INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI
[Coram: Pramod Kumar, Vice President, and,
Vikas Awasthy Judicial Member]

ITA No.: 869/Mum/2018
Assessment year: 2012-13

Bank of India ……………………... **Appellant**
8th floor, Star House, C 5 G Block, BKC,
Bandra East, Mumbai 400 051 [PAN: AAACB0472C]

Vs.

Assistant Commissioner of Income Tax
Circle 2(1)(1), Mumbai ………………….**Respondent**

Appearances:
C Naresh, *for the appellant*
Sanjay Singh, *for the respondent*

Date of concluding the hearing : February 4, 2021
Date of pronouncing the order : March 4, 2021

O R D E R

Per Pramod Kumar, VP:

1. One of the interesting questions that have come up for our adjudication, in this case, is whether an Indian taxpayer can claim refunds from the Government of India of taxes paid by the said taxpayer outside India, i.e., the foreign Governments, in respect of the income taxes paid abroad on income earned in the respective tax jurisdictions. It's like someone making a contribution to, say, the US Exchequer because an income was earned there, and claiming that the Indian Treasury refunds the said tax because the aggregate of overall taxable income, from all the operations worldwide- including India, is in negative, i.e., a loss figure. In effect, one pays tax, for example, to the US and seeks its refund from the Indian Exchequer.

2. Such issues are more of an interest to the Indian business houses operating abroad rather than a typical Indian public sector undertaking, and yet ironically, it has come up for adjudication in this case of a public sector undertaking. Be that as it may, whatever we decide in this case will be equally applicable to all similarly situated taxpayers and thus affect a large number of Indian taxpayers. The order impugned in this appeal is the order dated 30th November, 2017, passed by the learned Commissioner (Appeals) in the matter of order under section 250 r.w.s. 143(3) of the Income Tax Act, 1961, for the assessment year 2012-13.

Issues requiring our adjudication in this appeal:

3. As we have noted in our opening observations, the questions that we are required to adjudicate upon in this appeal are of far-reaching ramifications, and the answers to these

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questions affect a large number of Indian corporates having business operations, through branches or other forms of permanent establishments (PEs), outside India. These questions, as learned representatives fairly agree, are as follows:

(a) Whether or not, on the facts and in the circumstances of this case, learned CIT(A) was justified in upholding the action of the Assessing Officer, in declining refund to the assessee for Rs 165,96,87,349 for income tax paid in treaty partner jurisdictions, for Rs 15,79,80.943 for income tax paid in non-treaty partner jurisdictions and for Rs 87,54,656 in respect of dividend taxes abroad?

and, in the event of our holding this issue against the assessee,

(b) Whether or not the learned CIT(A) was justified in upholding the action of the Assessing Officer in declining deduction, in the computation of business income, of Rs 182,64,22,948 in respect of taxes so paid abroad?

4. The related grounds of appeal, for the records, are set out below:

1A: On the facts in the circumstances of the case in law, while computing refund due to the appellant bank, the learned Deputy Commissioner of Income Tax -2(1)(1) [hereinafter referred to as 'DCIT'] has erred in not granting the credit of:

a) Income tax paid by the branches of the appellant bank, located outside India, under section 90 of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] amounting to Rs 165,96,87,349;

b) Income tax paid by the branches of the appellant bank outside India, under section 91 of the Act, amounting to Rs 15,79,80.943;

c) TDS, on dividend income received from foreign associates of the bank, amounting to Rs 87,54,656

and the Hon'ble CIT(A) erred in confirming the said disallowance.

The learned CIT(A) be directed to allow the credit for the aforesaid taxes paid outside India, under section 90 and 91, and enhance the refund due to the appellant bank accordingly.

1B: Without prejudice to Ground 1A above, assuming without accepting that your honours are of the opinion that the credit for taxes paid outside India aggregating to Rs 182,64,22,948 is not allowable under section 90n and 91 of the Act, as the case may be, while computing the refund due, then appellant bank prays that such taxes be allowed as a deduction while computing total income and the learned DCIT be directed to reduce the total income accordingly.

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5. We will take first take up the claim of the assessee for the refund of taxes paid abroad, and, in the event of our rejecting the said claim, we will take up the alternative claim of the assessee, i.e., for deduction of these taxes in the computation of business income of the assessee.

Claim for refund, of the taxes paid abroad, by the Indian tax authorities:

6. The assessee before us is a major Indian bank, with several branches abroad- a few in the treaty partner jurisdictions, i.e., the countries with which India has entered into Double Taxation Avoidance Agreements under section 90, and remaining in the non-treaty partner jurisdictions. The assessee has also invested, as a shareholder, in two foreign banks, namely PT Bank Swadeshi (Indonesia) and Indo Zambia Bank Limited (Zambia). The assessee has earned business profits from its branches outside India, namely in UK, USA, France, Belgium, Kenya, Japan, Singapore, China, Hong Kong, Cambodia, and Jersey. During the relevant previous year, the assessee earned profits in these jurisdictions, and, in accordance with the domestic tax laws in the respective tax jurisdictions, the assessee bank paid income tax aggregating to Rs 165.96 crores in treaty partner jurisdictions (on taxable income aggregating to Rs 200.90 crores in these jurisdictions) and Rs 15.79 crores in non-treaty partner jurisdictions (on taxable income aggregating to Rs 635.19 crores in these jurisdictions), in addition to income tax amounting to Rs 87,54,656 having been withheld from the foreign dividend income aggregating to Rs 8,46,61,252 received by the assessee. However, while the assessee did earn profits from these foreign operations and by way of foreign dividend income, the computation of the assessee's global income, which is taxable in India, resulted in a net loss of Rs 191,38,89,912. This is the loss computed by the Assessing Officer, vide appeal effect order dated 15th March 2017, and the assessee does not, therefore, have any tax liability in India in respect of its income. Since the assessee does not have any Indian tax liability in respect of the profits earned by the assessee abroad, the assessee was not given any credit for the taxes paid abroad. The assessee is not satisfied. The claim of the assessee is that the taxes so paid by the assessee to the overseas tax jurisdictions, where the related profits are earned, should be given due credit in the computation of refund due to the assessee, and, accordingly, the income tax paid by the assessee to foreign tax jurisdictions should be refunded to the assessee by the Indian tax authorities. This claim was rejected by the Assessing Officer by observing as follows:

> **The claim of the assessee have been perused but not found allowable. As per section 90 of the Income Tax Act, 1961, relief of taxes paid in foreign countries is given against the income tax chargeable under Income Tax Act, 1961 and hence it does not say that the tax paid n foreign countries would be refunded in the cases where income tax chargeable under Income Tax Act, 1961, is NIL. Therefore, the claim of the assessee to refund taxes paid in foreign countries is hereby rejected.**

7. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) rejected the claim of the assessee and observed as follows:

> **However, even if the claim of the assessee is to be considered on the merit, then too, the same is not found to be acceptable in view of the provision of section 90(1)(a)(ii) of the Income-tax Act. In the facts of the assessee's case it is not**

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disputed that after accounting for the income earned by the assessee from its branches located abroad, the total income computed in India is not resulting into any tax payable after giving the effect to the appellate order. The appellant in support its contention has relied on the decision of Hon'ble Karnataka High Court in the case of Wipro Ltd. V DCIT (supra). In respect of such reliance placed, it is observed that the Hon'ble High Court in their order at para 33 have clearly observed that section 91 makes it clear that if a person is residing in India has paid tax in any country with which, there is no agreement u/s 90 for the relief or avoidance of double taxation, Income-tax if deducted or otherwise paid as per law in force in that country, then he shall be entitled to the deduction from the India 'Income-tax payable' by him in a sum computed on such doubly taxed income, at the Indian rate of tax or the rate of tax of the said country, whichever is lower of the Indian rate of tax, if both the rates are equal.

From the observations as aforesaid at Para 33 of the order it can be noted that the entitlement to the deduction is from the Indian 'Income-tax payable'. It does not say anywhere that deduction or the refund would even be available when there is no tax payable in India. It is further seen from the same order of the Hon'ble High Court wherein at Para 39 they have observed as under. "Thirdly, in cases covered under section 90(1)(a)(ii) it is not a case of the income being subjected to tax or the assessee has paid tax on the income. This applies to a case where the income of the assessee is chargeable under this Act as well as in the corresponding law in force in the other country. Though the income-tax is chargeable under the Act, it is open to the Parliament to grant exemptions under the Act from payment of tax for any specified period. Normally it is done as an incentive to the assessee to carry on manufacturing activities or in providing services. Though the Central Government may extend the said benefit to the assessee in this country, by negotiations with the other countries, they could also be requested to extend the same benefit. If the contracting country agrees to extend the said benefit, then the assessee gets the relief. In another scenario, though the said income is exempt in this country, by virtue of the agreement, the amount of tax paid in the other country could be given credit to the assessee. Thus for the payment of Income-tax in the foreign jurisdiction, the assessee gets the benefit of its credit in this country."

From the above said Para it can be clearly seen that the relief is in respect of grant of relief and credit for the taxes paid in other country. This read with the Para 33 of the said order makes it clear that the credit or the relief which is available is in respect of Indian Income-tax payable and it would not be open to take the credit of such taxes paid outside India if there are no Indian Income-tax payable by the assessee. The provisions of section 90(1)(a)(ii) cannot be interpreted to mean grant of refund to the assessee of taxes paid by such assessee outside India by the Indian authorities under the situations when there are no tax is payable by the assessee in India, in this view of the matter, it is held that the reliance placed by the assessee on the aforesaid decision of Wipro Ltd. V DCIT(supra) does not help the cause of the assessee for seeking refund of taxes paid outside India, in India when it has no Indian Income-tax payable.

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8. The assessee is not satisfied and is in further appeal before us.

Rival contentions on this issue

9. Learned counsel's basic submission before us, on this issue, is that it is now a settled legal position that the actual payment of tax abroad is not a condition precedent for being entitled to tax credit, in the computation of tax liability, in India. He relies upon the decisions of Hon'ble Karnataka High Court in the case of **Wipro Ltd Vs DCIT [(2015) 62 taxmann.com 26 (Kar)]** wherein it was held that even though income in question of the assessee was exempt from tax in India, the assessee was entitled to tax credit in respect of taxes paid abroad on the foreign income embedded therein. In effect, thus, the taxes one pays abroad, for all practical purposes, can indeed be refunded in India. It is further pointed out that this decision has been consistently followed by various coordinate benches of this Tribunal. It is also pointed out that actual taxation of an income is not the condition precedent for taking benefit of the tax treaty provisions in the other country. He has filed a decision of a coordinate bench of this Tribunal in the case of **ADIT Vs Green Emirates Shipping & Travels [(2006) 200 ITD 203 (Mum)]** in support of this proposition. Learned counsel then repeatedly states, even though after being conveyed our reservations of this averment, that it is an admitted position that the income of the foreign branches has been subjected to tax in both the treaty partner jurisdictions, and, therefore, the assessee cannot be denied credit for the taxes paid abroad. When asked how the said income has been subjected to tax in India, learned counsel explains that the income in question was includible in its total income in India inasmuch much as it has reduced the entitlement for losses carried forward, and, to that extent, it has suffered income tax in India. It is contended that the income earned abroad has a real impact on the assessee's Indian tax liability because his carried forward business losses have been reduced by the said income. Learned counsel also refers to the decision of Hon'ble jurisdictional High Court in the case of **CIT Vs Petroleum India International [(2013) 29 taxmann.com 250 (Bombay)]**. All that 'subject to tax' in India means, according to the learned counsel, is that the income in question should be subjected to Indian tax laws whether or not there is any actual liability to tax, and that clearly is the situation before us. It was put to the learned counsel that 'liable to tax' and 'subject to tax' are two different terms used in the tax treaties, and in the light of his hypothesis, will there be the line of demarcation between 'liable to tax' and 'subject to tax', he did not have anything to say. When asked whether he does indeed pray that the taxes paid abroad contributed in the respective national exchequers should be refunded by the Indian tax administration and from the Indian exchequer, he does confirm that prayer. Learned counsel for the assessee then takes us through the related tax treaty provisions and justifies the interpretation that he is canvassing. We are thus urged to uphold the plea of the assessee. Learned Departmental Representative submits that he has already filed a written note in support of his stand, and he would seek to rely upon the same. He nevertheless makes brief submissions supporting the stand that refunds cannot be granted for the taxes paid abroad. It is submitted that it is clearly stretching the things too far that the taxes paid, for example, in UK, to the UK exchequer, should be refunded in India, from the Indian exchequer. Leaned Departmental Representative submits that it is important to bear in mind the fact that right now, we are dealing with the proceedings to give effect to the appellate order, and such contentious issues cannot be taken up at this stage. Once the assessee has not raised these points earlier, he cannot raise these points even at this stage where only the mechanical exercise of giving effect to the appellate order is to be carried out. On merits, it is submitted that the question of the foreign tax credit

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will only arise when there is any Indian tax payable by the assessee. When there is no Indian tax payable by the assessee, no credit can be granted in respect of the taxes paid abroad. Our attention is then invited to a decision of a coordinate bench in the case of **JCIT Vs Digital Equipment India Pvt Ltd [(2004) 94 ITD 340 (Mum)]** wherein it is held, vacating the relief granted by the CIT(A), that a foreign tax credit is to eliminate double taxation of an income and it can never exceed the actual tax liability in the residence jurisdiction. As regards the Wipro decision (supra) by Hon'ble Karnataka High Court, learned Departmental Representative submits that this decision overlooks, and does not even deal with, other Hon'ble High Court judgments in the case of **CIT Vs M A Morris [(1994) 210 ITR 284 (AP)]** and **CIT Vs Dr R N Jhanji [(1990) 185 ITR 586 (Raj)]**. On the first principles, this decision is clearly incorrect inasmuch as all the methods of eliminating the double taxation, i.e. exemption method, credit method or hybrid method, restrict the liability to tax in the source jurisdiction, but the relief sought in the present case goes well beyond that and would result in a refund of taxes by India and what is being termed as a refund is not even paid to Indian exchequer. Learned Departmental Representative then points out that this judicial precedent is in context of the question as to whether the credit for income tax paid in a country outside India in relation to an income eligible for deduction under section 10A would not be available under section 90(1)(a), and what Their Lordships have held is that merely because the exemption has been granted in respect of the taxability of the said source of income, it cannot be postulated that the assessee is not liable to tax, and, therefore, the case falls under Section 90(1)(a)(ii). It is then pointed out that 10A was held to be in the nature of exemption and, therefore, it cannot be said that the said income was not liable to tax, but then, in the light of the subsequent judgment of Hon'ble Supreme Court in the case of **CIT Vs Yokogawa India Ltd [(2017) 77 taxmann.com 41 (SC)]**, section 10A is required to be treated as deduction and not as an exemption, and thus the decision of Hon'ble Karnataka High Court ceases to be good in law. It is then pointed out that even going by the interpretation canvassed by Hon'ble Karnataka High Court, such a refund is permissible as a result of relaxation in the nature of treaty that India can enter under section 90(1)(a)(ii) but then this statutory came into effect from 1st April 2004 and all the related tax treaties were entered into by India well before that date. This decision cannot, therefore, have any impact of the tax treaties which were entered into prior to that date. Learned Departmental Representative submits that this decision from a High Court other than Hon'ble jurisdictional High Court, and is not a binding judicial precedent for this reason also. It is then pointed out that this decision was in the context of an income that was taxable in the hands of the assessee but exempt for the reason of an incentive provision and the assessee had actually paid his taxes on the non-exempt income. In none of these cases, therefore, there was any question of refund being made to the assessee. Learned Departmental Representative very politely, but equally firmly, submits that this decision is *per incuriam*, it is from a non-jurisdictional High Court, and on a materially different set of facts, and, therefore, does not bind us. For all these reasons, and relying upon the reasoning adopted by the learned CIT(A), he urges us to approve the order of the learned CIT(A) and decline to interfere in the matter. In a brief rejoinder, learned counsel for the assessee submits that the "CIT(A) had clearly held that appellant is entitled of relief of tax paid in a foreign country which was not granted when AO gave effect to the direction of ld. CIT(A)". It is thus submitted that the grounds raised clearly emanates and arise from the appeal effect order. Learned counsel then points out that learned Departmental Representative seeks to distinguish various decisions relied on by the bank on the contention that "in none of the cases, refunds were being claimed when the assessed income was a loss and no taxes were paid" but then this plea amounts to stipulating

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a new condition viz 'to be eligible for tax relief, the assessee should not have an assessable loss after set off foreign income' which is not prescribed in sec 90 or 91 of the Act or any of the DTAA applicable to appellant. He submits that the issue is whether the appellant is entitled to relief in respect of income chargeable under the Act and the corresponding law in force in a foreign country in accordance with the DTAA, and that issue is no longer *res integra*. His stand is that the assessee is being subjected to double jeopardy inasmuch as on the one hand the assessee is declined tax credit, and, on the other hand, his loss being carried forward are being reduced to the extent of profits earned abroad. As against a business loss of Rs 826.58 crores, what is being allowed to be carried forward for set-off against future profits is only Rs 191.39 crores as the foreign profits of Rs 635.19 crore are set off against the same. It is submitted that such double jeopardy will be absolutely unjust and inequitable to the assessee. We are, in effect, once again urged to direct the Assessing Officer to refund the taxes paid by the assessee abroad.

