

I.CONCEPT OF PREPONDERANCE OF PROBABILITIES

1.What is the degree or standard of proof required to establish a fact or sustain a finding in the Income Tax Act?In order to understand this we need to answer the question as to what kind of law is Income Tax.Of course,it is a civil law.Albeit with shades of criminal law as is evident from prosecution provisions starting from s 276C onwards.The key task before the AO ,the primary raison d' etre of the Act is **Assessment Of Income**.

2.What is the precise nature of this task before the revenue?" **The word "assessment" would mean the ascertainment of the amount of taxable income and of the tax payable thereon**"[**Praful Chunilal Patel v. ACIT [1999] 236 ITR 832 (Gujarat)**].

3.When the AO ascertains the taxable income he embarks on a post facto enquiry on claims made in the return of income.He is empowered with enabling provisions like s. 142(1), s 142(2) ,143(2),authority like s. 131 and s. 133(6).He can also use data external to the ITR gathered by enquiry,received from external sources etc which is relevant for determination of taxable income.He is bound by rules of natural justice ,most spectacularly encapsulated in the almost forgotten s 142(3).

3.1 What is his task thereafter? :its there in s 143(3):

³⁴[(3) ³⁵[On the day specified in the notice issued under] sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall³⁶, by an order in writing, **make an assessment of the total income or loss of the assessee, and ³⁶determine the sum payable by him or refund of any amount due to him** on the basis of such assessment:].

So this is the task, the term assessment being defined (supra). Assessment involves a process of evaluation of claimed facts on legal parameters and may involve informed guesstimate. E.g. disallowing a certain percentage of, say, petrol expenses on account of personal utilization. This inevitability of guesstimation coupled with post facto verification validates and calls for utilization of principle of preponderance of probabilities as a standard of proof in income tax proceedings. The principle also finds validation in provisions like s 37(1) or 57(iii) or very specifically in s 38(2) where a "fair proportionate part thereof" is allowed as deduction. s 68 ff can be used as another illustration where "satisfaction" of AO is required.

3.2 I am fortified in my view by the decision of a 3 judge bench in **S. S. GADGIL v. LAL AND CO. [1964] 53 ITR 231 (SC)** wherein it was held that "A proceeding for assessment is not a suit for adjudication of a civil dispute. That an Income-tax proceedings is in the nature of a judicial proceeding between contesting parties, is a matter which is not capable of even a plausible argument. The income-tax authorities who have power to assess and recover tax are not acting as judges deciding a litigation between the citizen and the State: **they are administrative authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the taxpayer and to assess him to tax on the basis of that estimate.** Tax legislation necessitates the setting up of machinery to ascertain the taxable income and to assess tax on the income, but that does not impress the proceeding with the character of **an action between the citizen and the State.**"

[NOTE: IT IS IN THIS SENSE THAT I.T. PROCEEDINGS ARE NON ADVERSARIAL, NOT IN THE POPULAR SENSE OF NON CONFRONTATIONAL.]

4. Case authorities validate this utilization of concept of probabilities. In **CITv.Swarup Cold Storage and General Mills[1982] 136 ITR 435 (All.)** It was held that “The **nature of proof** (in IT proceedings) is certainly as in a civil suit and for the degree of proof necessary to dislodge this presumption, **preponderance of probabilities of a case ought to be examined.**”

In **ARVIND M. KARIYA vs. ACIT (2013) 153 TTJ 0422 (MUM)** it was held “20. Needless to say that income tax proceedings are civil proceedings and the degree of proof required is by preponderance of probabilities,.....”

II.THE SOURCE CODE:

5.The phrase "preponderance of probability" comes from decision in **Charles R. Cooper v. F.W. Slade, (1857-59) 6 HLC 746**. A reading thereof tells us that what "preponderance of probability" means is "more probable and rational view of the case".

