at a port in India. Section 195 falling under Chapter XVII-B Collection and Recovery – Deduction at Source by sub-section (1) deals with any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act, not being income chargeable under the head "Salaries" and obliges him to deduct income tax thereon at the rates in force. It is evident, therefore, that the responsibility is on any person making payment to a non-resident. It is that person's obligation to deduct the tax at source. If the tax is deductible at source and any assessee declares his income chargeable under the head "Profits and Gains of Business or Profession", while computing the income chargeable under this head, the amounts mentioned in section 40(a)(i) should not be deducted in the event there is a failure to deduct the tax at source in terms of Chapter XVII-B. Therefore, a sum ought to be of the nature payable under sub-clause (i) outside India or in India to a non-resident, not being a company, or to a foreign company, but which invites the obligation to deduct the tax at source on the payment thereof. The assessee may be a resident in India. The assessee in our case also, as before the Division Bench, is a company registered under

the Indian Companies Act, 1956, in India. It is a resident. It is the assessee's income under the above heads from which certain deduction has been disallowed. That is for failure to discharge the obligation to deduct the tax at source. The assessee contends that the payment is made to a non-resident / foreign company and, therefore, there maybe an obligation to deduct the tax at source in terms of sub-section (1) of section 195 but the overriding provision in section 172 will come to its assistance.

45. The shipping business of non-residents is an aspect dealt with by section 172. While considering the levy and recovery of tax in case of such business which is carried on with the aid of any ship belonging to or chartered by a non-resident which carries passengers etc. shipped at a port in India, then, it is to compute the tax and recover it in relation to such business of a non-resident that section 172 is incorporated in the Statute Book. We have found that there are special provisions for computing profits and gains for shipping business in the case ofa non-resident and enacted by section 44B which falls in Chapter IV – Computation of Business Income. That section reads as under:

> *"**44B.** (1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an*

assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to seven and a half per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession" .

(2) The amounts referred to in sub-section (1) shall be the following, namely :—

(i) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India; and

(ii) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

Explanation.—For the purposes of this sub-section, the amount referred to in clause (i) or clause (ii) shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature."

46. A bare perusal thereof would indicate as to how this provision covers the case of an assessee who is a non-resident and engaged in the business of operation of ships. That stipulates a sum equal to 7½% of the aggregate of the amount specified in sub-section (2) of section 44B as deemed to be profits and gains of such business chargeable to tax under the head "Profits and Gains of Business or Profession". It is the explanation which refers to the demurrage and for the purpose of sub-section (2) of

section 44B. It clarifies that the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature shall for the purposes of sub-section (1) deemed to be the profits and gains of the business, namely, shipping business chargeable to tax under that head. The amounts which are paid or payable whether in or out of India to the assessee or to any person on his behalf on account of carriage of passengers, livestock, mail or goods shipped at a port in India and the amount received was deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India shall be deemed to be the profits and gains. On that the tax is payable by virtue of sub-section (1) of section 172. That has to be levied and recovered in terms of the sub-sections of section 172 of the Income Tax Act. Once section 172 falls in Chapter XV titled as Liability in Special Cases – Profits of Non-residents, then section 172 is referable to section 44B. Both provisions open with a non-obstante clause and whereas section 44B enacts special provisions for computing profits and gains of shipping business in case of non-residents section 172 dealing with shipping business of non-residents is

enacted for the purpose of levy and recovery of tax in the case of any ship belonging to or chartered by a non-resident operated from India. These sections and particularly section 172 devise a scheme for levy and recovery of tax. The sub-sections of section 44B denote as to how the amounts paid to or payable would include demurrage charges or handling charges or any other amount of similar nature. The sub-sections of section 172 read together and harmoniously would reveal as to how the tax should be levied, computed, assessed and recovered. Therefore, there is no warrant in applying the provisions in chapter XVII for collection and recovery of the tax and its deduction at source vide section 195.

47. To our mind, the Division Bench judgment in *Commissioner of Income-tax vs. Orient (Goa) Pvt. Ltd.* seen in this light does not, with greatest respect, take into account the scheme and setting as understood above. There need not be apprehension because there is no escape from the levy and recovery of tax. The tax has to be levied and collected. The ship cannot leave the port or if allowed to leave any port in India, it must either pay or make arrangement to pay the tax. Hence, the apprehension of

avoidance or evasion both are taken care of by the legislature. That is how advisedly the legislature cast the obligation to deduct tax at source on the person responsible to make payment to a non-resident in shipping business.