Our analysis on the first issue for consideration

10. Let us now deal with the specific claims made by the assessee. The incomes earned by the assessee outside India, and taxes paid by the assessee in the respective jurisdiction are as follows:

Sl No.	Tax jurisdiction / concerned	Income as per tax laws of the respective jurisdiction	Taxes paid in the respective tax jurisdiction
1	United Kingdom	164,83,03,346	42,85,58,870
2	Singapore	148,75,29,708	24,27,31,477
3	United States of America	134,29,98,097	43,57,35,733
4	Japan	115,31,72,581	34,59,51,694
5	Belgium	29,27,12,456	9,49,70,556
6	Kenya	27,25,92,653	8,84,42,686
7	China	11,38,14,129	1,00,64,665
8	France	4,07,81,841	1,32,31,668
	Total	**635,19,04,811**	**165,96,87,349**

11. So far as taxes paid in the United Kingdom are concerned, we find that the provision relating to the tax credits in the Indo UK Double Taxation Avoidance Agreement [(1994) 206 ITR (Sta) 235; **Indo UK tax treaty,** in short] is concerned, Article 24 of the Indo UK tax treaty, relatable to the elimination of double taxation in India, provides as follows:

ARTICLE 24

ELIMINATION OF DOUBLE TAXATION

2. **Subject to the provisions of the law of India regarding the allowance as a credit against Indian tax of tax paid in a territory outside India (which shall not affect the general principle hereof), the amount of the United Kingdom tax paid, under the laws of the United Kingdom and in accordance with the provisions of this Convention, whether directly or by deduction, by a resident of India, in respect of income from sources within the United Kingdom which has been subjected to tax both in India and the United Kingdom shall be allowed as a credit against the Indian tax payable in respect of such**

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income but in an amount not exceeding that proportion of Indian tax which such income bears to the entire income chargeable to Indian tax.

For the purposes of the credit referred to in this paragraph, where the resident of India is a company, by which surtax is payable, the credit to be allowed against Indian tax shall be allowed in the first instance against the income-tax payable by the company in India and, as to the balance, if any, against the surtax payable by it in India.
………………..

***6.* Income which in accordance with provisions of this Convention is not to be subjected to tax in a Contracting State may be taken into account for calculating the rate of tax to be imposed in that Contracting State on other income.**

***7.* For the purposes of paragraphs 1 and 2 of this Article profits, income and chargeable gains, owned by a resident of a Contracting State which may be taxed in the other Contracting State in accordance with the provisions of this Convention shall be deemed to arise from sources in that other Contracting State.**

[Emphasis, by underlining, supplied by us]

12. The scheme of Article 24(2) is like this. The first important point is that the tax credits being granted is subject to the provisions of the domestic law, which, however, shall not affect the general principles under this treaty provision. However, as the domestic law provisions in this regard, introduced vide rule 128 of the Income Tax Rules 1962, have come into effect only with effect from 1st April 2017, that rider is wholly academic in the present context. The second important point is that the income in question, in respect of which foreign tax credit is to be given, must have been "subjected to tax" in both the jurisdictions, i.e., United Kingdom as also in India. And third point is that if the income in question has been 'subjected to tax' in both the jurisdictions, i.e. UK and India, only so much of tax credit is given as is proportionate to the income so doubly taxed vis-à-vis entire income chargeable to tax in India.

13. The question, therefore, arises whether the income in question, i.e. Rs 164,83,03,346 can be said to have been subjected to tax in the United Kingdom as also in India.

14. Learned counsel has repeatedly stated during the course of hearing, despite our expressing reservations on the correctness of this averment, that there is no dispute on the fact that the income earned by the assessee abroad has been subjected to tax in India as also abroad. His plea is that while the assesses has actually suffered taxation of a soured foreign income in the source jurisdiction, the income earned by the assessee abroad has also been included in the income taxable in India, which happens to be a negative figure nevertheless, the foreign-sourced income has been subjected to tax in India as well. Taking this argument to its logical conclusion, learned counsel has submitted that once an income has been subjected to tax in both the jurisdictions, the assessee has to be relieved of such double subjection of tax in two jurisdictions, by giving appropriate relief in the residence jurisdiction, i.e., India. Learned counsel has also submitted that the actual taxation of an income in not a condition precedent for availing the tax treaty benefit, and he has relied upon a decision of the coordinate bench in the case of Green Emirates Shipping & Travels *(supra)* in support of this proposition. Learned counsel has then also relied upon the decisions of Hon'ble Karnataka High Court in Wipro's case *(supra)* in support of the contention that the

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payment of tax in the residence jurisdiction is not a condition precedent for availing the benefit of foreign tax credits.

15. So far as the decision of coordinate bench, in the case of **Green Emirates Shipping & Travels** ***(supra)*** is concerned, that was a decision in the context definition of the expression **'liable to tax'** and in the context of Indo UAE Double Taxation Avoidance Agreement; [(1995) 205 ITR (St) 29; **Indo UAE tax treaty** in short] with a jurisdiction which did not have, at least at the relevant point of time, any provisions enabling domestic law taxation of the income concerned. On these peculiar facts, both the jurisdictions subsequently revised the DTAA itself, and delinked the treaty entitlement requirement, i.e. definition of resident in UAE, to the taxation of the resident by restating the definition as "**an individual who is present in the UAE for a period or periods aggregating totalling in aggregate at least 183 days in the calendar year concerned, and a company, which is incorporated in UAE and which is managed and controlled wholly in UAE**". Quite clearly, therefore, the expression 'liable to tax' is no longer used in this treaty and, the actual taxation of an income ceases to be relevant for this purpose. In any event, what this decision holds is that the actual taxation of an income is not availing the treaty benefits in general, because the term 'liable to tax', as appearing in the definition of a resident, refers to a locality related attachment leading to residence type taxation, and not the taxation *per se*. However, the entitlement of tax credits uses the expression of the related income having been 'subjected to tax' in both the tax jurisdictions, and that is the pre-condition for being granted foreign tax credits. 'Liable to tax' is one thing, and 'subjected to tax' is another. When we are to compare a tax treaty with, say, a building or a residential unit, if '**liable to tax'** is the key to open the main door, i.e., entitle someone to the tax treaty entitlement in general, '**subjected to tax in both India and United Kingdom**' is a key to open doors of one of the rooms inside, i.e. one of the specific benefits of the treaty entitlement. The former is a condition precedent to be covered by the scope of the tax treaty, and the latter is a condition precedent for being eligible for getting the foreign tax credits under article 24(2). Nothing, therefore, turns on the connotations of 'liable to tax' in the present context, and we reject this plea of the assessee without going into any further details about the same.

16. The connotations of 'subjected to tax' are simple and easy to understand. In plain words, it means when an income is actually subjected to tax, i.e., tax is levied on the said income. Hon'ble Authority for Advance Ruling, in the case of **General Electric Pension Trust In Re [(2006) 280 ITR 425 (AAR)] had**, highlighting the distinction between 'liable to tax' and 'subject to tax', observed made certain important observations and emphasized that actual taxation is a sine qua non for an income being treated as having been subjected to tax. That was a case in which the AAR was dealing with a treaty requirement for 'resident of a contract state' for a trust which required the income derived by the trust being subject to tax' in the treaty partner jurisdiction. It was in this context that the AAR, speaking through Hon'ble Justice Quadri, speaking for the Authority of Advance Ruling, observed that the expression 'subject to tax' has materially distinct connotations vis-à-vis the connotations of 'liable to tax', and observed that "**It is worth pointing out that the phrase 'liable to tax' in para (1) and the phrase 'subject to tax' in proviso (b) are not synonymous. If both were to be read as synonymous, proviso(b) would become otiose. Whereas para (1) speaks of being in the tax net, proviso is concerned with actual taxation**". The AAR then added "**Thus it would follow that the term "resident of USA" for the purpose of the treaty would mean a person who under the laws of USA is liable to tax therein by reason of his**

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domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature; however, in the case a trust, the term "resident of USA" would apply only to the extent that the income derived by such trust is subject to tax in USA as the income of a resident either in its hands or in the hands of its beneficiaries". What essentially follows from this discussion is that so far income being subjected to tax in a particular jurisdiction is concerned, that requirement can be met when income tax is actually levied in respect of the said income in the jurisdiction in question, and, to this extent, we are in respectful agreement with the views so expressed in the said ruling. We may, in this regard, refer to a judicial precedent from the United Kingdom which has, in extended and profound discussions, taken note of judicial precedents from the other part of the world- including India, as also of the academic literature and the IFA and OECD reports, and analyzed this issue in great detail. In the case of **Paul Wiser Vs The Commissioners [(2012) UK FTT 501 (TC)],** explaining the connotations of expression 'subject to tax', the United Kingdom First Tier Tribunal has observed as follows:

> **24. An Australian case, Emanuel v Federal Commissioner of Taxation [1968] HCA 57, concerned the Australia/UK double tax treaty. At the relevant time, the rate of Australian withholding tax on domestic source dividends was 30%. Under the treaty, however, that rate was reduced to 15% in the case of such dividends to a UK resident "who is subject to United Kingdom tax in respect thereof". The UK resident recipient was not domiciled in the UK, and so, although generally within the scope of UK tax as a resident, was chargeable on income from non-UK sources only to the extent that the income was remitted to the UK. The dividends had not been so remitted.**
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> **25. In the High Court of Australia, Windeyer J held that the taxpayer was not entitled to the reduced rate of withholding tax. He said (at [15]):**
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>> **"The present case has, as I have said, proceeded on the basis that the taxpayer is not domiciled in the United Kingdom – and that he is treated as having satisfied the Commissioners of Inland Revenue of that fact. Therefore in respect of the dividends in question the 'remittance' basis would apply. Therefore, in my opinion, unless and until they be remitted and received by him in the United Kingdom he is not "subject to United Kingdom tax in respect thereof". These words I think describe a present liability of a person to tax, not the character of income in respect of which he will if it comes to him in the United Kingdom in the future incur then a liability to tax"**
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> **26. In General Electric Pension Trust v Director of Income-tax (International Taxation) Mumbai (2005) 8 ITLR 1053, the Indian Authority for Advance Rulings held that a pension fund which was exempt from tax in the US under US tax law was not "subject to tax" in the US and so could not fall within the meaning of "resident of a Contracting State" as that was defined for a trust under the US/India double tax treaty. After describing the relevant provision, under which in the case of income derived or paid by a trust the term 'resident of a Contracting State' applied only to the extent that the income derived by the trust (which would have to be liable to tax by reason of residence or another relevant criterion in the State in question) was in addition subject to tax in that State as the income of a resident either in its own hands or in the hands of the beneficiaries, Syed Shah Mohammed Quadri J said (at p 1061):**
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>> **"It is worth pointing out that the phrase 'liable to tax' in para (1) and the phrase 'subject to tax' in proviso (b) are not synonymous. If both were read to be**

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> **synonymous, proviso (b) would become otiose. Whereas para (1) speaks of being in the tax net, proviso (b) speaks of actual taxation."**

27. The distinction between "liable to tax" and "subject to tax" has been the topic of some debate within the international tax community. This debate has been alluded to in a number of academic commentaries. Ms McCarthy referred me to one, from the Canadian Tax Journal (1996) Vol 44, No 2, 408 entitled "A Resident of a Contracting State for Tax Treaty Purposes: A Case Comment on Crown Forest Industries" by a number of contributors led by David A Ward of Canada, and including, from the UK, Dr John Avery Jones. The focus of the article is on the case in the Supreme Court of Canada of The Queen v Crown Forest Industries Limited et al., 95 DTC 5389 (SCC) – a case on whether a Bahamian corporation carrying on business in the US and with a place of management there was a resident of the US within the US/Canada double tax treaty. In that case, the Supreme court of Canada concluded that in interpreting the term "resident of a contracting state" in that treaty the expression "liable to tax" required the person in question to be subject to as comprehensive a liability to taxation as is imposed by a State. That analysis arguably brought the requirements of "liable to tax" closer to those considered appropriate for "subject to tax". But in their discussion, the authors draw the same distinction between "liable to tax" and "subject to tax" as was later described in General Electric.

28. The authors refer in particular to that distinction being drawn by participants at a seminar conducted in 1985 by the International Fiscal Association ("IFA"). The conclusion, for which it is demonstrated that there is widespread international support, is that if a person's connecting characteristics with a state are the same as those of persons who are fully liable and actually subject to tax, that person can be said to be liable to tax even though he is not subject to tax on part or all of his income by virtue of special provisions of the state of his residence: see p 419 and footnote 32.

29. This view has remained unaltered by the passage of time. According to an article published in 2011, "Worrying Interpretation of 'Liable to Tax': OECD Clarification Would Be Welcome" (Arnaud de Graaf and Frank Pötgens), Intertax, Vol 39, Issue 4, 169, which discusses a ruling of the Dutch Supreme Court (4 December 2009; V-N 2009/63.17) that adopted a similar approach to the residence article in the Netherlands/US treaty to that of Crown Forest, the broad international consensus was confirmed at the IFA Congress in 2004. As the authors describe the position (at p 172), that view encompasses a contrast between "liable to tax", which refers simply to an abstract liability to tax on a person's worldwide income, and the expression "subject to tax" which may require an effective liability to tax on a person's income.

30. The same analysis also appears from the Editor's Note to the General Electric ruling in the International Tax Law Reports, where he says (p1054):

> **"It is generally recognised that 'subject to tax' has a different meaning from 'liable to tax' and requires that the person claiming benefit of the treaty is actually required to pay tax (or would, for example, be required to do so if it had any positive income)."**

31. Although it was not cited to me, I should also refer to the commentary on the OECD Model Convention. Although, as I have mentioned earlier, the Treaty provision with which I am concerned does not follow the OECD Model, there are nonetheless some useful indicators to be obtained from the commentary.

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32. In its reference to Article 18 of the Model on the taxation of pensions, the commentary refers to the possible mismatches that can arise where the contracting states may have different rules regarding pensions. It refers particularly to the position where one contracting state regards a deduction for pension contributions essentially as a deferral of tax on the part of the employment income that is saved towards retirement, and the other state, in which the individual becomes resident, does not tax pension benefits. In such cases the commentary refers to examples of provisions which States are free to agree bilaterally. One such possible provision, which the commentary cites as an example of a provision allowing source taxation of pension payments only where the state of residence does not tax those payments is as follows:

> **"However, such pensions and other similar remuneration may also be taxed in the Contracting State in which they arise if these payments are not subject to tax in the other Contracting State under the ordinary rules of its tax law."**
>
> **This is therefore an example of the expression "subject to tax" being used to draw a distinction between cases where the state of residence taxes pension income, and cases where it does not.**

33. The starting point is to look for a clear meaning of the words in Art XI(2) that is consistent with the purpose of the Treaty. That purpose I discern to be the allocation of taxing rights as between the UK and Israel to obviate double taxation, and to prevent the evasion of tax. Its purpose is not to enable double non-taxation of the relevant income.