5.1 In Indian context Preponderance of probability Is a derived concept from:INDIAN EVIDENCE ACT SECTION 3-

“Proved”: - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

[:this is the concept of Preponderance of probability]

6. Majority view in **Rishi Kesh Singh And Ors. vs The State AIR 1970 All 51 on 18 October, 1968** (a **nine judge bench**), through Mathur J., puts it beyond pale of doubt:

“62. On the basis of the definition of the words "proved", "disproved" and "not proved", as contained in **Section 3** of the Evidence Act, a similar inference can be drawn. The term "proved" is defined as below:-

"A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

When the evidence is of a overwhelming nature and is conclusive, there shall exist no dispute, nor shall there be any doubt and the Court can say that the fact does exist, but in criminal trials, where the accused claims the benefit of the Exception, there cannot be any evidence of such a nature. Very often there is oral evidence which may be equally balanced. In the circumstances, the case of the prosecution or of the defence has to be accepted or rejected on the basis of probabilities. **Section 3 of the Evidence Act by itself lays down that a fact is said to be proved when, after considering the matters before it, the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is what is meant by the "test of probabilities" or the "preponderance of probabilities." The decision is taken as in a civil proceeding.”**

III. The process of fixing P.P./determining where it lies is best encapsulated in :

Narayan Ganesh Dastane vs Sucheta Narayan Dastane 1975 AIR 1534, 1975 SCR (3) 967

“The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, **if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact.** As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. **The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second.** Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies.

IV.VITAL CONCEPTUAL POINTERS:

1.What is “preponderance”?

a.Preponderance is the **degree of cogency required to discharge a burden in a civil case**.It is defined in the judgment of Denning, J., in *Miller v. Minister of Pensions*, (1947) 2 All ER 372.:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: **"We think it more probable than not"**, the burden is discharged 'but if the probabilities are equal, It is not.'"

b. Beg J. in para 130 of *Rishi Kesh Singh And Ors. vs The State* AIR 1970 All 51 on 18 October, 1968 defines it succinctly:

130. "Preponderance", literally interpreted, means nothing more than an outweighing in the process of balancing however slight may be the tilt of the balance or the preponderance.

c.In US “BALANCE OF PROBABILITIES” standard is satisfied if there is greater than 50 percent chance that the proposition is true.

2..Per contra,the assessee cannot use a reverse proposition : creating reasonable doubt: that cannot be equated with proof by preponderance of probabilities.(*Rishi Kesh Singh AIR 1970 All 51*).

3. In **Section 3** of the Evidence Act, it is seen that a fact may be said to be proved under one of the two possible situations. Either **the Court** believes that the fact exists, or the Court considers existence of the fact probable.

4. An issue may arise whether AO is a Court in the above sense. Else he cannot invoke the provision at all. The Evidence Act defines a "Court" as follows:

3. Interpretation clause

In this Act the following words and expressions are used in the following sense.

Unless a contrary intention appears from the context-

"Court"- includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence.

An AO is a person legally authorized to take evidence. [Ref: CIT vs. HOTEL MERIYA(2011)332 ITR 537(KERALA) para 8]

[Interestingly, the expression 'Court' is not defined in the Civil Procedure Code nor in the General Clauses Act.]

5. THIS concept can be interchangeably used with the term used in US law called preponderance of the evidence. It is also known as balance of probabilities and is the standard required in most civil cases. This is also the standard of proof used in grand jury indictment proceedings in US. The standard is met if the proposition is more likely to be true than not true.

6. PREPONDERANCE OF THE EVIDENCE is also an interchangeable term.Black'sLaw Dictionary [pg 3745 eighth edition] **preponderance of the evidence is conceptualised as follows:**

“The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. • This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. — **Also termed preponderance of proof; balance of probability.**”

7.The term” Evidence” needs a mention.Per s 3 of Evidence Act-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) all documents,including electronic records produced for the inspection of the Court; such statements are called documentary evidence;

8.1 A more relatable conceptualization is done in ACIT v.Dwaraka Prasad Malpani [2012] 146 TTJ 498 (Cochin) wherein it was held that

4.2.....The term 'evidence' is of wide import, and is judiciously well settled to be a matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact”

This to me is actually definition of “probative evidence”,since there is irrelevant evidence too.Relevancy in fact has been defined in s 3

separately. Malpani decision can be however validated by the view that the phrase “irrelevant evidence” is an oxymoron: it is simply not evidence. But this is a subject matter of a separate discussion.