48. The resident assessee contended before the Division Bench in *Orient (Goa)* (supra) as well as the Division Bench which made the referring order that section 172 of the Income Tax Act has a bearing and an important one on the obligation to deduct tax at source. Therefore, it is the recipient's position and the perspective in which the recipient's income would be taxed will have to be borne in mind. The non-resident shipping company in respect of it's income would be in a position to rely upon section 44B and consequently section 172. However, we do not see how there is an obligation to deduct tax at source on the resident assessee/Indian company before us. While computing the income of the non-resident Indian / foreign company, assistance can be derived by such non-residents from section 44B if they are in shipping business. It would also be in a position to rely upon section 172 but the responsibility of the person making payment to a non-resident in sub-section (1) of section 195 cannot be

avoided in the manner set out in other cases. The scheme as above operates only to cases covered by section 172 of the IT Act and none else.

49. The term "non-resident" means a person who is not a resident as per section 2(30) of the Income Tax Act and for the purposes of sections 92, 93 and 168, includes a person who is not ordinarily a resident within the meaning of clause (6)of section 6. The term "person" includes an individual, a HUF, a company, firm and every artificial juridical person not falling within any of the preceding sub-clauses of clause (31) of section 2. By section 2(23A), a foreign company is defined to mean a company which is not a domestic company. Hence, any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act not being income chargeable under the head "Salaries", would have to deduct the tax thereon at the rates in force.

50. The view that we are taking is based on the enunciation and exposition of law by the Hon'ble Supreme Court of India, firstly in

the case of *Union of India vs. Gosalia Shipping (PVT.) Ltd.* reported in **(1978) 3 SCC 23**. Insofar as section 172 of the IT Act as it stood then, its ambit and scope, the Hon'ble Supreme Court of India held as under:-

> *".....*
> *3. Section 172 occurs in Chapter XV which is entitled "Liability in special cases" and the sub-heading of the section is "Profits of non-residents from occasional shipping business". It creates a tax liability in respect of occasional shipping by making a special provision for the levy and recovery of tax in the case of a ship belonging to or chartered by a non-resident which carries passengers, livestock, mail or goods shipped at a port in India. The object of the section is to ensure the levy and recovery of tax in the case of ships belonging to or chartered by non-residents. The section brings to tax the profits made by them from occasional shipping, by means of summary assessment in which one-sixth of the gross amount received by them is deemed to be the assessable profit. Before the departure of the ship, the master of the ship has to furnish to the Income-tax Officer a returnof the full amount paid or payable to the owner or charter on account of the carriage of passengers, goods etc., shipped at the port in India since the last arrival of the ship at the port. In the event that, to the satisfaction of the Income-tax Officer, the master is unable so to do, he has to make satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf. A port clearance cannot be granted to the ship until the tax assessable under the section is duly paid or satisfactory arrangements have been made for the payment thereof.*
>
> *4. The assessee in this case is the Aluminium Company of Canada which had time-*

chartered the ship and on whose behalf its shipping agent, the respondent, had executed the guarantee bond. Since the Company is a non-resident and the ship carried goods which were shipped at a port in India, the conditions specified in sub-section (1) are satisfied and the provisions of Section 172 will apply for the purpose of levy of tax, notwithstanding anything contained in the other provisions of the Income-tax Act.

5. The charging provision is contained in sub-section (2) of Section 172, the relevant part of which provides that where a ship belonging to or chartered by a non-resident carries goods shipped at a port in India, one-sixth of the amount paid or payable "on account of such carriage" to the owner or the charterer or to any person on his behalf shall be deemed tobe income accruing in India to the owner or charterer on account of such carriage. The ship was delivered to the time-charterers at Betul, Goa, whereupon they loaded it with their own goods to the fullest capacity of the ship. Under the charter-party, the charterers had agreed to pay to the owners of the ship a sum of 4.50 U. S. dollars per ton on the total dead weight carrying capacity, per calendar month, commencing on and from the date of the delivery of the ship. The short question for consideration is whether the amount which the time-charterers had agreed to pay to the owners of the ship was payable "on account of" the carriage of goods.
....."

51. Similarly, in the case of *A. S. CLITTRES D/5 I/S GARONNE AND OTHERS vs. COMMISSIONER OF INCOME TAX, KERALA-II* reported in **(1997) 9 SCC 546**, once again, after reproduction of section 172 of the IT Act, the Hon'ble Supreme Court of India