34. In my view, consist with what I regard as the purpose of the treaty in this regard, the ordinary meaning of Art XI(2) is that pension income derived from UK sources is only exempt from UK tax if that income is chargeable to Israel tax such that Israel tax will ordinarily be payable in respect of that income, subject to deductions for allowances and reliefs, etc. This follows from the distinction that must in my view be drawn between the use, in double tax treaties, of the expressions "liable to tax" and "subject to tax", and also by the requirement, under Art XI(2), that the individual concerned should not only be a resident of Israel (that is, resident in Israel for the purposes of Israel tax), but should be subject to tax in respect of the relevant income. The reference to that income in this context clearly distinguishes this provision from one which requires that the individual fall within the scope of a State's taxation generally. This provision is not concerned with the status of the individual, but with the chargeability to tax of the specific income. Income which is exempted from taxation cannot during the currency of that exemption be income in respect of which an individual can be said to be subject to tax.

35. Although it is not necessary to place any reliance on the international cases and academic writings I have referred to, nor on the OECD commentary, this conclusion does accord with what appears to be a broad consensus as to the meaning of the expression "subject to tax". I have no doubt that the contracting states of Israel and the UK, when entering into the Treaty, intended that pension income exempt from Israel tax should be excluded from the exemption from UK tax. If it had been intended otherwise, so that merely being within the scope of Israel tax as a general matter would suffice for the treaty exemption to apply, there would have been no need to include any reference to the pension income being subject to tax; the position would have been covered by the mere reference to the individual being a resident of Israel.

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36. It follows that I do not accept Mr Weiser's arguments on the proper meaning to be given to Art XI(2). Nor do I accept that the terms of Art XI are ambiguous or anything other than clear and, adopting Mr Weiser's phraseology, transparent.

37. Ms McCarthy referred me to certain references from HMRC's International Tax Manual to illustrate the long-standing published view of the phrase "subject to tax". Paragraph 332210 of that manual was first published on HMRC's website on 29 December 2006. It reads:

> **"INTM332210 – DT applications and claims – Subject to tax**
> **Background**
>
> **The expression "subject to tax" usually means that the person must actually pay tax on the income in their country of residence.**
>
> **However, a person is still regarded as "subject to tax" if, for example, he or she does not pay tax because their income is sufficiently small that it is covered by personal allowances that are available to set against liability to tax in the other country.**
>
> **A person is not regarded as "subject to tax" if the income in question is exempted from tax because the law of the other country provides for a statutory exemption from tax. For example**
>
> > **– the income is that of a charity**
> > **– the income is that of an exempt approved superannuation scheme (pension fund)**
>
> **In such cases the "subject to tax" condition is not met and relief is not allowable."**

38. I agree with this summary. It refers to particular exemptions by way of example, but it is not limited in any way, and is apt to apply also to the… *(present situation before us)*

17. We are in considered agreement with the above analysis of the UK First Tier Tribunal. Closer home, a coordinate bench of this Tribunal, in the case of **Durametallic India Ltd Vs ACIT [(2003) 85 ITD 442 (Chennai)]**, following the same school of thoughts, and in fact going a step further by excluding the admissible deduction from the scope of 'income subjected to tax', has observed as follows:

10. We are thus left with the question : What is the amount of Singapore tax payable by the assessee in respect of the income which has been subjected to tax in both countries? It is our considered view that the expression "subjected to tax" has a narrower meaning, and it refers to the amount of income on which tax has been levied. In the present case though "income chargeable to tax" in both countries was royalty, under the Indian Tax Laws the assessee was allowed deduction under section 80-O and tax was levied in India, on the net amount only. Hence only 50 per cent of the royalty on which tax was levied in India, could be considered as income subjected to tax in India. Even though royalty income subjected to tax in Singapore was Rs. 18,97,295, in India the assessee had to bear the tax burden only on 50 per cent of the royalty amount. The intention behind the

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Agreement for Avoidance of Double Taxation is to remove the hardship caused to a tax payer by the burden of double taxation on the same quantum of income. That objective is achieved by following the procedure laid down in the provisions of the Agreement. In accordance with the provisions of clause 2(*a*) of the Agreement tax at the rates applicable in Singapore on that amount of income assessed in both countries has to be found out and it is 40 per cent of Rs. 9,48,647 and not Rs. 18,97,295.

11. In Singapore tax incentive is provided on 100% of the income, but tax is deemed to have been paid by deduction. There is a specific reference in clause 2(*a*) of Article 24 to the amount of tax payable, - whether directly or by deduction. But with regard to the Indian tax there is no reference to tax exemption or concession in the hands of a resident in India. There is only a reference to the 'Indian tax payable' and it can mean only the tax liability arising out of the assessment of the amount of royalty in India. What is subjected to tax in both the countries is Rs. 9,48,647 and so the assessee is entitled to the credit on the Singapore tax of Rs. 3,79,459, *i.e.,* tax calculated at 40 per cent on the sum of Rs. 9,48,647. Though it has to be limited to an amount not exceeding that portion of Indian tax which such income bears, *i.e.,* the doubly taxed income of Rs. 9,48,647 bears to the entire income chargeable to Indian tax, as the Indian income-tax at 50 per cent comes to Rs. 4,74,323, the ceiling is not applicable in this case. The assessee is thus entitled to a credit of Rs. 3,79,459 being the Singapore tax paid on the income subjected to tax in both countries.

12. In this connection it is useful to refer to section 91 which provides for relief in respect of income from countries with which there exists no agreement under section 90 for avoidance of double taxation. It is provided in section 91 that a person resident in India is entitled to the deduction from the income-tax payable by him, a sum calculated on such doubly taxed income at the Indian rate of tax or at the rate of the foreign country whichever is lower. In the case of *CIT* v. *C.S. Murthy* [1988] 169 ITR 686[1] the A.P. High Court held that as the assessee had been granted deduction under section 80RRA, on 50 per cent of the remuneration from foreign employer, only balance amount was subjected to tax in India and so relief on double taxation was available only on 50 per cent of the remuneration. That was the view taken by the Rajasthan High Court also in *CIT* v. *Dr. R.N. Jhanji* [1990] 185 ITR 586[2]. In that case the Court observed:

> **"Section 91 cannot be construed in isolation, but with the other provisions of the Act. Accordingly it is only the tax already paid on that part of the foreign income under the Indian Income-tax which is required to be deducted for the purpose of giving relief from double taxation."**

The above decision was followed in the subsequent decision of the Rajasthan High Court in *CIT* v. *Dr. J.C. Sharma* [1990] 186 ITR 173[3].

13. True, the above decisions are concerned with the D.I.T. relief under section 90. The ld. counsel for the assessee is correct that the expression used in section 91 is "such doubly taxed income" and not 'income subjected to tax' in both countries as appearing in the Agreement with Singapore with which we are now concerned. We may mention here that in the case of *C.S. Murthy (supra)* decided by the A.P. High Court the expression 'subjected to tax' has been used on page 691, as we have understood—

> **"... The main requirement, therefore, is that the income must have been taxed outside India and the same *income must have again been subjected to tax* under**

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> **the Income-tax Act in India. If any portion of the foreign income is not subjected to tax in India, then, the assessee will not be entitled to claim deduction on that part of the foreign income *which is not subjected to tax in this country*. This fits into the real scheme and intent of section 91 of the Act which is to the effect that in respect of any income, a person should not be doubly taxed, once outside India and again in India. If the income taxed outside India *is subjected to tax again in India,* then, the provisions of section 91 of the Act would come into operation and the assessee can claim appropriate relief on the doubly taxed income. . . ." [Emphasis supplied]**

> **14. It may be seen that the Court has used the expression 'doubly taxed' to mean that the income taxed outside India is subjected to tax again in India. The view taken is that the same income should have been subjected to tax in both countries. In the circumstances of this case, we hold that the CIT(A) was justified in confirming the order passed by the Assessing Officer allowing the D.I.T. relief on the Singapore tax on net amount of royalty subjected to tax in India. This ground of appeal is accordingly decided against the assessee.**

18. In view of the above discussions, we are of the considered view that the income earned by the assessee in the United Kingdom cannot be said to have been 'subjected to tax in India'. While it did indeed suffer taxation in the United Kingdom, as the assessee did not have any taxable income in India, and as this income was offset against the losses incurred by the assessee outside of UK, the income so earned in UK was never subjected to tax in India. Just because learned counsel says something umpteen number of times, i.e., it is an admitted position that the income in question has been subjected to tax in India as also abroad, it does not actually become an admitted position. It is thus not correct to proceed on the basis that the "**income from sources within the United Kingdom", i.e.,** income earned by the assessee in the UK from its branch offices there "**has been subjected to tax both in India and the United Kingdom"** which is a *sine qua non* for the availability of tax credit under article 23. We reject this plea on facts as also in law.

19. As regards learned counsel's reliance on Hon'ble jurisdictional High Court's judgment in the case of **Petroleum India International *(supra),*** it is only to be noted and rejected for the simple reason that this judicial precedent deals with an altogether different question and that question is whether, in terms of the provisions of Section 91, the taxes paid abroad, in respect of which credit can be availed in an assessment year, can be paid either in the relevant previous year or even subsequently. Their Lordships have held that as long as the assessee has paid the tax, whether in the relevant previous year, or even later, the tax credit in respect of the same is available. That was a case in which the assessee had paid tax of Rs 82 lakhs in Kuwait, the said income was included in its Indian taxable income, but the foreign tax credit was declined on the ground that the said payment of Rs 82 lakhs was paid after the end of the relevant previous year. The stand so taken by the Assessing Officer was reversed by a coordinate bench of this Tribunal, and the order so passed by the coordinate bench was upheld by Hon'ble jurisdictional High Court. The issue adjudicated upon in this judicial precedent relates only to the 'timing' of the foreign tax payments, and whether the foreign tax credit can be declined only on the ground of delay in payment of taxes or mistiming of payment of taxes. It has nothing to do with the present situation where taxes have admittedly been paid abroad in the relevant previous year, but no taxes on the said income have been levied in India at all. We reject this line of argument as well.

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20. The next issue to be considered is to what extent the foreign tax credit, in respect of taxes paid in the UK, is available in the computation of tax payable by the assessee in India.

21. Article 24(2) makes it clear that credit will be available "**against the Indian tax payable in respect of such income**, **but in amount not exceeding that proportion of Indian tax which such income bears to the entire income chargeable to Indian tax**". Essentially, therefore, the foreign tax credit is available only against the Indian tax payable on such income. As a corollary to this position, when Indian tax payable in respect of such income is nil, there cannot be any foreign tax credit against available to the assessee. Even if such an income is a positive figure, say 'x' amount, and the proportionate tax payable on such income is less than 'x', say 'y' amount, the foreign tax credit will be restricted to 'y' amount only. To illustrate, let us assume an assessee earns Rs 1,00,000 in UK whereas his total global income taxable in India is Rs 10,00,000, and pays 50% tax thereon in the UK, whereas tax rate payable by the assessee in India in respect of such income is only 30%. In this case, whereas the assessee will pay Rs 50,000 as tax in the UK, the admissible tax credit will only be Rs 30,000 even though his total tax liability in India will be Rs 3,00,000. That is what is typically called "ordinary tax credit" under the scheme of the treaties. Let us contrast this with the treaties in which "full tax credit", a rather rare feature in Indian tax treaties, is given. In India Namibian Double Taxation Avoidance Agreement [(1999) 236 ITR (Stat) 230; **Indo Namibian tax treaty**, in short], for example, Article 23(2) provides that "**where a resident of India derives income or capital gains from Namibia, which, in accordance with the provisions of this Convention may be taxed in Namibia, then India shall allow as a deduction from the tax on the income of that resident an amount equal to the tax on income or capital gains paid in Namibia, whether directly or by deduction**". If this was the method to be followed in the above illustration, the tax credit would have been Rs 50,000 which is much more than UK tax liability, but nevertheless less than the Indian tax liability. Even in this situation, since tax credit is allowed as a deduction from the Indian tax liability, the deduction cannot exceed the liability itself. This aspect of the matter will be more glaring from the academic literature on the subject. Let us, therefore, take a look at the guidance available on what constitutes tax credit, and how does this mechanism works.

22. Tax credit mechanism is one of the two broad mechanisms to provide for the elimination of juridical double taxation. When the same taxation object, i.e., an income, is taxed in the hands of the same taxation subject, i.e. the taxpayer, in two tax jurisdictions, it is defined as juridical double taxation, and such a juridical double taxation can be of a cross-border income can be relieved either under exemption method or under credit method Fundamentally, the difference between the methods is that the exemption methods look at income, while the credit methods look at tax. This relief is relevant only in the residence jurisdiction, where the global income of the assessee is taxed, because under the tax treaties, only source taxation rights are restricted, and under the domestic tax law legislation, the relief is unilateral anyway. There are small variants of these methods, and small nuances in their applications, but those issues are not really relevant in the present context. Coming back to these methods of relieving double taxation, under the exemption method, which hardly finds application in the Indian tax treaties or under the domestic law, once an income is taxed in the source jurisdiction, it is excluded from the scope of taxation in residence jurisdiction. Once doubly taxed income itself is excluded from the scope of taxable income, which eliminates double taxation of an income. The second method of relieving this double taxation of income

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is the credit method, and it is in this context that foreign tax credits are relevant. In **Prof Brian J Arnold and Prof Michael J McIntyre**, in their book "**International Tax Primer**" [Second Edition, ISBN 90-411-8898-3, published by Kluwer Law International, The Netherlands, @ page 36], describe this method, *inter alia,* as under:

> Under the credit method, foreign taxes paid by a resident taxpayer on foreign-sourced income generally reduce the domestic taxes payable by the amount of foreign tax. For example, if P pays a foreign tax of 10 on some foreign source income and otherwise would be subject to a domestic tax of 40 on that income, the foreign tax credit reduces the domestic tax from 40 to 30. Consequently, the credit method completely eliminates international double taxation of residence-source type. **Under the credit method, foreign source income is subject to domestic tax, wherever the foreign tax rate is less than the domestic tax rate.** The net domestic rate in such circumstances is an amount equal to difference between the two tax rates multiplied to foreign-source income. In effect, the foreign taxes are 'topped up' by domestic taxes so that the combined domestic and foreign tax rate on the foreign-source income is equal to domestic tax rate.
>
> **Credit countries invariably do not pay tax refunds when their taxpayers pay a foreign income tax at an effective rate that is higher than the domestic effective rate.** See, for example, Article 23B of the OECD Model Treaty. Nor do they allow the excess foreign tax to offset domestic taxes paid on the domestic income. In other words, the credit for foreign taxes paid is usually limited to the amount of domestic tax payable on foreign source income. Various limitation rules, sometimes quite complex in application, are used to prevent what is perceived as inappropriate use of foreign tax credits. As a result of such limitations on the credit, foreign income is typically taxed at the foreign effective rate whenever the foreign effective rate wherever the foreign rate is higher than domestic rate. **In summary, under the credit method, foreign-source income earned by the residents is taxed at the higher of the domestic and foreign taxes**.
>
> *[Emphasis, by underlining, supplied by us]*

23. Clearly, therefore, by application of the credit method, and by resultant grant of foreign tax credits, can ever exceed the actual Indian tax liability in respect of foreign-sourced income. Explaining this aspect of the credit method, or grant of foreign tax credits. in very emphatic terms, **Prof Klaus Vogel**, in his oft referred treatise "**Klaus Vogel on Double Taxation Conventions**" [ISBN 978-81-899960-62-9; Second Indian reprint 2010, published by Wolters Kluwers (India) Pvt Ltd, @ page 1227], states as follows:

> **h) Maximum deduction (limitation): Credit is allowed only upto that part of the domestic tax which is "attributable" to the items of income or capital taxed in the State of source in accordance with the treaty. Hence, application of credit method never results in a loss in revenue which is greater than under 'exemption with progression' method. The State thus makes use of advantage it derives from a lower rate of tax applied abroad, while warding off the disadvantages inherent in application of a higher rate of tax in the other contracting state**
>
> *[Emphasis, by underlining, is supplied by us]*

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24. In plain words, therefore, a foreign tax credit is a notional credit, for taxes paid in the foreign jurisdiction, in respect of the taxes so paid and it cannot, in any event, exceed the home jurisdiction tax liability for the resident tax-payer in respect of the said income. UN Model Convention Commentary, which specifically sets out and follows **OECD Model Convention Commentary** in this regard, observes that "Article 23 B, based on the credit principle, follows the ordinary credit method: **the State of residence (R) allows, as a deduction from its own tax on the income or capital of its resident, an amount equal to the tax paid in the other State E (or S) on the income derived from, or capital owned in, that other State E (or S), but** **the deduction is restricted to the appropriate proportion of its own tax**". [Para 57, Article 23, **UN Model Tax Convention Commentary, 2011**]. On a similar note, **Prof Michael Lang**, in his book "**Introduction to the Law of Double Taxation Conventions**" [ISBN 978-90-8722-198-0; published by IBFD; 2nd Edition, at page 140], sums up this principle as follows:

> **10.3.3. Maximum credit**
>
> 455 DTCs generally set forth a **maximum credit** that must be granted. The amount of tax which must be credited may not exceed the tax that the resident would pay in the residence state on the same (foreign) item of income. This is known as "ordinary credit." This means that in order for a credit to be granted, a tax on the same (foreign) item of income must first of all be due in the residence state. **If no tax is due in the residence state in the same tax period, the tax paid in the source state is not credited.** According to the OECD Commentary on Art. 23A and 23B (at para. 32.8), the residence state must nonetheless grant the credit when the lack of tax due in the residence state is the consequence of a timing mismatch.