V. PROBABILITY PREPONDERANCE VS REASONABLE DOUBT

8. In a criminal proceeding the prosecution has to prove the guilt of an accused person beyond reasonable doubt but in a civil proceeding a party succeeds on the balance of probabilities. The distinction in the standard of proof in the two classes of cases cannot, be better expressed than by quoting from the judgment of Denning, J., in **Miller v. Minister of Pensions**, (1947) 2 All ER 372. (Not cited at the bar). Speaking of the **degree of proof required in a criminal case** before an accused person is found guilty, Denning, J.. stated:--

"That degree is well settled. It need not reach certainty but it must reach a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community **if it admitted fanciful possibilities to deflect the course of justice.** If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course, it is possible but not in the least probable", the case is proved beyond reasonable doubt."

9 This is the highest standard used as the burden of proof in Anglo-American jurisprudence and typically only applies in criminal proceedings. It has been described, in negative terms, as **a proof having been met if there is no plausible reason to believe otherwise.** If there is a real doubt, based upon reason and common sense after careful and impartial consideration of

all the evidence, or lack of evidence, in a case, then the level of proof has not been met.

9.1 Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that one would be willing to rely and act upon it without hesitation in the most important of one's own affairs. However, it does not mean an absolute certainty. **The standard that must be met by the prosecution's evidence in a criminal prosecution is that no other logical explanation can be derived from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent unless and until proven guilty.** [Denning, in *Miller v. Minister of Pensions*) (1947) 2 ALL ER 272]

VI. THE PRINCIPLE OF HUMAN PROBABILITIES

10. This principle is probably best conceptualised in Smt. Rajrani Gupta v. DCIT [2013] 257 CTR 47 (Bombay) Wherein it was held in para 33 that (human probability) is “ a degree of probability of a prudent man taking into account the probable behaviour of a reasonable man along with surrounding circumstances.”

The vital related aspect of “surrounding circumstances” is dealt with separately. [A full reading of para 33 of the said judgment may lead some to an erroneous view that the concept is context specific, but it is not. It is part of the ratio decidendi and by parity of reasoning is applicable as a legal principle.]

11. The Human Probability Test were laid down for the first time in the case of *CIT vs. Durga Prasad More* (1971) 82 ITR 540 (SC) as: “11.

.....The Tribunal disbelieved the story, which is, prima facie, a fantastic story. **It is a story that does not accord with human probabilities.....** “

12. It was also followed in the case of **Sumati Dayal vs. CIT (1995) 214 ITR 801 (SC)**

These two decisions are a tax student's delight and the willing would do well to demarcate the surrounding circumstances, circumstantial evidence and human probabilities on the one hand and direct evidence on the other. The prospect is mouth watering.

13. The concept **owes its origin to generic part of s 114** just as preponderance is derived from s 114. To wit,

“114. Court may presume existence of certain facts

The court **may presume** the existence of any fact which it thinks likely to have happened, regard being had to the **common course** of natural events, **human conduct** and public and private business, in their relation to the facts of the particular case. “

[Also refer: para 18 & 18.1 below]

14. ILLUSTRATIONS:

A. CIT vs. DURGA PRASAD MORE (1971) 82 ITR 540 (SC)

EXTRACTS:

11. Now, coming to the question of onus, the law does not prescribe any quantitative test to find out whether the onus in a particular case has been discharged or not. It all depends on the facts and circumstances of each case.