explained the scheme of the section in the following words:-

> *"7. The Scheme of Section 172 of the Act appears to be this: Section 172(1) of the Act gives a right to the Income Tax Officer to levy and recover tax in the case of any ship belonging to a non-resident, in a summary manner, (ad hoc assessment) notwithstanding anything contained in the other provisions of the Act. It is an absolute right conferred on the assessing authority. The assessee has no right to object to the same. Normally, this will be assessment of the assessee for the year. But, under Section 172(7) of the Act a right is given to the assessee to claim before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment, according to the provisions of the Act, in a regular manner be made. Thus, a right is given to the assessee to opt for a regular assessment although a "rough and ready" or a "summary assessment" has already been made under Section 172(4) of the Act. It is a valuable right. If the assessee exercises the right conferred on him under section 172(7) of the Act, the Income Tax Officer is bound to make an assessment of the total income of the previous year of the assessee and the tax payable on the basis thereof "should be determined in accordance with the other provisions of the Act" and any payment made under the section (earlier) "shall be treated as a payment in advance of the tax" leviable for that assessment year and the difference between the sum so paid and the amount of tax found payable by him on such assessment, shall be paid to the assessee or refunded to him. The "ad hoc" assessment made under Section 172(4) of the Act is superseded and a "regular assessment" is made as per the provisions of the Act. In such a case, it is only proper and appropriate to hold that all "the provisions" of the Act in the determination of the tax liability including the ancillary or incidental or consequential matters pertaining to it are necessarily attracted.*

8. Section 172(7) of the Act provides that payment made under the section shall be treated as a payment in advance of the tax leviable for that assessment year. It only means that such payment would be treated as advance of the tax leviable. Such payments are treated on a par with advance income tax payments. It is implicit from the tenor and phraseology employed in Section 172(7) of the Act to the effect, "payment made under the section .... shall be treated as a payment in advance of the tax leviable for that assessment year" that in substance, a legal fiction is created by which the payments have been treated as advance tax. That is the purpose for which the legal fiction is created. In construing the said legal fiction, it will be proper and necessary to assume all those facts on which alone the fiction can operate. The law on the point has been stated in innumerable decisions of this Court. In Mond. Iqbal Madar Sheikh v. State of Maharashtra ***(1996) 1 SCC 722*** *a three-number Bench of this Court stated the law thus:*

> *"..... The effect of a legal fiction by deeming clause is well known. Legislature can introduce a statutory fiction and courts have to proceed on the assumption that such state of affairs exists on the relevant date, because when one is bidden to treat an imaginary state of affairs as real he has to also imagine as real the consequence which shall flow from it unless prohibited by some other statutory provision." (emphasis supplied)*

So, necessarily all the provisions in the Act in respect of the payment of advance tax will apply. On effecting the regular assessment, if there is any excess payment made by the assessee, then the assessee would be entitled to the excess amount paid and also interest, for payments made in excess of the tax assessed. We are unable to appreciate the distinction drawn by the High Court between "advance tax" and "payment in advance of the tax" mentioned in Section 172(7) of the Act. We hold that the distinction so drawn has no basis. The High Court has furtehr held that the payment made under Section 172(4) of the Act is not a payment of

advance tax within the meaning of the Act, as the tax under Section 172(4) of the Act is a payment on assessment and not a payment of advance tax under the Act. We are afraid that the High Court has failed to give due effect to the language employed in Section 172(7) of the Act and the scope of the legal fiction enshrined therein. The reasoning of the High Court is rather strained as the distinction drawn is without any substance or difference. Section 172(7) of the Act provides for a regular assessment, wherein all the provisions of the Act will apply. It is not a mere provision for adjustment. The High Court was swayed by the title used in the corresponding provision of the predecessor Act (Income Tax Act, 1922 – Section 44-C), wherein there was a heading to the section - "Adjustment". Section 172 of the Act contains no such heading. We hold that the Income Tax Appellate Tribunal was justified in holding that since the payment made under Section 172(4) of the Act is, by fiction, treated as advance tax, all the provisions in respect of the advance tax will apply and if on regular assessment made under Section 172(7) of the Act, there is any excess payment made by the assessee, then the assessee would be entitled to it and also interest thereon under Section 214 of the Act. We answer the question referred to the High Court in the affirmative, in favour of the assessees and against the Revenue. ....."

52. Lastly, in the case of *GE India Technology Centre Private Limited vs. Commissioner of Income Tax and Anr.* reported in **(2010) 10 SCC 29** the Hon'ble Supreme Court of India had an occasion to consider the ambit and scope of section 195 of the IT Act. After reproduction of the section, as it stood at the relevant time, the Hon'ble Supreme Court of India held as under:-

"6. Under Section 195(1), the tax has to be deducted at source from interest (other than interest on securities) or any other sum (not being salaries) chargeable under the I.T. Act in the case of non-residents only and not in the case of residents. Failure to deduct the tax under this Section may disentitle the payer to any allowance apart from prosecution under Section 276B. Thus, Section 195 imposes a statutory obligation on any person responsible for paying to a non- resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the I.T. Act, to deduct income tax at the rates in force unless he is liable to pay income tax thereon as an agent. Payment to non-residents by way of royalty and payment for technical services rendered in India are common examples of sums chargeable under the provisions of the I.T. Act to which the aforestated requirement of tax deduction at source applies.