[Emphasis, by underlining, is supplied by us]

25. Explaining the mechanism of foreign tax credit, and recognizing the distinction between ordinary (or proportionate) foreign tax credit system vis-à-vis its rather rarely used variant full foreign tax credit system, **Peter Harris and David Oliver**, in their book **'International Commercial Tax'** (published by Cambridge University Press; 2010 Edition; ISBN 978-0-521-85311-8 Hardback), state as follows:

> **[These observations frequently refer to the **Beth Example** which refers to a simple cross border tax situation, set out at page 5 of this book, in which **Allan**, resident of Country A, rents an office in country A, and pays **Beth,** a resident of Country B owning the said office in Country A, the rent for the said office]*
>
> **Credit** The credit method is often viewed as a complex method of foreign tax relief, particularly in the form of the underlying or indirect foreign tax credit, discussed below at 4.1.2.1. Returning to the example with Beth*, under this method Country B would initially calculate Beth's residence tax liability without any relief for the source tax of Country A. Further, Beth's Country A income would be calculated without a deduction for the Country A tax. The inclusion of tax in calculating income is referred to as *gross-up.* So initially, Beth's Country B tax liability would be 40, i.e. 40 per cent

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of 100. This amount is then reduced by source country tax, i.e. 30. So Beth's Country B tax liability would be 10 (40 less 30). Her overall tax liability is 40 (30 Country A tax and 10 Country B tax), which is consistent with her residence country progressive tax rate. For this reason, the foreign tax credit method is viewed as consistent with capital export neutrality (see above at 2.2.1).

Like the exemption method, the foreign tax credit method gives rise to substantial difficulties. Its apparent purpose is to maintain consistency with the residence country's progressive tax rate system. This is consistent with the residence country being in a better position than the source country to adjust overall tax liability according to a person's ability to pay taxes, i.e. according to the principle of equity. However, whether consistency with progressive taxation is maintained (and so consistency with capital export neutrality) depends on how the residence country treats the situation in which the foreign tax exceeds the tax liability in the residence country.

Returning to the example of Beth, now presume that her Country B marginal tax rate is 20 per cent, so her Country B tax with respect to the Country A income is 20. This is less than the Country A tax of 30 and the question is what happens to the extra 10 (20 less 30). This extra amount is referred to as *excess foreign tax credits.* If Beth can use the excess against Country B tax on her Country B source income (or get a refund from Country B of the extra Country A tax), then the system is *a full* foreign tax credit. In the example, Beth has 100 Country B source income in addition to the 100 Country A source income. Under a full foreign tax credit, Country B would calculate Beth's worldwide Country B tax liability as 40, i.e. 20 per cent of 200 (100 Country A income and 100 Country B income). This amount would be reduced by the credit for the Country A tax, leaving 10 Country B tax to be paid (40 less 30).

It will be seen that the full foreign tax credit permits Country A tax to not only exhaust Beth's Country B tax liability with respect to Country A income but also reduce Beth's Country B tax liability with respect to Country B source income. It provides an inducement for foreign countries to subject residents of foreign tax credit countries to high tax rates. **Such a subsidy for deriving income from high tax countries is viewed as unacceptable by virtually all foreign tax credit countries and so there are no major examples of countries that provide a full foreign tax credit. Rather, foreign tax credit countries limit the amount of foreign tax that may be credited to the amount of tax levied by the residence country with respect to foreign source income. This is referred to as an *ordinary* foreign tax credit system.**

If Country B adopts an ordinary foreign tax credit, Beth will not be permitted to use her extra 10 Country A tax to offset Country B tax with respect to Country B income. In this case, Beth must calculate her Country B tax liability with respect to her Country A source income separately from her Country B tax liability with respect to her Country B source income. Assuming Beth is taxed at 20 per cent by Country B, this means her Country B tax liability with respect to her Country A source income will be 20 and her Country B tax liability with respect to her Country B source

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income will also be 20. The foreign tax credit for Country A tax may reduce only the former 20 and not the latter 20. This is referred to as the *limitation on credit,* i.e. the foreign tax credit is limited to Country B tax on the Country A income. **In the result, the foreign tax credit will exhaust Beth's Country B tax liability on that income but not reduce Beth's Country B tax on Country B source income.** Beth pays 30 tax to Country A (on her Country A source income) and 20 tax to Country B (on her Country B source income).

26. In principle thus, there cannot be any occasion of refund of taxes paid in the source jurisdiction by the residence jurisdiction. Much as we researched, that is the only approach we could find so far as the operation of the credit system in the tax treaties is concerned. In other words, therefore, we could not find any academic support for the proposition that under the tax treaties, the taxes paid in the source jurisdiction could exceed the actual income tax payable in respect of the said income in the residence jurisdiction. On the first principles, therefore, under the bilateral tax treaty arrangements, which are dealt with under section 90 of Income Tax Act 1961, the scheme of eliminating double taxation under the credit method, in principle, for tax credits, in respect of taxes in source jurisdiction, in excess of the residence jurisdiction tax liability. Quite contrary to the proposition canvassed before us, a well-known Indian international tax scholar, **Prof Roy Rohtagi**, in his book "**Basic International Taxation; Second Edition, Volume I: Principles**" [ISBN 81-7496-732-X] has categorically states that excess foreign tax credits can never exceed domestic tax payable. The relevant observations, at pages 280-281 are as follows:

General

The credit method provides tax neutrality at home irrespective of whether the income earned at home or abroad. The residence State taxes its residents on their worldwide income but provides a credit for the foreign tax payments. **The foreign tax credit offsets the foreign tax actually paid against the home tax payable. If the home tax on the foreign-source income is more than the foreign tax, the taxpayer must pay the deficit as additional tax at home. However, if the foreign tax exceeds the home tax on the same income, the excess tax credit may be carried forward (or back) or forfeited.**

The foreign tax credit may be either full credit or ordinary credit. The full credit leaves the taxpayer with the same post-tax income at home, irrespective of the source of the income. The taxpayer receives full credit for the foreign tax paid, and is liable to pay only the difference between the home and foreign tax due on the same income. If the foreign tax exceeds the home tax. the residence State refunds the excess tax payment. The full credit method is rarely used. Most countries using the credit method grant ordinary credit relief for foreign taxes.

Under the ordinary credit relief method, the foreign tax credit cannot exceed the domestic tax payable on the income in the country of residence. It limits the tax credit to the tax on the same income, as computed under its domestic tax law, as if it were earned at home in the same accounting period. Therefore, the taxpayer pays the deficit as tax if the home equivalent tax exceeds the foreign tax paid on the same

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income, but the excess tax is not refunded if the foreign tax exceeds the home tax. He ends up paying the higher of the source and residence taxes.

Unlike the exemption method, the credit method avoids double taxation within the worldwide tax principle. If the home tax exceeds the foreign tax paid, the difference is payable as a residual tax**. Excess foreign tax credit arises if the foreign tax paid exceeds the foreign tax credit given at home. Some countries allow the excess foreign tax credit to be carried forward or back for offset. Many of them, however, do not have provisions for the carry-over of excess credits, which are then lost.**

[Emphasis, by underlining, is supplied by us]

27. Similar is the position taken by the Institute of Chartered Accountants of India, which, in the Study Material for International Tax- Practice at page 3.452, states as follows:

Carry forward/carry back of excess Foreign Tax Credit

A taxpayer cannot claim full FTC in India if the amount of income tax paid in the foreign Country is higher than the amount of income tax payable in India on that foreign source income. Some Countries allow carry forward/carry back of excess Foreign Tax Credit. Such option is not available in India and thus, result in adding to the cost of the taxpayer in India.

[Emphasis, by underlining, is supplied by us]

28. Clearly, therefore, the scheme of tax credits, as evident from the international tax literature and model convention commentaries, do not envisage any situation in which the excess foreign tax credit can result in a situation in which a taxpayer can get refunds, from the exchequer of residence jurisdictions, in respect of taxes paid to the exchequers of the source jurisdictions. If the taxes paid in the source jurisdictions could be refunded in the residence jurisdictions, it would have been perhaps possible to be fiscally domiciled in a no tax or low tax treaty partner jurisdiction and take refund of all the taxes paid in all the treaty partner tax jurisdictions. Wherever tax credits exceed the tax liability, at best a carry forward or back of excess tax credit can be given- when permitted by the domestic law, or at best when not restricted by the domestic law.

29. At this juncture, we would like to briefly touch upon the plea of the learned counsel that the assessee will be subjected to double jeopardy inasmuch as, on the one hand, the assessee has been subjected to tax abroad in respect of the foreign-sourced income, and, on the other hand, the said income will also end up reducing its losses carried forward, and thus enhance the domestic tax liability. In legal parlance, double jeopardy has very narrow connotation in the criminal law, but, lest such technicalities may detain the flow of our discussion, let us take this expression in a liberal sense of double disadvantage. There are two important points in this regard. The first point is that the double jeopardy, if one can call these two aspects of impact on the tax liability of the taxpayer as a double jeopardy, will arise in the year in which the losses incurred in India in this year will be eligible for set off against the eligible profits- if at all so happens. For example, if in the current year, total losses

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incurred by the assessee (excluding the profits of Rs 50 crores so taxed abroad, and reduced from the losses carried forward) are Rs 100 crores, and the assessee has a total taxable income (before setting off the losses carried forward) of Rs 150 crores in the next year, the assessee will have only Rs 100 crores set off against that year's income whereas assessee's actual eligibility for set off, excluding the foreign profit of Rs 50 crores, could have been Rs 150 crores. That's the year in which the so-called double jeopardy will hit the assessee. In case the assessee is not to make any profits during the period eligible for set off, there cannot be any double jeopardy. Therefore, the so called double jeopardy, as in the present year, is nothing more than a mere possibility, in the realm of a contingent event. The taxation reliefs cannot be on the basis of possibilities. The second point is that one has to see the legal position in the year in which the double jeopardy actually hits the assessee. Rule 128 of the Income Tax Rules 1962, introduced with effect from 1st April 2017, specifically restricts the foreign tax credit "in the manner and to the extent as specified" therein [See rule 128(1)], and, therefore, so far as the assessment years 2017-18 onward are concerned, a taxpayer cannot even claim carry forward of the excess tax credits. It is well settled in law, and as provided in the relevant treaty article itself, foreign tax credits are admissible subject to the domestic law provisions inasmuch as these credits are "**subject to the provisions of the law regarding the allowance as a credit against Indian tax of tax paid in a territory outside India**" [Article 24(2)]. So far as the period prior to 1st April 2017 is concerned, without expressing any merits on the admissibility or otherwise, of carrying forward foreign tax credits, all we can say is that even for such a double disadvantage, the double disadvantage could at best arise in which the taxpayer is denied the full set-off of the carried forward loss-excluding the foreign income in respect of which foreign tax credit is declined. This issue cannot, therefore, be addressed in the present assessment year. The claim of the assessee regarding double disadvantage, in terms of taxation of an income abroad and the corresponding reduction in losses carried forward having tax implications in the source jurisdiction, is thus premature in any case. For this reason, while we reject the plea of the assessee at present, we leave the issue open for adjudication, if and so necessary, at an appropriate stage. The issue whether in the absence of any specific legal bar on carrying forwards on foreign tax credits, the taxpayer can nevertheless, on the grounds of equity and double disadvantage, claim those tax credits in the year in which the taxpayer is actually subjected to a higher tax burden on account of reduced eligible set off of losses carried forward, thus perhaps remains an open issue for adjudication. In all fairness, we must add that, as we have seen in our survey of academic literature on the subject a short while ago, according to one school of thought, in the absence of domestic law provisions for carry forward or back for offset for foreign tax credits, the excess tax credits are lost. To what extent this school of thought is correct or not is a call to be taken as and when the occasion comes for that adjudication. Our observations above are in the context of holding that no double disadvantage to the assessee, by denial of the tax credit, at least in the present assessment year, and, these observations should be seen in this context alone. As to what is the impact of this deduction being claimed on the possible claim of the assessee with respect to the carry forward of the tax credit, even if that be admissible, it may indeed appear that once the assessee is allowed a deduction for expenses, the claim of the assessee for carrying forward of the tax credit, whether permissible in the pre 1st April 2017 period or not, may cease to be inadmissible for the short reason of this deduction having been allowed alone. It could be so for the reason that there may be no double disadvantage in that case. However, we need not deal with that aspect of the matter at this stage.

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30. Let us now take up the judgment rendered by Hon'ble Karnataka High Court in Wipro's case *(supra).*

31. We may, at the outset, point out that the questions which came up for consideration before Hon'ble Karnataka High Court, was "**whether the Tribunal was right in holding that credit for income tax paid in a country outside India in relation to an income eligible for deduction under section 10A would not be available under section 90(1)(a)".** Their Lordships decided this issue in favour of the assessee and concluded that "**Merely because the exemption has been granted in respect of the taxability of the said source of income, it cannot be postulated that the assessee is not liable to tax. The said exemption granted under the statute has the effect of suspending the collection of income tax for a period of 10 years. It does not make the said income not leviable to income tax. The said exemption granted under the statute stands revoked after a period of 10 years. Therefore, the case falls under Section 90(1)(a)(ii)**". Whatever observations, relied upon by the learned counsel, have been made by Their Lordships are the observations made in this context, and, should, therefore, be construed as such only. As observed by Hon'ble Supreme Court in the case of **CIT Vs Sun Engineering Works (Pvt) Ltd [(1992) 198 ITR 297 (SC)],** "**It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a latter case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India [1971] 3 SCR 9 this Court cautioned. 'It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment'**." It would, therefore, be grossly incorrect to pick out some observations from this judicial precedent and treat the same as complete law declared by the Hon'ble High Court. We may also, at this stage, take note of Hon'ble jurisdictional High Court in the case of **CIT v. Sudhir Jayantilal Mulji [(1995) 214 ITR 154 (Bom)]** wherein it is observed that**,** a judicial precedent is only "**an authority for what it actually decides and not what may come to follow from some observations which find place therein**". In any case, we must always bear in mind the fundamental fact that at best the Wipro decision *(supra)* can be seen as an authority for full tax credit- something similar to Indian tax credits under the Indo Namibian tax treaty discussed in paragraph 21 earlier, rather than an ordinary tax credit, on account of peculiarities of section 10A exemption. A full tax credit will mean that irrespective of the actual residence jurisdiction tax liability in respect of an income taxed in the treaty partner jurisdiction, the residence jurisdiction will grant credit for the entire tax paid in the source jurisdiction, but even then, as is the global consensus, foreign tax credit cannot exceed the domestic tax liability- save and except for carry forward or carry back of the excess foreign tax credits. That proposition remains intact. A coordinate bench of this Tribunal, in the case of **Maharashtra State Electricity Board vs. JCIT [(2002) 82 ITD 422 (Mum**)], has, speaking through Shri M K Chaturvedi, the then Vice President, observed that "**Legal**

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precedents are like statistics. If you manipulate them, you can prove anything. Each case depends on its own facts, and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. Minutest differences on facts have swayed the judicial decisions one way or the other. In deciding such cases, one should avoid temptation as said by Cordozo, by matching the colour of one case against the colour of another". Let us, in this light, look at a very significant facet of the case, so far as relevant for our fact situation. As a simple look at the figures set out in the said decision would show, the amount of foreign tax credit claimed was substantially less than the Indian tax liability. For example, in the assessment year 2003-04, the returned income of the assessee was Rs 164.86 crores, and the foreign tax credit was Rs 20.99 crores. None of the situations dealt with in the said order was to result in a refund in India of the taxes paid abroad. For this short reason alone, the learned counsel must fail in his ambitious argument. Of course, there are many decisions that he has cited in which, while following the Wipro decision, this aspect of the matter has not been looked at, but then neither there is a categorical decision, in those judicial precedents, that when the foreign tax credits exceed domestic tax liability, the assessee will be entitled to refund in the residence jurisdiction, nor, just because these coordinate benches have not examined this aspect of the matter, we cannot examine this aspect either.