In some cases, the onus may be heavy whereas, in others, it may be nominal. **There is nothing rigid about it.** Herein the assessee was receiving some income. He says that it is not his income but his wife's income. His wife is supposed to have had two lakhs of rupees neither deposited in banks nor advanced to others but safely kept in her father's safe. Assessee is unable to say from what source she built up that amount. Two lakhs before the year 1940 was undoubtedly a big sum. **It was said that the said amount was just left in the hands of the father-in-law of the assessee. The Tribunal disbelieved the story, which is, prima facie, a fantastic story. It is a story that does not accord with human probabilities.** It is strange that the High Court found fault with the Tribunal for not swallowing that story. **If that story is found to be unbelievable** as the Tribunal has found, and in our opinion rightly, then the position remains that the consideration for the sale proceeded from the assessee and, therefore, it must be assumed to be his money.

.....

13. In stating that there is no proof that the consideration for the conveyance passed from the assessee the learned judge, in our opinion, looked at the case from a wrong angle. There is no dispute that the consideration for the sale was in fact paid by the assessee. He says that he paid it on behalf of the trust orally created by his wife. Therefore, the question is whether he has satisfactorily proved that case. If he has failed to prove that case, as we think it to be so, and in the absence of any other alternative case pleaded by him, it follows as a matter of course that the consideration for the sale passed from him. **Science has not yet invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Therefore, the Courts and Tribunals have to judge the evidence before them by applying the test of human probabilities. Human minds may differ as to the reliability of a piece of**

evidence. But in that sphere the decision of the final fact finding authority is made conclusive by law.

B. Sumati Dayal vs. CIT (1995) 214 ITR 801 (SC)

“12. This, in our opinion, is a superficial approach to the problem. **The matter has to be considered in the light of human probabilities.** The Chairman of the Settlement Commission has emphasised that the appellant did possess the winning ticket which was surrendered to the Race Club and in return a crossed cheque was obtained. **It is, in our view, a neutral circumstance,** because if the appellant had purchased the winning ticket after the event she would be having the winning ticket with her which she could surrender to the Race Club. The observation by the Chairman of the Settlement Commission that "fraudulent sale of winning ticket is not an usual practice but is very much of an unusual practice" ignores the prevalent malpractice that was noticed by the District Taxes Enquiry Committee and the recommendations made by the said Committee which led to the **amendment of the Act by the Finance Act, 1972** whereby the **exemption from tax that was available in respect of winnings from lotteries, crossword puzzles, races, etc., was withdrawn.** Similarly the observation by the Chairman that if it is alleged that these tickets were obtained through fraudulent means, **it is upon the allegor to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record.** Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record an **inference could reasonably be drawn** that the winning tickets were purchased by the appellant after the event. We are, therefore, unable to agree

with the view of the Chairman in his dissenting opinion. In our opinion, the majority opinion **after considering surrounding circumstances and applying the test of human probabilities** has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence.”

C. Usha Chandresh Shah vs ITO

I.T.A. No.6858/Mum/2011 AY:2006-07 on 26 September, 2014

“12. We have already seen that the tax authorities have applied the test of human probabilities explained by the Hon'ble Supreme Court in the cases of **Sumati Dayal and Durga Prasad More (supra)** to disbelieve the claim of Long term Capital gains put forth by the assessee. We notice that the test of human probabilities was not applied by the co-ordinate benches of Tribunal in the case of **Shri Avinash Kantilal Jain (supra)** and **Mr. Shyam R Pawar (supra)**. Hence, in our view, the assessee cannot take support from the above said decisions. We further notice that the ld CIT(A) has placed reliance on the decision dated 04.1.2011 rendered by ITAT Delhi in the case of **Haresh(sic) Win Chaddha Vs. DDIT**, wherein the Tribunal has expressed the view that **there is no presumption in law that the AO is supposed to discharge an impossible burden to assess the tax liability by direct evidence only** and to establish the evasion beyond doubt as in criminal proceedings. Further it was held that **the AO can assess on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information / evidence available on record.**”

D. DEEPAK DALELA vs. ITO(2011)128 ITD 225(JP)

6.4 Burden of proof means that one of the contending parties has to introduce evidence. Where however parties have joined issue and have led evidence and conflicting evidence then the issue can be weighed to determine which way the issue can be decided, the abstract question of burden of proof is academic. **Hence one is left but to test the evidences on record on the basis of human probability.** It has been noticed that there are entities which are only providing bills but on that basis only, an addition cannot be made. **But if the assessee also fails to lead evidence about genuineness of purchases** then one will have to weigh all the materials available with AO and has to derive a conclusion based on human probability.