7. The tax so collected and deducted is required to be paid to the credit of Central Government in terms of Section 200 of the I.T. Act read with Rule 30 of the I.T. Rules 1962. Failure to deduct tax or failure to pay tax would also render a person liable to penalty under Section 201 read with Section 221 of the I.T. Act. In addition, he would also be liable under Section 201(1A) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.

8. The most important expression in Section 195(1) consists of the words "chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the I.T. Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the I.T. Act.

9. It may be noted that Section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated October 30, 1995 the CBDT has clarified that the tax deductor can take into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS. It may also be noted that Section 195(1) is in identical terms with Section 18(3B) of the 1922 Act.

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11. While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195. Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions.

12. Reference to ITO(TDS) under Section 195(2) or 195(3) either by the non-resident or by the resident payer is to avoid any future hassles for both resident as well as non-resident. In our view, Sections 195(2) and 195(3) are safeguards. The said provisions are of practical importance. This reasoning of ours is based on the decision of this Court in Transmission Corporation (supra) in which this Court has observed that the provision of Section 195(2) is a safeguard. From this it follows that where a person responsible for deduction is fairly certain then he can make his own determination as

to whether the tax was deductible at source and, if so, what should be the amount thereof.

Submissions and findings thereon

13 If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in Section 195(1). The said expression in Section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not so assessable, there is no question of TAS being deducted. [See : Vijay Ship Breaking Corporation and Others Vs. CIT 314 ITR 309]

14. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in Section 195. For example, Section 194C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, Sections 194EE and 194F inter alia provide for deduction of tax in respect of "any amount" referred to in the specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in Section 195(1). Therefore, this Court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act.

15. Section 195(2) is not merely a provision to provide information to the ITO(TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, Section 195

has to be read in conformity with the charging provisions, i.e., Sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in Section 195(1).

16. The fact that the Revenue has not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from Section 195(1). While interpreting a Section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the machinery Sections. The Act is to be read as an integrated Code.

17. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of C.I.T. Vs. Eli Lilly & Co. (India) (P.) Ltd. [312 ITR 225] the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the I.T. Act form one single integral, inseparable Code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax" under the I.T. Act. It is true that the judgment in Eli Lilly (supra) was confined to Section 192 of the I.T. Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under

the provisions of the Act", which expression, as stated above, do not find place in other Sections of Chapter XVII. It is in this sense that we hold that the I.T. Act constitutes one single integral inseparable Code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the I.T. Act.

18. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the I.T. Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum, i.e., the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable is liable to tax.

19. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the

case of the Department that Section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the ITO(TDS) of payments made to non-residents. In other words, according to the Department Section 195(2) is a provision by which payer is required to inform the Department of the remittances he makes to the non-residents by which the Department is able to keep track of the remittances being made to non-residents outside India.

20. We find no merit in these contentions. As stated hereinabove, Section 195(1) uses the expression "sum chargeable under the provisions of the Act." We need to give weightage to those words. Further, Section 195 uses the word `payer' and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfill the statutory obligation under Section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default.

21. The abovementioned contention of the Department is based on an apprehension which is ill founded. The payer is also an assessee under the ordinary provisions of the I.T. Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income Tax Act for the said sum as an "expenditure". Under Section 40(a)(i), inserted vide Finance Act, 1988 w.e.f. 1.4.89, payment in respect of royalty, fees for technical services or other sums chargeable under the Income Tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the I.T. Act. This provision ensures effective compliance of Section 195 of the I.T. Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the I.T. Act. In a given case where the payer is an assessee he will definitely claim deduction under the I.T. Act for such

remittance and on inquiry if the AO finds that the sums remitted outside India comes within the definition of royalty or fees for technical service or other sums chargeable under the I.T. Act then it would be open to the AO to disallow such claim for deduction. Similarly, vide Finance Act, 2008, w.e.f. 1.4.2008 sub-Section (6) has been inserted in Section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from 1.4.2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage."

53. In the view that we have taken, it is not necessary to refer the judgment of a Division Bench of the Delhi High in the case of *Emirates shipping Line, FZE vs. Assistant Director of Income Tax* reported in **(2012) 349 ITR 493**. Suffice it to note that the view taken by the Division Bench and particularly in paras 17 and 18 of this judgment accords with the conclusion reached by us.

54. The difficulty is presented only when provisions are not read together and harmoniously so also without bearing in mind the setting and placement thereof in the chapters. These chapters of the Income Tax Act cover several aspects in relation

to imposition, levy, assessment, collection and recovery of tax on the income specified above. To the extent contrary to above, we overrule the view in Orient Goa's case (supra). The question referred is answered accordingly. Since the question above is referred to us, having answered it, let the Appeals be now listed for hearing before appropriate Division Bench.

S.C. DHARMADHIKARI, J.

R.D. DHANUKA, J.

B.P. COLABAWALLA, J.