32. In view of the above discussions, in our humble understanding, under no circumstances, therefore, this decision can be seen as a judicial precedent in support of the proposition that the taxes paid outside India can be refunded in India in a situation in which the income has suffered tax abroad but has not been subjected to tax in India, which precisely is the issue before us. The inference that the situation envisaged in the Wipro decision can also result in a refund situation of the taxes paid abroad is neither dealt with by the said decision nor implicit from the conclusions arrived therein- and, in any case, contrary to the first principles. It is our considered view that the question as to whether a refund can be granted by the Indian tax administration as a result of foreign tax credits being in excess of the domestic tax liability, as is claimed to be settled in favour of the assessee by this decision, has not been the subject matter of consideration and has been thus left intact by this judicial precedent.

33. In any case, in the present case, there is a specific tax credit entitlement requirement of the UK sourced income being "subjected to tax in India," which was not the case before Their Lordship in the Wirpo's case *(supra)*.

34. Be that as it may, it is also essential to bear in mind the fact that the said judicial precedent from a non-jurisdictional High Court. It is necessary to deal with this aspect for two fundamental reasons. The first reason is that whether or not this decision applies to the present fact situation, there are certainly other aspects of decisions, which may be relevant and critical in different facets of foreign tax credit situations. Therefore, one has to take a conscious call about the binding nature of this judicial precedent outside of Hon'ble Karnataka High Court jurisdiction. The second reason is that this judicial precedent is widely perceived to hold, even though wrongly so, that the full tax credit is required to be given in most of the treaty situations based on the wording of the treaties, going much beyond the tax credit proportionate to the related domestic tax liability- as is, by and large, scheme of Indian tax treaties, and further, this treatment may even result in a refund of taxes paid abroad. The matter being of wide ramifications not only on fundamentals on the scheme of tax treaties

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being given effect in India but also has a huge impact on the national exchequer, the matter deserves to be dealt with in some detail. Let us, in this background, examine the binding nature of this judicial precedent outside Hon'ble Karnataka High Court's jurisdiction. While dealing with judicial precedents from non-jurisdictional High Courts, we may usefully take of observations of Hon'ble jurisdictional High Court in the case of **CIT Vs Thana Electricity Co Ltd [(1994) 206 ITR 727 (Bom)],** to the effect "**The decision of one High Court is neither binding precedent for another High Court nor for the courts or the Tribunals outside its own territorial jurisdiction. <u>It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction</u>. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect**". Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower authorities on account of the persuasive effect of these decisions and on account of the concept of judicial propriety- factors which are inherently subjective in nature. Quite clearly, therefore, the applicability of the non-jurisdictional High Court is never absolute, without exceptions and as a matter of course. That is the principle implicit in Hon'ble Supreme Court's judgment in the case of **ACIT Vs Saurashtra Kutch Stock Exchange Ltd [(2008) 305 ITR 227 (SC)]** wherein Their Lordships have upheld the plea that "**non-consideration of a decision of Jurisdictional Court or of the Supreme Court can be said to be a mistake apparent from the record**". The decisions of Hon'ble non-jurisdictional High Courts are thus placed at a level certainly below the Hon'ble High Court, and it's a conscious call that is required to be taken with respect to the question whether, on the facts of a particular situation, the non-jurisdictional High Court is required to be followed. The decisions of non-jurisdictional High Courts do not, therefore, constitute a binding judicial precedent in all situations. To a forum like us, following a jurisdictional High Court decision is a compulsion of law and absolutely sacrosanct that way, but following a non-jurisdictional High Court is a call of judicial propriety which is never absolute, as it is inherently required to be blended with many other important considerations within the framework of law, or something which cannot be, in deserving cases, deviated from. The rationale justifying the approach that non-jurisdictional High Courts are to be followed proceeds, *inter alia,* on the basis that, as held by Hon'ble Supreme Court in the case of **CIT Vs Vegetable Products Ltd (88 ITR 192),** when two interpretations are possible, and one of the views is in favour of the assessee, the view in favour of the assessee, and a decision of Hon'ble non-jurisdictional High Court is required to be treated at least as a possible view of the matter. This principle has, however, two major exceptions. It has been held that the rule of resolving ambiguities in favour of tax-payer does not apply to deductions, exemptions, and exceptions which are allowable only when plainly authorised. This exception, laid down in **Littman vs. Barron 1952(2) AIR 393** and followed by apex Court in **Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commr. of CT (1992) Suppl. (1) SCC 21** and **Novopan India Ltd. vs. CCE & C 1994 (73) ELT 769 (SC),** has been summed up in the words of Lord Lohen, "**in case of ambiguity, a taxing statute should be construed in favour of a tax-payer does not apply to a provision giving tax-payer relief in certain cases from a section clearly imposing liability**". The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of **State of M.P. vs. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd. AIR 1972 (SC) 614**. Once it is clear that this principle does not apply to a situation in which, to borrow the words of Lord Lohen, "a provision giving tax-payer relief in certain

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cases from a section clearly imposing liability", and it is also clear that we are dealing with the foreign tax credit, wherein relief is being given from unambiguous levy of tax, this principle of resolving ambiguity does not come into play at all. To this extent, the justification for following non-jurisdictional High Court judgments does not hold good as such, and one of the foundational propositions in support of following the non-jurisdictional High Courts ceases to hold good in law.

35. It is interesting to note that in the case of **Wipro Ltd** *(supra),* in paragraphs 58 to 63, Their Lordships have proceeded to interpret the provisions of India USA Double Taxation Avoidance Agreement [(1991) 187 ITR (Stat) 102; **Indo US tax treaty**, in short] and India Canada Double Taxation Avoidance Agreement [(1998) 229 ITR (Stat) 44; **Indo Canadian tax treaty**, in short] and it is on the observations so made in the course of this interpretation that the learned counsel seeks to rely upon. While so interpreting the provisions of the tax treaties, Their Lordships have simply proceeded without taking into account peculiarities of interpretation of tax treaties which have been highlighted, *inter alia*, by Hon'ble Supreme Court in the case of **Union of India Vs Azadi Bachao Andolan [(2004) 263 ITR 702 (SC) at page 751]** as follows:

A: **"Interpretation of treaties**

The principles adopted in interpretation of treaties are not the same as those in interpretation of statutory legislation. While commenting on the interpretation of a treaty imported into a municipal law, Francis Bennion observes:

"With indirect enactment, instead of the substantive legislation taking the well-known form of an Act of Parliament, it has the form of a treaty. In other words the form and language found suitable for embodying an inter-national agreement become, at the stroke of a pen, also the form and language of a municipal legislative instrument. It is rather like saying that, by Act of Parliament, a woman shall be a man. Inconveniences may ensue. One inconvenience is that the interpreter is likely to be required to cope with disorganized composition instead of precision drafting. The drafting of treaties is notoriously sloppy usually for very good reason. To get agreement, politic uncertainty is called for.

. . The interpretation of a treaty imported into municipal law by indirect enactment was described by Lord Wilberforce as being 'unconstrained by technical rules of English law, or by English legal precedent, but conducted on broad principles of general acceptation'. This echoes the optimistic dictum of Lord Widgery C. J. that the words 'are to be given their general meaning, general to lawyer and layman alike. . . the meaning of the diplomat rather than the lawyer'." (see Francis Bennion, Statutory Interpretation, page 461 (Butterworths, 1992, second edition)"

B: 91. In John N. Gladden v. Her Majesty the Queen 85 D.T.C. 5188 the principle of liberal interpretation of tax treaties was reiterated by the Federal Court, which observed :

"Contrary to an ordinary taxing statute a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties. A literal or legalistic interpretation must be avoided when the basic

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object of the treaty might be defeated or frustrated insofar as the particular item under consideration is concerned. (p. 5190)"

92. John N. Gladden case (supra) was a case where an American citizen resident in U.S.A. owned shares in two privately controlled Canadian companies. Upon his death, the question arose as to the capital gains which would arise as a result of the deemed disposition of the said shares. The Canadian Revenue took the position that there was a deemed disposition of the shares on the death of the tax payer and capital gains tax was chargeable on account of the deemed disposition. This view of the Revenue was upheld in appeal by the Tax Court of Canada. Upon further appeal to the Federal Court it was held that capital gains were exempt from tax under the Canada-U.S.A. Tax Treaty as Canada had no capital gains tax when it entered the treaty and it could not unilaterally amend its legislation. The argument which prevailed with the trial court in this case was similar to the one which prevailed with the High Court in the matter before us. Interpreting the relevant Article of the Double Taxation Avoidance Treaty the trial court held : "The parties could not have negotiated to avoid double taxation on a tax which did not exist in Canada". The Federal Court emphasised that in interpreting and applying treaties the Courts should be prepared to extend "a liberal and extended construction" to avoid an anomaly which a contrary construction would lead to. The Court recognized that "we cannot expect to find the same nicety or strict definition as in modern documents, such as deeds, or Acts of Parliament; it has never been the habit of those engaged in diplomacy to use legal accuracy but rather to adopt more liberal terms".

[Emphasis, by underlining, supplied by us]

36. Similarly, in the case of **Union of India Vs Ram Jethmalani [(2011) 12 taxman.com 27 (SC)],** Hon'ble Supreme Court has observed as follows:

60. Article 31, "General Rule of Interpretation", of the Vienna Convention of the Law of Treaties, 1969 provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also.

61. This Court in Union of India v. Azadi Bachao Andoian [2003] 132 Taxman 373 ,approvingly noted Frank Bennion's observations that a treaty is really an indirect enactment, instead of a substantive legislation, and that drafting of treaties is notoriously sloppy, whereby inconveniences obtain. In this regard this Court further noted the dictum of Lord Widgery, C.J. that the words "are to be given their general meaning, general to lawyer and layman alike.... The meaning of the diplomat rather than the lawyer." The broad principle of interpretation, with respect to treaties, and provisions therein, would be that ordinary meanings of words be given effect to, unless the context requires or otherwise. However, the fact that such treaties are drafted by diplomats, and not lawyers, leading to sloppiness in drafting also implies that care has to be taken to not render any word, phrase, or sentence redundant, especially where rendering of such word, phrase or sentence redundant would lead to a manifestly absurd situation, particularly from a constitutional perspective. .....

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37. In the Wipro decision *(supra)* there is neither whisper of a discussion about the variations of general principles of interpretation vis-à-vis the normal principles of statutory interpretation, nor these principles having been followed is evident from any part of the discussions. While the legal position as discussed above, in the light of Hon'ble Supreme Court's quoting, with approval, the Canadian Federal Court decision in the case of John N Gladden *(supra),* is that "**a literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated insofar as the particular item under consideration is concerned**", Their Lordships have simply gone by the plain words of the treaty. While dealing with the principles of interpretations of tax treaties, it may be added that, time and again, various judicial forums, right from Hon'ble Supreme Court to the coordinate benches of this Tribunal, have recognized peculiarities of these principles. Hon'ble Supreme Court has, in the cases of **Azadi Bachao Andolan** *(supra)* and **Ram Jethmalani** *(supra),* have referred to the principles set out in Vienna Conventions on Law of Treaties (VCLT) which, *inter alia*, refer to the interpretation of the tax treaties "**in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose".** Hon'ble Courts above, in a large number of reported judgments, including in Hon'ble Supreme Courts' landmark judgments in the cases of **Azadi Bachao Andolan** *(supra)* and **Formula One World Championship Ltd [(2017) 80 taxmann.com 47 (SC)],** referred to OECD Commentary in support of their reasoning. None of these aids to interpretation have been thus factored in the **Wipro decision *(supra).*** When the choice before us is between the views, even *obiters*, of Hon'ble Supreme Court, the binding force of which emanates from article 141 of the Constitution of India, and between the views of Hon'ble non-jurisdictional High Court, which, according to one of the binding judicial precedents from Hon'ble jurisdictional High Court, have no binding force of law outside the jurisdiction of respective Hon'ble High Court, we have no difficulty in taking that call. We would rather be guided by the *obiters* of the Hon'ble Supreme Court.

38. Viewed thus and following the path shown by Hon'ble Supreme Court, what is to be essentially seen is whether the interpretation being assigned by the learned counsel, i.e., seeking a refund of taxes paid in the UK from Indian tax authorities, could be said to be a correct meaning in the light of the context of the treaty terms and in the light of its object and purpose, or in the light of the principles based on which tax treaties are required to be interpreted. Unless that is so, the condition laid down under Article 31(1) of Vienna Convention, which has been quoted, with approval, by Hon'ble Supreme Court in the landmark judgments in the cases of **Azadi Bachao Andolan** *(supra)* and **Ram Jethmalani** *(supra),* as also the observations made by the Hon'ble Supreme Court with respect to principles of tax treaty interpretations will not be satisfied. It is also important to bear in mind the fact that these expressions being terms employed in the tax treaties, requiring interpretation in the context of the tax treaties, the principles of interpretations of these terms are not the same as the interpretation of statutes. While on this aspect of the matter, it may be useful to refer to the following observations made by a coordinate bench of this Tribunal in the case **JCIT Vs Merrill Lynch Capital Market Espana SA SV [(2019) 180 ITD 627 (Mum)]:**

> **42. As we deal with the principles of interpretation of tax treaties, it may also be appropriate to refer to some of the observations made by a coordinate bench, in the case of Hindalco Industries Ltd. v. Asstt. CIT [2005] 94 ITD 242 (Mum.) in the context of principles governing the interpretation of tax treaties. That was a**

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case in which the coordinate bench, after an elaborate analysis of the related judicial precedents from even outside India and the related first principles, inter alia, observed that "A tax treaty is to required to be interpreted as a whole, which essentially implies that the provisions of the treaty are required to be construed in harmony with each other", that "the words employed in the tax treaties …… need not be examined in precise grammatical sense or in literal sense" and "even departure from plain meaning of the language is permissible whenever context so requires, to avoid the absurdities and to interpret the treaty *ut res magis valeat quam pereat*. i.e., in such a manner as to make it workable rather than redundant". It was also observed that "A literal or legalistic meaning must be avoided when the basic object of the treaty might be defeated or frustrated when the basic object of the treaty might be defeated or frustrated insofar as particular items under consideration are concerned. Words are to be understood with reference to the subject-matter, i.e., *verba accipienda sunt secundum subjectam materiam*." Double Taxation Avoidance Agreements are international agreements entered into between States. The conclusion and interpretation of such conventions is governed by public international law, and particularly, by the Vienna Convention on the Law of Treaties of 23rd May, 1969. The rules of interpretation contained in the Vienna Convention, being customary international law, also apply to the interpretation of tax treaties. This view also finds mention in the Tribunal's order in the case of Modern Threads (I) Ltd. v. Dy. CIT [1999] 69 ITD 115 (Jp.)(TM). Although India is not a signatory to Vienna Convention on Law of Treaties (VCLT), our judicial forums, right upto Hon'ble Supreme Court, have consistently referred to, and relied upon, Vienna Convention on Law of Treaties (VCLT), e.g. in the case of Azadi Bachao Andolan (supra). Elaborating upon the principles governing interpretation of tax treaties, Lord Denning, in Bulmer Ltd. v. S.A. Bollinger [1972] 2 AER 1226, has observed that " ……. The treaty …. is quite unlike any of the enactments we have been accustomed… It lays down general principles. It expresses aims and purposes ….. what are English Courts to do when they are faced with a problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent…… " Echoing these views and justifying his departure from the plain meaning of the words used in the treaty, Goulding J. in IRC v. Exxon Corpn. [1982] STC 356 at page 359, observed that "In coming to the conclusion, I bear in mind that the words of the Convention are not those of a regular Parliamentary draughtsman but a text agreed on by negotiations between the two contracting Governments. Although I am thus constrained to do violence to the language of the Convention, I see no reasons to inflict a deeper wound than necessary. In other words, I prefer to depart from the plain meaning of language only in the second sentence of article XV and I accept the consequence (strange though it is) that similar words mean different things in the two sentences."