15. OTHER JUDGMENTS ON HUMAN PROBABILITIES:

The Human Probability test is also applied in the following cases:

1. A. Rajendran & Ors. vs. ACIT (2006) 204 CTR (Mad) 9
2. Hacienda Farms (P) LTD. vs. CIT (2011) **239 CTR (Del) 212(PARAS 7 & 8)**
3. Major Metals Ltd. vs. UOI AND ORS (2012) **251 CTR (Bom) 385(paras 23,25,27-28)**
4. Pradip Kumar Loyalka vs. ITO (1997) 59 TTJ (Pat)(TM) 655(**paras 6-10 of TM order**)
5. ACIT vs. Sampat Raj Ranka (2001) 73 TTJ (Jd) 642
6. DCIT vs Alok Gautam(2010)**128 TTJ 532(LUCK.)(paras 26-30)**
7. CIT vs. Empire Builtech Pvt. Ltd. [2015] 228 Taxman 346 (Del)(Mag.);
8. Umakant B. Agrawal vs. Dy. CIT [2014] 369 ITR 220 (Bom);
9. CIT vs. Narinder Kumar Sekhri [2015] 228 Taxman 35 (P&H)(Mag);

10. Edayanal Constructions vs. CIT [1990] 183 ITR 671 (Ker).

VII.

**‘HUMAN PROBABILITIES ‘.PREPONDERANCE OF PROBABILITIES
‘PREPONDERANCE OF EVIDENCE’. ‘PREPONDERANCE OF
PROOF’.‘BALANCE OF PROBABILITY’.**

16. These are the various terms we have come across in course of our discussion. Are they identical? Can they be used interchangeably?

17. As I have mentioned above the generic term would be “preponderance of probabilities” as conceptualised in s 3 of the Evidence Act. Its terminological counterpart in US Law would be **balance of probabilities or preponderance of proof or preponderance of Evidence** going by the label provided by Black’s (supra) but I would be inclined, going by the same conceptualisation to put it on a parallel footing, but probably not the same space.

17.1 But I would definitely place Human Probabilities in a distinct category. One only need to look at s 114 and S. 3 to mirror my trail of thinking.

18. Further in **Naresh K. Pahuja*v.DCIT [2008] 118 TTJ 319 (Mumbai)** it was held as follows :

“27. According to **section 3 of the Evidence Act**, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

Section 114 of the Evidence Act provides that the Court **may presume** the existence of any fact which it thinks likely to have happened, **regard being had to the common course of natural events, human conduct, and public and private business**, in their relation to the facts of the particular case. **The aforesaid**

provisions are nothing but recognition of broad principles of common law governing the issue under consideration.”

18.1 The utilization of s 114 above completes the concept because the utilization of parallel term Human Probabilities gets validated. I would venture to hold that “preponderance of probabilities”, a wider and generic term derives from s 3 and “Human Probabilities”, its instantiation derives from s 114. We may fruitfully refer to relevant part of s 114 of the Evidence Act 1872 (supra) to have a rounded picture.

19. **Khopade Kisanrao Manikrao v. ACIT [2000] 74 ITD 25 (PUNE) (TM)** uses the most interesting phrase- ***“preponderance of probabilities judged by human conduct.”***

19.1 This is probably the bridge connecting the two. If I were to put it my way I would say that the term “human” is a generic term and denotes way in which a **preponderance of human beings** conduct themselves. Hence the two connect. But that is as far as I will take the analogy. I won’t stretch it to subsume human probability under the generic “preponderance of probabilities”. The citation above stands as a validation to this point of view where the generic “preponderance of probabilities” is customised to “human conduct”- a kind of personification in terms of figures of speech.

VIII. The role of surrounding circumstances and totality of circumstances ; circumstantial evidence

20. Circumstantial evidence and surrounding circumstances form two vital anchors of the twin concepts of preponderance of probabilities and human probabilities. The illustrations given in para 14 (supra) clarify this amply.