43. Article 31(1) of the Vienna Convention States that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose".

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39. As we have seen in a large number of foreign and Indian academic literature as also in the Model Convention Commentary, right from the views of Brian Arnold, Klaus Vogel, Michael Lang, Peter Harris and Roy Rohtagi, to the OECD Model Convention Commentary, there is a complete unanimity that foreign tax credits cannot exceed the domestic tax liability. Therefore, at the minimum, normal, even if not universal, meaning of the foreign tax credit., must be held to be in consonance of such an approach. The ordinary meanings given to the expression 'foreign tax credit' does not thus visualize the possibility of refund of taxes paid in the source jurisdiction by the residence jurisdiction. In view of this position, interpretation that results in the refund of taxes paid abroad by the Indian exchequer is something which cannot be said to be "**in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose"** and thus clearly contrary to article 31 of Vienna Convention of Law of Treaties. On the first principles and in the light of the words of guidance of Hon'ble Supreme Court as well, therefore, the claim of the assessee us is not tenable in law, and must be rejected as such.

40 The next claim is for the foreign tax credit of Rs 148.75 crores in respect of taxes paid by the assessee in Singapore, in respect of profits earned by its branch office in Singapore.

41. So far as India Singapore Double Taxation Avoidance Agreement [(1994) 209 ITR (Stat) 1; **Indo Singapore tax treaty**, in short] is concerned, the relevant treaty provision is as follows:

> **Article 25- Avoidance of Double Taxation**
>
> **2. Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in Singapore, <u>India shall allow as a deduction from the tax on the income of that resident an amount equal to the Singapore tax paid, whether directly or by deduction</u>. Where the income is a dividend paid by a company which is a resident of Singapore to a company which is a resident of India and which owns directly or indirectly not less than 25 per cent of the share capital of the company paying the dividend, the deduction shall take into account the Singapore tax paid in respect of the profits out of which the dividend is paid. <u>Such deduction in either case shall not, however, exceed that part of the tax (as computed before the deduction is given) which is attributable to the income which may be taxed in Singapore</u>.**

42. In addition to the discussions earlier in the context of foreign tax credit claim for taxes paid by the assessee in the UK, it is clear that in this case also the foreign tax credit is restricted to the Indian tax attributable to the income which has been taxed in Singapore. Learned counsel fairly agrees that so far as the year before us is concerned, no part of the said income has been taxed in India inasmuch the total income of the assessee was a negative figure. There is no question of any admissible foreign tax credit in this year. In any event, any such foreign tax credit, on the facts of this case, will result in a refund of taxes paid to Singapore exchequer by the Indian treasury- something clearly impermissible, in the light of the foregoing discussions. We, therefore, reject this claim as well.

43. The foreign tax credit claim of Rs 148.75 crores, paid in Singapore, is thus rejected.

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44. The next foreign tax credit claim is of Rs 134.29 crores paid by the assessee in respect of profits earned by its branches in the United States of America.

45. This issue is covered, by a decision of a coordinate bench of this Tribunal, in the case of **JCIT Vs Digital Equipment India Pvt Ltd [(2004) 94 ITD 340 (Mum)],** wherein speaking through one of us *(i.e., the Vice President)*, the bench had observed as follows:

> **4. We consider it useful to reproduce the text of Article 25(2)(*a*) of the Indo US DTAA which is as follows:**
>
> > **"Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in the United States, India shall allow a deduction from the income of that resident an amount equal to income tax paid in the Unites States, whether directly or by way of deduction. *Such deduction shall however not exceed that part of income tax (as computed before the deduction is given) which is attributable to the income which is taxed in the United States*." [*Emphasis supplied*]**
>
> **A plain reading of the above provision makes it clear that the deduction on account of income tax paid in the US, from income tax payable in India, cannot exceed Indian income tax liability in respect of such an income. This restriction on the deduction is unambiguous and beyond any controversy, as evident particularly from the last sentence in Article 25(2)(*a*) which is *underlined* as above the supply the emphasis on the same. As a matter of fact, we are unable to appreciate any basis whatsoever for the CIT(A)'s conclusion that the taxes paid in the US, in the instant case, are to be credited to the assessee's account and are to be refunded to the appellant, in case he has no income tax liability in respect of that income in India. As for the Commissioner (Appeals)'s observation, referring to payment of income-tax in the United States on an income and returning a loss in respect of that income in India, to the effect that "this is an absurd situation and was not visualized by the Treaty", it cannot but stem from his inability to take note of the fact that certain incomes (*e.g.,* royalties, fees for technical or included services, interest, dividends etc.), are taxed on gross basis in the source country but are only be taxed on net basis, as is the inherent scheme of income-tax legislation normally, in the country of which the assessee is resident. In such situations, it is quite possible that while an assessee pays tax in the source country which is on gross basis, he actually ends up incurring loss when all the admissible deductions, in respect of that earning, are taken into account. There is nothing absurd about it. The underlying philosophy of the source rule on gross basis, which prescribes taxation of certain incomes on gross basis in the source country, is that irrespective of actual overall profits and losses in earning those incomes, the assessee must pay a certain amount of tax, at a negotiated lower rate though, in the country in which the income in question is earned. It is also noteworthy that the heading of Article 25 is "Elimination of double taxation" but then there has to be double taxation of an income in the first place before the question of elimination of that double taxation can arise. In the case before us the assessee company has paid taxes, in respect of that earning, only in one country, *i.e.,* the United States, and claimed losses, on taking into account the admissible deductions therefrom, in the other country *i.e.,* India. This is surely not,**

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by any stretch of logic, a case of double taxation of an income. Article 25 does not, therefore, come into play at all. Turning to the Commissioner (Appeals)'s observation that "the Treaty nowhere stipulates that the credit for the taxes paid in the USA has to be given on proportionate basis", all we need to say is that the Indo US DTAA, as indeed other DTAAs as well, does stipulate that the foreign tax credit cannot exceed the income tax leviable in respect of that income in the country of which the assessee is resident. It is because of this limitation that the Assessing Officer declined the refund in respect of taxes paid by the assessee in the Untied States. In view of this limitation on the foreign tax credit, the innovative theory of crediting the entire tax paid in the US to the assessee and grant of refund to him in case there is no tax liability in India in respect of that income, as enunciated and adopted by the Commissioner (Appeals), is wholly unsustainable in law. Where is the question of refund of taxes paid abroad when FTD (*i.e.,* foreign tax credit), in view of specific provisions to that effect in the DTAAs, cannot even exceed the Indian income tax liability? It is not the tax payment abroad which is the material figure for the purpose of computing Indian income tax liability, but it is the admissible foreign tax credit in respect of the same which affects such an Indian income tax liability. The FTD in respect of income tax paid in the US cannot exceed the Indian income tax liability in respect of the income on which income tax is paid in US. Unless one entirely ignores this restriction on deduction, as unambiguously placed in the last sentence of Article 25(2)(*a*) itself, the interpretation approved by the CIT(A) is not even a possible view of the matter. We cannot, therefore, approve the same. We hold that the CIT(A) indeed erred in directing the Assessing Officer to grant the refund to the assessee by giving credit for the taxes paid in the USA. Accordingly, we vacate the order of the CIT(A) on this issue and uphold the stand taken by the Assessing Officer.

46. As for the learned counsel's plea that this decision is no longer good law in the light of Hon'ble Karnataka High Court's decision in Wipro's case *(supra),* all we can say is that the issue before Hon'ble Karnataka High Court was materially different, that the decision of a non-jurisdictional High Court is not binding in all the situations, and that, whether the related foreign tax credit can be given in this fact situation or not, no such credit, for the detailed reasons earlier, such credit, in this case, will result in a situation in which taxes paid to the US Exchequer will have to be refunded by the Indian Exchequer- something, for the detailed reasons set out earlier, clearly impermissible, and, of course, unintended, under the scheme of the tax treaties.

47. The foreign tax credit claim of Rs 134.29 crores, being taxes paid in the USA, is also thus rejected.

48. So far as foreign tax credit claim of Rs 115.31 crores, being taxes paid in respect of profits earned by the branch offices of the assessee in Japan, are concerned, the relevant tax treaty provisions in India Japan Double Taxation Avoidance Agreement [(1990) 182 ITR (Stat) 380- as amended up to the relevant point of time] are as follows:

Article 23- Elimination of Double Taxation

2. Double taxation shall be avoided in the case of India as follows:

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(a) Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in Japan, India shall allow as a deduction from the tax on the income of that resident an amount equal to the Japanese tax paid in Japan, whether directly or by deduction. Such deduction in either case shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable, as the case may be, to the income which may be taxed in Japan. Further, where such resident is a company by which surtax is payable in India, the deduction in respect of income-tax paid in Japan shall be allowed in the first instance from income-tax payable by the company in India and as to the balance, if any, from surtax payable by it in India.

(b) Where a resident of India derives income which, in accordance with the provisions of this Convention, shall be taxable only in Japan, India may include this income in the tax base but shall allow as a deduction from the income-tax that part of the income-tax which is attributable, as the case may be, to the income derived from Japan.

49. In addition to the discussions earlier in the context of foreign tax credit claim for taxes paid by the assessee in the UK, it is clear that in this case also the foreign tax credit is restricted to the Indian tax attributable to the income which has been taxed in Japan. Learned counsel fairly agrees that so far as the year before us is concerned, no part of the said income has been taxed in India inasmuch the total income of the assessee was a negative figure. There is no question of any admissible foreign tax credit in this year. In any event, any such foreign tax credit, on the facts of this case, will result in a refund of taxes paid to the Japanese exchequer by the Indian exchequer- something clearly impermissible, in the light of the foregoing discussions. We, therefore, reject this claim as well.

50. The foreign tax credit claim of Rs 115.31 crores, paid in Japan, is thus also rejected.

51. The next foreign tax credit claim is for the tax of Rs 29.27 crores paid in respect of profits earned by the Belgian branch of the assessee bank.

52. So far as this claim of the assessee is concerned, we find that the related tax treaty provision under the India Belgium Double Taxation Avoidance Agreement [(1997) 228 ITR (Stat) 79; **Indo Belgian tax treaty,** in short] is as follows:

ARTICLE 23- ELIMINATION OF DOUBLE TAXATION

1. The laws in force in either of the Contracting States will continue to govern the assessment and taxation of income in the respective Contracting States except where express provision to the contrary is made in this Agreement.

2. In the case of India, double taxation shall be avoided as follows:—

(a) Where a resident of India derives income which, in accordance with the provisions of the Agreement, may be taxed in Belgium, India shall allow as a

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deduction from the tax on the income of that resident an amount equal to the income-tax paid in Belgium whether directly or by deduction. Such deduction shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in Belgium. Further, where such resident is a company by which surtax is payable in India, the deduction in respect of income-tax paid in Belgium shall be allowed in the first instance from income-tax payable by the company in India and as to the balance, if any, from surtax payable by it in India.

(b) Where a resident of India derives income which, in accordance with the provisions of the Agreement, shall be taxable only in Belgium, India may include this income in the tax base but shall allow as a deduction from the income-tax that part of the income-tax which is attributable to the income derived from Belgium.

53. Once again, in addition to the discussions earlier in the context of foreign tax credit claim for taxes paid by the assessee in the UK, it is clear that in this case also the foreign tax credit is restricted to the Indian tax attributable to the income which has been taxed in Belgium. Learned counsel fairly agrees that so far as the year before us is concerned, no part of the said income has been taxed in India inasmuch the total income of the assessee was a negative figure. There is no question of any admissible foreign tax credit in this year. In any event, any such foreign tax credit, on the facts of this case, will result in a refund of taxes paid to Belgium exchequer by the Indian exchequer- something clearly impermissible, in the light of the foregoing discussions. We, therefore, reject this claim as well.

54. The foreign tax credit claim of Rs 29.27 crores, paid in Belgium, is thus rejected.

55. The next foreign tax credit claim is for the tax of Rs 27.25 crores paid in respect of profits earned by the Kenyan branch of the assessee bank.

56. So far as this claim of the assessee is concerned, we find that the related tax treaty provision under the India Kenya Double Taxation Avoidance Agreement [(1986) 157 ITR (Stat) 8; **Indo Kenyan tax treaty**, in short] is as follows:

ARTICLE 24- METHODS FOR ELIMINATION OF DOUBLE TAXATION

1. The laws in force in either of the Contracting States will continue to govern the taxation of income in the respective Contracting States except where provisions to the contrary are made in this Agreement.

2. Double taxation shall be eliminated in India as follows:

(a) Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in Kenya, India shall allow as a deduction from the tax on the income of that resident, an amount equal to the tax paid in Kenya. Such deduction shall not, however, exceed that portion of the tax as computed before the deduction is given, which is attributable, as the case may be, to the income which may be taxed in Kenya.

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(b) Where in accordance with any provision of the Agreement income derived by a resident of India is exempt from tax in India, India may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

57. Once again, in addition to the discussions earlier in the context of foreign tax credit claim for taxes paid by the assessee in UK, it is clear that in this case also the foreign tax credit is restricted to the Indian tax attributable to the income which has been taxed in Kenya. Learned counsel fairly agrees that so far as the year before us is concerned, no part of the said income has been taxed in India inasmuch the total income of the assessee was a negative figure. There is no question of any admissible foreign tax credit in this year. In any event, any such foreign tax credit, on the facts of this case, will result in a refund of taxes paid to the Kenyan exchequer by the Indian exchequer- something clearly impermissible, in the light of the foregoing discussions. We, therefore, reject this claim as well.

58. The foreign tax credit claim of Rs 27.25 crores, paid in Kenya is thus rejected.

59. The next foreign tax credit claim is for the tax of Rs 11.38 crores paid in respect of profits earned by the Chinese branch of the assessee bank.

60. So far as this claim of the assessee is concerned, we find that the related tax treaty provision under the India China Double Taxation Avoidance Agreement [(1995) 214 ITR (Stat) 160; **Indo China tax treaty**, in short], as it stood at the relevant point of time, was as follows:

ARTICLE 23- METHOD OF ELIMINATION OF DOUBLE TAXATION

2. In India, double taxation shall be eliminated as follows:

Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in China, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in China whether directly or by deduction. Such deduction shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable, as the case may be, to the income which may be taxed in China.

61. Once again, in addition to the discussions earlier in the context of foreign tax credit claim for taxes paid by the assessee in UK, it is clear that in this case also the foreign tax credit is restricted to the Indian tax attributable to the income which has been taxed in China. Learned counsel fairly agrees that so far as the year before us is concerned, no part of the said income has been taxed in India inasmuch the total income of the assessee was a negative figure. There is no question of any admissible foreign tax credit in this year. In any event, any such foreign tax credit, on the facts of this case, will result in a refund of taxes paid to China exchequer by the Indian exchequer- something clearly impermissible, in the light of the foregoing discussions. We, therefore, reject this claim as well.

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62. The foreign tax credit claim of Rs 11.38 crores, paid in China, is thus rejected.

63. The next foreign tax credit claim is for the tax of Rs 4.07 crores paid in respect of profits earned by the French branch of the assessee bank.

64. So far as this claim of the assessee is concerned, we find that the related tax treaty provision under the India France Double Taxation Avoidance Agreement [(1994) 209 ITR (Stat) 130; **Indo French tax treaty**, in short], is as follows:

> **ARTICLE 25- ELIMINATION OF DOUBLE TAXATION**
>
> **1. Double taxation shall be avoided in the following manner:**
>
> **In the case of India:**
>
> **(a) Where a resident of India derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in France, <u>India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in France, whether directly or by deduction; and as a deduction from the tax on the capital of that resident an amount equal to the capital tax paid in France</u>. <u>Such deduction in either case shall not, however, exceed that part of the income-tax or capital tax (as computed before the deduction is given) which is attributable, as the case may be, to the income or the capital which may be taxed in France.</u> Further, where such resident is a company by which surtax is payable in India, the deduction in respect of income-tax paid in France shall be allowed in the first instance from income-tax payable by the company in India and as to the balance, if any, from surtax payable by it in India.**
>
> **(b) Where a resident of India derives income which, in accordance with the provisions of this Convention, shall be taxable only in France, India may include this income in the tax base but shall allow as a deduction from the income-tax that part of the income-tax which is attributable to the income derived from France.**

65. Once again, in addition to the discussions earlier in the context of foreign tax credit claim for taxes paid by the assessee in the UK, it is clear that in this case also the foreign tax credit is restricted to the Indian tax attributable to the income which has been taxed in France. Learned counsel fairly agrees that so far as the year before us is concerned, no part of the said income has been taxed in India inasmuch the total income of the assessee was a negative figure. There is no question of any admissible foreign tax credit in this year. In any event, any such foreign tax credit, on the facts of this case, will result in a refund of taxes paid to the French exchequer by the Indian exchequer- something clearly impermissible, in the light of the foregoing discussions. We, therefore, reject this claim as well.

66. The foreign tax credit claim of Rs 4.07 crores, paid in France, is thus rejected.

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67. To sum up, all the foreign tax credit claims, in respect of the taxes paid abroad in treaty partner jurisdictions, are thus rejected inasmuch refund of these taxes by the Indian tax administration is declined.

68. Let us now turn to the assessee's claim for the foreign tax credit in respect of the taxes paid abroad in non-tax treaty partner jurisdictions.

69. As far as non-tax treaty partner jurisdictions are concerned, the foreign tax credits are granted unilaterally under section 91(1) of the Income Tax Act, 1961, which specifically provides that "**If any person who is resident in India in any previous year proves that**, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), **he has paid in any country with which there is no agreement under section 90 for the relief or avoidance of double taxation, income-tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian income-tax payable by him of a sum calculated on <u>such doubly taxed income</u>** *(emphasis supplied)* **at the Indian rate of tax or the rate of tax of the said country, whichever is the lower**, or at the Indian rate of tax if both the rates are equal". A plain reading of this statutory provision shows that double taxation of an income is a condition precedent for this relief because the relief is granted only with respect to "such doubly taxed income", and when there is no income which has been taxed doubly, there is no question relief being granted under section 91(1). Learned counsel's reliance on the judgment of Hon'ble Karnataka High Court, in the case of Wipro *(supra),* is of no avail inasmuch as all that this decision holds is that "**even though India has not entered into any agreement with the State of a Country and if the assessee has paid income tax to that State, the income tax paid in relation to that State is also eligible for being given credit to the assessee in India**" but then the issue is not the admissibility of foreign tax credit but the quantum of the tax credit. No doubt foreign tax credit is admissible in principle, but the quantum of this credit, in the present case, is nil inasmuch as there is no doubly taxed income and there is no income tax liability in India. It would thus appear that, on the first principles, under the domestic law provisions, there cannot be a situation in which foreign tax credits granted to a resident assessee can lead to a situation in which the Indian tax authorities have to refund the taxes paid by the assessee outside India, which is included in its global income- whether such global income is actually a figure of positive income or not.

70. Elaborating upon the scheme of foreign tax credits under section 91, Hon'ble Andhra Pradesh High Court, in the case of **M A Morris** *(supra),* has observed as follows:

> **To appreciate the contention of learned counsel for the assessee it is relevant to have a look at sub-section (1) of section 91 of the Act, which reads as follows :**
>
> **"91. (1) If any person who is resident in India in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any country with which there is no agreement under section 90 for the relief or avoidance of double taxation, income-tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed**

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income at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal."

From a perusal of the above section, it is clear that for avoidance of double taxation relief is provided to any person, who is a resident in India in any previous year, in respect of his income which accrued or arose during the previous year outside India and if he has paid the tax under the law in force in that country, a deduction of a sum calculated on such doubly taxed income has to be made from the Indian income-tax payable by that person. The tax has to be calculated at the Indian rate of tax or if the rate of tax in that country is lower than the Indian income-tax at the rate applicable in the foreign country and if both are equal at the Indian rate of tax. The relief granted in India is by way of reduction of tax by deducting the tax paid in the foreign country on doubly taxed income from out of the amount of income-tax payable by him in India. The Indian tax is reduced by the amount of tax paid by the assessee in the foreign country on such doubly taxed income. In a given case, the foreign income that has gone into computation may be much more than the income which actually suffered double taxation. The intention of the Legislature is not to exempt from tax the whole foreign income which hasgone into computation ; not also that the whole of the tax paid by an assessee in a foreign country be deducted from out of income-tax payable by him in India. Unilateral relief is granted to a person resident in India in respect of his income which accrued or arose outside India in countries with which no agreement for double taxation exists under section 90 of the Act to the extent his foreign income suffers double taxation in India.

The relief granted by section 91 of the Act is different from and independent of relief by way of the reduction of income by operation of section 80RRA of the Act. For granting relief under section 91 of the Act, the test is what is the income of the assessee which is being doubly taxed. Relief is available only in respect of such income which is doubly taxed by allowing deduction of tax on that income at the Indian rate unless rate of tax in the foreign country is less in which case at the rate applicable in that country.

In K.V.Al.M. Ramanathan Chettiar v. CIT [1973] 88 ITR 169 (SC), his Lordship Justice Jaganmohan Reddy, speaking for the majority, observed as follows (at page 191) :

"...the relief to which an assessee would be entitled would be the amount of tax paid on the foreign income which by its inclusion in the total income once again bears tax under the Act."

It is this observation which is relied on by Sri Ravi S. in support of his contention that the relief should be granted on the amount of income which has gone into computation of the total income. We are unable to accede to his contention. The observations of the Supreme Court have to be understood in the context in which they are used. Their true import will be lost or distorted if they are taken in isolation and out of context. That observation is elucidated in the passage that follows it which reads thus (at page 191) :

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"The word 'such' in the phrase 'such doubly taxed income' has reference to the foreign income which is again being subjected to tax by its inclusion in the computation of the income under the Act and not the same income under an identical head of income under the Act."

Thus, it is clear that the relief under section 91 of the Act is limited only to the amount of tax paid on such doubly taxed income at the Indian rate of tax or the rate of tax of the foreign country, whichever is the lower, or at the Indian rate of tax, if both the rates are equal.

A Division Bench of this court in CIT v. C.S. Murthy [1988] 169 ITR 686 understood the judgment of the Supreme Court in RamanathanChettiar's case [1973] 88 ITR 169 in the same way as we did. That was also a case of an assessee resident in India who was having foreign income in respect of which double taxation relief was claimed. The Division Bench held that by merely including the foreign income in the total income it could not be said that the whole foreign income was subjected to tax in India. It laid down the criteria that not only the foreign income must be included in the total income in the assessment made under the Income-tax Act in India, but it should also be subjected to tax in India. For claiming relief under section 91 of the Act, these two conditions must be satisfied. Respectfully we agree with this test.

For the above reasons, we answer the question in the negative, that is, in favour of the Revenue and against the assessee.

71. On a similar note, Hon'ble Rajasthan High Court, in the case of Dr R N Jhanji *(supra)*, has observed as follows:

8. We shall first refer to the Supreme Court decision in K.V. AL. M. Ramanathan Chettiar's case (supra) which is the sheet anchor of the argument of the learned counsel for the assessee. This decision was rendered in relation to section 49D of the Indian Income-tax Act, 1922 ('the 1922 Act') corresponding to section 91(1) of the Income-tax Act, 1961. It may be mentioned at the outset that there was no provision corresponding to section 80RRA of the 1961 Act in the 1922 Act, taut section 49D was amended by the Indian Income-tax (Amendment) Act, 1953 and it is with reference to the provisions of section 49D as in existence prior to and after the amendment that the case was decided. Prior to the 1953 amendment, section 49D provided for double taxation relief by giving a deduction from the Indian income-tax payable of a sum equal to one-half of such Indian income-tax or to one-half of such tax payable in foreign country, whichever was less, 'in respect of the same income'. After the amendment the relief given was of deduction from the Indian income-tax payable of a sum calculated on 'such doubly taxed income' at the Indian rate of tax or the rate of tax of the foreign country, whichever was lower. Question arose about the meaning of 'in respect of the same income' in section 49D prior to the amendment and 'such doubly taxed income' after the amendment. The Supreme Court held that prior to the amendment the benefit given was of deduction of

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only one-half of the amount of tax, whereas after the amendment the benefit given was of deduction of the entire amount of tax paid on the foreign income which was taxed also in India. The object of the amendment in section 49D was to encourage Indian residents to start business in foreign country and to give full relief at the Indian rate of tax or the rate of tax of the foreign country, whichever was lower. Under the 1922 Act no such deduction was given as is provided in section 80RRA of the 1961 Act in computing the 'total income', and, therefore, the total foreign income was taxed in India also. This Supreme Court decision does not support the assessee's contention in the present case.

9. The consequence of the construction we have made of section 91(1) is that the entire foreign income which is actually taxed in India being included in computing the 'total income' is only 50 per cent of the total foreign income by virtue of the deduction given under section 80RRA. This entire amount which alone is taxed is in effect doubly taxed and, therefore, relief from double taxation under section 91(1) can be given only by allowing deduction of the amount of tax paid once again in India on half of the total foreign income. The principle enunciated in the above Supreme Court decision supports this construction.

10. We find that the Andhra Pradesh High Court in CIT v. C.S. Murthy [1988] 169 ITR 686 has taken the same view and construed the Supreme Court decision in K.V.AL.M. Ramanathan Chettiar's case (supra) similarly. The conclusion reached by the Andhra Pradesh High Court is as under :

"... The relief by way of deduction of tax under section 91 of the Act should be confined to the amount doubly taxed in accordance with the provisions of the Act and not to the full amount received by the assessee from the foreign employer. It is reasonable to assume that in enacting section 80RRA, the Legislature intended to grant relief under section 91 with reference to the amount of foreign income doubly taxed in accordance with the provisions of the Act and not with reference to the full amount which did not bear tax in this country. . . .The Legislature only intended to prevent double taxation but not to provide an additional benefit in respect of foreign income which is not subjected to tax in this country, . .

We are unable to agree that the majority judgment of the Supreme Court in Ramanathan Chettiar's case [1973] 88 ITR 169, supports the assessee's claim for deduction of tax treating the entire income as doubly taxed income ignoring the fact that one-half of such income was not subjected to tax at all in this country." (p. 694)
With respect we concur with this view. No other decision on the point was cited at the bar.

11. As a result of the above discussion, we hold that the Tribunal was not justified in holding that the assessee is entitled to relief under section 91(1) of the full amount of tax paid on the total foreign income in the foreign country ; and that the assessee is entitled to the relief under section 91(1) only of the amount of tax paid on 50 per cent of the total foreign income. The reference is answered accordingly. No costs.

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72. In view of the above discussions, and as no part of the income earned abroad had actually suffered tax in India, relief under section 91 is not admissible in respect of the same. We, therefore, reject the foreign tax credit claim of Rs 15,79,80,943 in respect of taxes paid in non-tax treaty partner jurisdictions as well.

73. As regards dividend taxes of Rs 87,54,656 paid abroad, the assessee has not addressed any specific arguments in respect of the same, and it, therefore, appears that the assessee has not proceeded on the basis that if the assessee is to be allowed any foreign tax credits in respect of the taxes paid abroad in respect of the profits of its PEs, the same fate must follow for the taxes paid abroad on the dividend. For the detailed reasons set out above, we have rejected these claims. In this view of the matter, and in the absence of any other specific arguments, this claim of the assessee is also dismissed as devoid of legal merits.

Our conclusions on the first issue

74. In view of the above discussions, as also bearing in mind, we answer the first question that we had identified for our adjudication, i.e., whether or not the assessee is eligible for foreign tax credits of Rs 165,96,87,349 for taxes paid in treaty partner jurisdictions, of Rs 15,79,80,943 in non-treaty partner jurisdictions, and of Rs 87,54,656 in respect of foreign dividends, we answer the same in negative, and against the taxpayer. These claims for the foreign tax credits are thus dismissed.

Claim for deduction in respect of taxes paid abroad

75. That brings us to our next question, and that is whether or not the assessee is eligible for a deduction of Rs 182,64,22,948 being taxes paid abroad on its income in the respective tax jurisdiction in respect of which the assessee has not been granted any tax credit.

76. We find that this issue is squarely covered, in favour of the assessee, by a judgment of Hon'ble jurisdictional High Court, in the case of **Reliance Infrastructure Limited Vs CIT [(2016) 390 ITR 271 (Bom)],** wherein Their Lordships have, *inter alia*, observed as follows:

> **(i) We have considered the rival submissions. So far as the question relating to the Tribunal not following its order in the case of the applicant itself for A.Y. 1979-80, we find that there is a justification for the same. This is so as the decision of this Court in S. Inder Singh Gill (supra) was noted by the Tribunal on an identical issue while passing the order for the subject assessment year. Thus, the Tribunal had not erred in not following its order for A.Y. 1979-80. In fact, the decisions of this Court in South East Asia Shipping Co. (supra) and Tata Sons Ltd. (supra), which are being relied upon in preference to Inder Singh Gill (supra) cannot be accepted as both the orders being relied upon by the applicant was rendered not at the final hearing but on applications under Section 256(2) of the Act and at the stage of admission under Section 260A of the**

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Act. This unlike the judgment rendered in a Reference by this Court in S. Inder Singh Gill (supra). Moreover, the decision in South East Asia Shipping Co. (supra) is not available in its entirety. Therefore, it would not be safe to rely upon it as all facts and on what consideration of law, it was rendered is not known. Similarly, the decision of this Court in Tata Sons (supra) being Income Tax Appeal No.209 of 2001 produced before us, dismissed the appeal of the Revenue by order dated 2nd April, 2004 by merely following its order dated 23rd March, 1993 rejecting the Revenue's application for Reference under Section 256(2) of the Act. Thus, it also cannot be relied upon to decide the controversy. Moreover, the order of this Court in Tata Sons Ltd. (supra) as produced before us for Assessment Year 1985-86 had not noticed the decision of this Court in S. Inder Singh Gill (supra) on a Reference. Therefore, it is rendered per incuriam.

(j) This Court in S. Inder Singh Gill (supra) was required to answer the question whether for the purpose of computing total world income of the assessee as defined in Section 2(15) of the I. T. Act, the income accruing in Uganda has to be reduced by the tax paid to the Uganda Government in respect of such income? The Court while answering the question in the negative observed that it is not aware of any commercial principle/practice which lays down that the tax paid by one on one's income is allowed as a deduction in determining the income for the purposes of taxation.

(k) It is axiomatic that income tax is a charge on the profits/ income. The payment of income tax is not a payment made/incurred to earn profits and gains of business. Therefore, it cannot be allowed an as expenditure to determine the profits of the business. Taxes such as Excise Duty, Customs Duty, Octroi etc., are incurred for the purpose of doing business and earning profits and/or gains from business or profession. Therefore, such expenditure is allowable as a deduction to determine the profits of the business. It is only after deducting all expenses incurred for the purpose of business from the total receipts that profits and/or gains of business/ profession are determined. It is this determined profits or gains of business/profession which are subject to tax as income tax under the Act. The main part of Section 40(a)(ii) of the Act does not allow deduction in computing the income i.e. profits and gains of business chargeable to tax to the extent, the tax is levied/ paid on the profits/ gains of business. Therefore, it was on the aforesaid general principle, universally accepted, that this Court answered the question posed to it in S. Inder Singh Gill (supra) in favour of the Revenue.

(l) We would have answered the question posed for our consideration by following the decision of this Court in S. Inder Singh Gill (supra). However, we notice that the decision of this Court in S. Inder Singh Gill (supra) was rendered under the Indian Income Tax Act, 1922 and not under the Act. We further note that just as Section 40(a)(ii) of the Act does not allow deduction on tax paid on profit and/or gain of business. The Indian Income Tax Act, 1922 Act also contains a similar provision in Section 10(4) thereof. However, the Indian Income Tax Act, 1922 contains no definition of "tax" as provided in Section

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2(43) of the Act. Consequently, the tax paid on income/profits and gains of business/profession anywhere in the world would not be allowed as deduction for determining the profits/gains of the business under Section 10(4) of the Indian Income Tax Act, 1922. Therefore, on the state of the statutory provisions as found in the Indian Income Tax Act, 1922 the decision of this Court in S. Inder Singh Gill (supra) would be unexceptionable. However, the ratio of the aforesaid decision in S. Inder Singh Gill (supra) cannot be applied to the present facts in view of the fact that the Act defines "tax" as income tax chargeable under the provisions of this Act. Thus, by definition, the tax which is payable under the Act alone on the profits and gains of business are not allowed to be deducted notwithstanding Sections 30 to 38 of the Act.