20.1 Circumstantial evidence is evidence of the circumstances, as opposed to direct evidence. It may consist of evidence afforded by the bearing on the fact to be proved, of other and subsidiary facts, which are relied on as inconsistent with any result other than the truth of the principal fact. It is evidence of various facts, other than the fact in issue which are so associated with the fact in issue, that taken together, they form a chain of circumstances leading to an inference or presumption of the existence of the principal fact.

21. In **Khopade Kisanrao Manikrao v. ACIT [2000] 74 ITD 25 (PUNE) (TM)** it was held that *“The word ‘evidence’ has to be construed in a comprehensive sense and it includes circumstantial evidence. It is well settled principle of law that the material or evidence on which the taxing authorities may base the assessment is not confined to direct testimony by witnesses. It may be reiterated that the word used in section 143/section 158BB is ‘evidence’.* However, **in making assessment the Assessing Officer does not act merely on what is technically described as evidence in the Indian Evidence Act.** It is observed from section 143(3) that the Assessing Officer can base his assessment not only on the evidence found during the course of the search but also on the material gathered by him. It is now well settled that the Assessing Officer is not fettered by technical rules of evidence and the like and that he may act on material which may not strictly speaking be accepted as evidence in a Court of law. **Such evidence need not necessarily be direct evidence. It may be**

circumstantial evidence or assessment based on preponderance of probabilities judged by human conduct.”

22. Classically we can consider CIT vs. DURGA PRASAD MORE (1971) 82 ITR 540 (SC) wherein it was held as follows:

“10. Now we shall proceed to examine the validity of those grounds that appealed to the learned judges. **It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real.** In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, other-wise it will be very easy to make **self-serving statements** in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that **the apparent was not the real.** The taxing authorities were **not required to put on blinkers** while looking at the documents produced before them. They were entitled to **look into the surrounding circumstances** to find out the reality of the recitals made in those documents.....

23. In Mangalchand Gobardhan Das v. CIT [1954] 26 ITR 706 (ASSAM) is useful in furthering our understanding ‘*For material or evidence on which taxing authorities may rely under the Income-tax Act is not confined to direct testimony in the shape of statements made by witnesses. All relevant circumstances which have a bearing on the issue which are revealed during the course of the assessment, would be covered by the expression "material or evidence on which the*

Income-tax Officer could rely" : vide Paras Dass Munna Lal v. Commissioner of Income-tax, Punjab [1937] 5 ITR 523 .

*The contention of the taxing authorities was that the encashment of notes in the name of the wife was a benami transaction. A benami transaction may be innocent or fraudulent. Here if the transaction of encashment was benami it had a fraudulent purpose. The transaction would be in its nature secret. **Direct evidence of the intended fraud would not be possible for the taxing authorities to procure. Fraud is secret in its nature and therefore evidence bearing on the benami character of the transaction would in its nature be mostly circumstantial***.**"*

24. In CIT v. Rameshwar Prasad Bagla [1968] 68 ITR 653 (ALL.) we can meet the term "totality of circumstances":

"It is well settled that in a case of circumstantial evidence the totality of circumstances has got to be taken into consideration and the combined effect of all those circumstances is determinative of the question as to whether or not a particular fact is proved."

25. A decisive conceptualization is provided in IN CIT v. Southern Sea Foods Ltd. [1995] 215 ITR 176 (MAD.):

*"An assessee who would be claiming deduction is expected to have some evidence of such expenditure incurred by it, as no one is expected to expend by any payment to another without there being any proof of it. No fact is proved without evidence. A fact is proved by evidence, and **evidence means and includes all statements made by the witnesses in relation to matters of fact under enquiry, and all documents produced for the exhibition in course of the enquiry.** Statements made by the witnesses in relation to matters of fact under enquiry are called **oral evidence**, documents produced for the exhibition in*

course of the enquiry are called **documentary evidence**. Any thing, state of things, or relation of things, capable of being perceived by the senses, and any mental condition of which any person is conscious are taken in the fold of **facts**. **Some facts can be proved by the admission, some by the preponderance of probabilities, and some by oral or documentary proof and their association with other relevant facts. In the latter case, circumstances play a very important role and establish a fact as proved by inference.** Courts, however, have always pointed out that no fact can be surmised or conjectured, though it can be inferred from proved facts. Presumptions as to genuineness and proof play a very important role but the court, Tribunal or any authority cannot presume something which is not envisaged in the Evidence Act, and which does not fall in the realm of the discretion as to the existence of any fact. The court, Tribunal or authority may presume the existence of any fact which it thinks is likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of public importance. **Circumstantial evidence may take the character of proof only when it is conclusive in the sense that no other possibility is conceivable in a given case, and the only probable conclusion is the one indicated by the circumstances.”**

IX. Where does Direct Evidence stand then? A dilemma.

26. Can preponderance dislodge the direct evidence? Or more radically can it be argued that such is the status of PP that “direct rule of evidence does not apply to income tax proceedings to arrive at any conclusion or to establish facts,” as mentioned by CIT A in his

order which became subject matter of a special bench ultimately reported in GTC Industries Ltd. v. ACIT [2017] 164 ITD 1 (Mumbai - Trib.) (SB)? The head note makes for interesting reading:

*“Section 69 of the Income-tax Act, 1961 - Unexplained investments - (Bank Accounts) - Assessment years 1984-85 to 1986-987 - Assessee-company namely 'GTC' was engaged in manufacturing of cigarettes - Distribution and sale of cigarettes was made through chain of wholesalers, retail outlets and salesmen - Cigarettes under various brands had different MRPs which were printed on packets - In course of assessment, Assessing Officer noted that assessee was selling cigarettes at a price higher than declared/printed MRP and, thus, generating cash premium in said process - According to Assessing Officer, premium was collected by wholesalers who deposited said amount in fictitious bank accounts belonging to assessee - He thus added amount of premium on sale of cigarettes to assessee's taxable income - Whether **even though** wholesalers collected some premium which was deposited in fictitious bank accounts from where certain advertisement expenses were also incurred, yet **in view of revenue's failure to prove through any direct or indirect material or evidence that those bank accounts had been either maintained by assessee or was under control of assessee or was benami of assessee, impugned addition made by Assessing Officer was to be set aside - Held, yes [Para 50][In favour of assessee].”***

27. On the other hand we have a decision like Sumati Dayal where direct evidence stood in front of the probabilities. In a slightly more fluid situation, so was DP More (supra). We know the decisions therein.

Prior to this we had the pioneering decision of DP More (supra). I would be inclined to take the view that the Special Bench decision turned entirely on

its own peculiar facts and its ratio if any cannot admit of any general application in view of landmark decisions of hon'ble S.C.

28. In addition we can fruitfully refer to **Hersh W. Chadha v. DDIT [2011] 43 SOT 544 (Delhi)** wherein it was held that In criminal proceedings, the charge is to be proved by the State against the accused, establishing it beyond doubt, whereas **as per the settled proposition of law, the income-tax liability is ascertained on the basis of the material available on record, the surrounding circumstances, human conduct and preponderance of probabilities.** [Para 6.1] The aspect of circumstantial evidence too stands well explained in the same.

X. CONCLUSION

29. Preponderance of probabilities does not imply an a priori application of a theoretical construct on a given event/situation. The facts presented, evidence given, surrounding circumstances and totality of circumstances all form valid parameters for determination of a given claim on basis of preponderance of probabilities. Likewise for human probabilities the aspect of human conduct and what a ordinary prudent man would do in given circumstances would form valid parameters to establish a fact. **An assessee likewise can establish its claim by cogent, reliable and relevant material.** If the assessee advances a reasonable explanation, then the onus may shift back to the Revenue. **The explanation need not be proved affirmatively and may be shown to be reasonable and probable.** If the assessee fails to show that his explanation was reasonable or probable, adverse consequences may follow.

Anadi Varma