(m) It therefore, follows that the tax which has been paid abroad would not be covered with in the meaning of Section 40(a) (ii) of the Act in view of the definition of the word 'tax' in Section 2(43) of the Act. To be covered by Section 40(a)(ii) of the Act, it has to be payable under the Act. We are conscious of the fact that Section 2 of the Act, while defining the various terms used in the Act, qualifies it by preceding the definition with the word "In this Act, unless the context otherwise requires" the meaning of the word 'tax' as found in Section 2(43) of the Act would apply wherever it occurs in the Act. It is not even urged by the Revenue that the context of Section 40(a)(ii) of the Act would require it to mean tax paid anywhere in the world and not only tax payable/ paid under the Act.

(n) However, to the extent tax is paid abroad, the Explanation to Section 40(a)(ii) of the Act provides/clarifies that whenever an Assessee is otherwise entitled to the benefit of double income tax relief under Sections 90 or 91 of the Act, then the tax paid abroad would be governed by Section 40(a)(ii) of the Act. The occasion to insert the Explanation to Section 40(a)(ii) of the Act arose as Assessee was claiming to be entitled to obtain necessary credit to the extent of the tax paid abroad under Sections 90 or 91 of the Act and also claim the benefit of tax paid abroad as expenditure on account of not being covered by Section 40(a)(ii) of the Act. This is evident from the Explanatory notes to the Finance Act, 2006 as recorded in Circular No.14 of 2006 dated 28th December, 2006 issued by the CBDT. The above circular inter alia, records the fact that some of the assessee who are eligible for credit against the tax payable in India on the global income to the extent the tax has been paid outside India under Sections 90 or 91 of the Act, were also claiming deduction of the tax paid abroad as it was not tax under the Act. In view of the above, Explanation inserted in 2006 to Section 40(a)(ii) of the Act, would require in the context thereof that the definition of the word "tax" under the Act to mean also the tax which is eligible to the benefit of Sections 90 and 91 of the Act. However, this departure from the meaning of the word "tax" as defined in the Act is only restricted to the above and gives no license to widen the meaning of the word "tax" as defined in the Act to include all taxes on income/profits paid abroad.

(o) Therefore, on the Explanation being inserted in Section 40(a)(ii) of the Act, the tax paid in Saudi Arabia on income which has accrued and/or arisen in

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India is not eligible to deduction under Section 91 of the Act. Therefore, not hit by Section 40(a)(ii) of the Act. Section 91 of the Act, itself excludes income which is deemed to accrue or arise in India. Thus, the benefit of the Explanation would now be available and on application of real income theory, the quantum of tax paid in Saudi Arabia, attributable to income arising or accruing in India would be reduced for the purposes of computing the income on which tax is payable in India.

(p) It is not disputed before us that some part of the income on which the tax has been paid abroad is on the income accrued or arisen in India. Therefore, to the extent, the tax is paid abroad on income which has accrued and/or arisen in India, the benefit of Section 91 of the Act is not available. In such a case, an Assessee such as the applicant assessee is entitled to a deduction under Section 40(a)(ii) of the Act. This is so as it is a tax which has been paid abroad for the purpose of arriving global income on which the tax payable in India. Therefore, to the extent the payment of tax in Saudi Arabia on income which has arisen/accrued in India has to be considered in the nature of expenditure incurred or arisen to earn income and not hit by the provisions of Section 40(a)(ii) of the Act.

(q) The Explanation to Section 40(a)(ii) of the Act was inserted into the Act by Finance Act, 2006. However, the use of the words "for removal of dobuts" it is hereby declared "...." in the Explanation inserted in Section 40(a)(ii) of the Act, makes it clear that it is declaratory in nature and would have retrospective effect. This is not even disputed by the Revenue before us as the issue of the nature of such declaratory statutes stands considered by the decision of the Supreme Court in CIT v. Vatika Township (P) Ltd. [2014] 367 ITR 466/227 Taxman 121/49 taxmann.com 249 and CIT v. Gold Coin Health Foods (P.) Ltd. [2008] 304 ITR 308/172 Taxman 386 (SC).

(r) In the above facts and circumstances, question (iii)(a) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee. Question (iii)(b) is answered in the negative i.e. against the Revenue and in favour of the applicant assessee.

77. Learned Departmental Representative, however, invites our attention to a decision of Ahmedabad bench of this Tribunal, in the case of **DCIT Vs Elitecore Technologies Pvt Ltd [(2017) 80 taxmann.com 6 (Ahd)]**, wherein even after taking note of Hon'ble Bombay High Court's judgment in the case of Reliance Infrastructure *(supra),* the coordinate bench rejected the similar claim. Learned Departmental Representative also invites our attention to certain points in Hon'ble Bombay High Court decision and submits that this decision is based on certain concessions during the course of arguments which learned Departmental Representative is specifically declining now. He thus urges us to follow the Elitecore decision *(supra)*, and, in particular, he invites our attention to the following observations therein:

43. In the light of the above observations in judicial precedents relied upon by the learned counsel for the assessee, and in the light of extracts from the impugned orders, the core issue, in our considered view, is whether or not the

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meaning of expression 'tax' appearing in section 40(a)(ii) must remain confined to a tax levied under the Indian Income-tax Act, 1961. As a matter of fact, Hon'ble Bombay High Court, in the case of Reliance Infrastructure Ltd. (supra), Their Lordships have gone to the extent of saying that but for definition of tax under section 2(43) "We (Their Lordships) would have answered the question posed for our consideration by following the decision of this Court in Inder Singh Gill (supra)" which was rendered in the context of the Income-tax Act, 1922, and added that "the ratio of the aforesaid decision in Inder Singh Gill (supra) cannot be applied to the present facts in view of the fact that the Act (Income-tax Act, 1961) defines "tax" as income tax chargeable under the provisions of this Act" In our humble and sincere understanding, given these facts, it is not really possible for us to ignore the question as to what is the impact of Section 2(43) on connotations of expression 'tax' appearing in section 40(a)(ii), and when we address this question, we cannot be oblivious of the following guidance from Hon'ble Courts above:

> **(i) Hon'ble Bombay High Court in Lubrizol India Ltd. case (supra)**
>
> **With respect, this argument [i.e. the definition of 'tax' under section 2(433) must hold the field] does not appeal to us. It is significant to note that the word "tax" is used in conjunction with the words "any rate or tax", The word "any" goes both with the rate and tax. The expression is further qualified as a 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. If the word "tax" is to be given the meaning assigned to it by s. 2(43) of the Act, the word "any" used before it will be otiose and the further qualification as to the nature of levy will also become meaningless. Furthermore, the word "tax" as defined in s. 2(43) of the Act is subject to "unless the context otherwise requires". In view of the discussion above, we hold that the words "any tax" herein refers to any kind of tax levied or leviable 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. [Emphasis supplied]**
>
> **(ii) Hon'ble Supreme Court in Smithkline & French India Ltd. case (supra) specifically approving the Lubrizol judgment**
>
> **. . . . . . Firstly, it may be mentioned, s. 10(4) of the 1922 Act or s. 40(a)(ii) of the present Act do not contain any words indicating that the profits and gains spoken of by them should be determined in accordance with the provisions of the IT Act. All they say is that it must be a rate or tax levied on the profits and gains of business or profession. The observations relied upon must be read in the said context and not literally or as the provisions in a statute. But so far as the issue herein is concerned, even this literal reading of the said observations does not help the assessee. As we have pointed out hereinabove the surtax is essentially levied on the business profits of the company computed in accordance with the provisions of the IT Act. Merely because certain further deductions**

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> **[adjustments] are provided by the Surtax Act from the said profits, it cannot be said that the surtax is not levied upon the profits determined or computed in accordance with the provisions of the IT Act. Sec. 4 of the Surtax Act read with the definition of "chargeable profits" and the First Schedule make the position abundantly clear.**
>
> **We agree with the view taken by the High Courts of Calcutta [Molins (India) Ltd. v. CIT [1983] 144 ITR 317 (Cal) and Brooke Bond (India) Ltd. v. CIT [1992] 193 ITR 390 (Cal) : TC 15R.590], Bombay (in) Lubrizol (India) Ltd. v. CIT [1991] 187 ITR 25 (Bom) followed in several other decisions of that Court], Karnataka [CIT v. International Instruments Pvt. Ltd. [1983] 144 ITR 936 (Kar), Madras [Sundaram Industries Ltd. v. CIT [1986] 159 ITR 646 (Mad), Andhra Pradesh [Vazir Sultan Tobacco Co. Ltd. v. CIT [1988] 169 ITR 35 (AP)], Rajasthan [Associated Stone Industries Co. Ltd. v. CIT [1988] 170 ITR 653 (Raj)], Gujarat [S.L.M. Maneklal Industries Ltd. v. CIT [1988] 172 ITR 176 (Guj) followed in several cases thereafter], Allahabad [Himalayan Drug Co. Pvt. Ltd. v. CIT [1996] 218 ITR 346 (All)] and Punjab & Haryana High Court [Highway Cycle Industries Ltd. v. CIT [1989] 178 ITR 601 (P&H) : TC 17R.807].**

44. We are therefore of the considered view that the plea of the assessee does not merit legal acceptance. No doubt it is a close call but within our limitation of knowledge and wisdom, we sincerely believe that the plea of the assessee must be rejected To put a question of ourselves, can it be open to us to hold that the meaning of expression 'tax' under section 40(a)(ii) will be fettered by the definition of tax under section 2(43), so far as the question of credit for taxes abroad is concerned, even though Hon'ble Supreme Court notes, in the case of Smithkline & French India Ltd. (supra), that s. 40(a)(ii) of the present Act do not contain any words indicating that the profits and gains spoken of by them should be determined in accordance with the provisions of the IT Act. All they say is that it must be a rate or tax levied on the profits and gains of business or profession". We, therefore, do not think we have the liberty of taking the view that learned counsel is urging us to take.

45. In any case, Hon'ble Bombay High Court's judgment in the case of Reliance Infrastructure (supra) proceeds on peculiar facts and a sort of concession by the revenue inasmuch as it was not the case of the revenue that context in which the expression 'tax' is used in section 40(a)(ii) requires a meaning different from the meaning assigned by Section 2(43). This is evident from the observations made by Their Lordships to the effect that "We are conscious of the fact that Section 2 of the Act, while defining the various terms used in the Act, qualifies it by preceding the definition with the word "In this Act, unless the context otherwise requires" the meaning of the word 'tax' as found in Section 2 (43) of the Act would apply wherever it occurs in the Act. It is not even urged by the Revenue that the context of Section 40(a)(ii) of the Act would require it to mean tax paid anywhere in the world and not only tax payable/ paid under the Act". That was not the situation before us. The very thrust of stand of the revenue was that the

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> **connotations of expression 'tax' in section 40(a)(ii) must be taken in its contextual meaning which extends to any tax ascertainable with reference to the profits of the assessee as evident from the wordings of section which refer to "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 , and that its connotations cannot be treated as restricted to tax under the Income Tax Act. This argument, in the context of deduction in respect of tax outside Income-tax Act, 1961, has already met the approval of Hon'ble Supreme Court. The law laid down by Hon'ble Supreme Court binds all of us under Article 141 of the Constitution of India. Once we are aware about a particular position that Hon'ble Supreme Court has taken, it is not open to us to reach a conclusion which is, or can be perceived as, in defiance to the position taken by Hon'ble Supreme Court. Maybe, if the views expressed were by our jurisdictional High Court, or by any of Hon'ble High Courts after taking into account the views expressed by Hon'ble Supreme Court on that issue, things may have been little different, but that is not the case here.**

78. Learned Departmental Representative's plea is only fit to be noted and rejected. It is relevant to note that this decision was rendered by a bench that did not fall in the jurisdiction of this Hon'ble jurisdictional High Court, and, for that reason, strictly speaking, this Hon'ble jurisdictional High Court judgment was not conclusively binding on the said bench. As on now, however, the said judgment of Hon'ble jurisdictional High Court judgment is binding on this bench, which is in the jurisdiction of Hon'ble Bombay High Court, and we most humbly and most respectfully bow before the views expressed by Their Lordships. As laid down by the Apex Court in the case of **Ambika Prasad Mishra v. State of U.P. AIR 1980 SC 1762; [1980] 3 SCC 719 (Page 1764 of AIR 1980 SC):" Every new discovery nor argumentative novelty cannot undo or compel reconsideration of a binding precedent.... A decision does not loose its authority merely because it was badly argued, inadequately considered or fallaciously reasoned...**". Similarly in the case of **Kesho Ram & Co. v. Union of India [1989] 3 SCC 151**, it was stated by the Supreme Court thus (page 160): "**The binding effect of a decision of this Court does not depend upon whether a particular argument was considered or not, provided the point with reference to which the argument is advanced subsequently was actually decided in the earlier decision**." We are, therefore, not swayed by the arguments of the learned Departmental Representative. As a matter of fact, even in the Elitecore decision *(supra),* it is specifically stated that the fact that the Reliance Infrastructure decision, being a non-jurisdictional Hon'ble High Court decision, is on a different footing and that "**Maybe, if the views expressed were by our jurisdictional High Court, or by any of Hon'ble High Courts after taking into account the views expressed by Hon'ble Supreme Court on that issue, things may have been little different, but that is not the case here**". Once the Hon'ble jurisdictional High Court holds the law in a particular way, it is our bounden duty to follow the same in letter and in spirit. Whatever arguments learned Departmental Representative seeks to make in support of any other interpretation, than the interpretation adopted by Hon'ble jurisdictional High Court even if was adopted in the light of a concession then made by the learned counsel for the revenue before them, being more appropriate, these arguments may be made before Their Lordships if and when that occasion comes. It is for Their Lordships to take a call on these arguments. We are not inclined to entertain these arguments before us. In the light of these

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discussions, as also bearing in mind the entirety of the case, we reject the plea of the learned Departmental Representative, uphold the plea of the assessee, and direct the Assessing Officer to allow the deductions in respect of taxes paid by the assessee abroad, in respect of which no foreign tax credit is granted to the assessee, in the light of the decision of Hon'ble jurisdictional High Court in the case of Reliance Infrastructure decision *(supra)*, and examine the matter be afresh in this light. To this extent, this plea of the assessee is upheld.

Our conclusions on the second issue

79. The second question that we had identified for our adjudication, i.e. whether or not the learned CIT(A) was justified in upholding the action of the Assessing Officer in declining deduction, in the computation of business income, of Rs 182,64,22,948 in respect of taxes so paid abroad, is thus answered in favour of the assessee in principle but the matter is remitted to the file of the Assessing Officer for limited factual verification.

Concluding remarks

80. To sum up, the assessee is declined the foreign tax credits for Rs 182,64,22,948, and, accordingly, we hold that the assessee is not entitled to seek a refund of that money from the Indian tax exchequer. As we hold so, we may add that in the present case, our entire focus was on whether these foreign tax credits could be allowed even when such tax credits lead to a situation in which taxes paid abroad could be refunded in India, but that must not be construed to mean that, as a corollary to our decision, these foreign tax credits would have been allowed, even if there is no domestic tax liability in respect of the related income in India if it was not to result in such a refund situation. At the cost of repetition, we may add that, for the detailed reasons set out earlier, we have our reservations on the applicability of the Wipro decision *(supra)* on this bench, being situated outside of the jurisdiction of Hon'ble Karnataka High Court, and we are of the considered view that full tax credit for source taxation cannot, as such and to that extent, be extended in the residence jurisdiction when a tax treaty sanctions only proportionate credit, and does not, in any case, specifically provide for the full foreign tax credit. A full tax credit, which goes beyond eliminating double taxation of an income, actually ends up subsidizing the foreign exchequer, to the extent that the taxes paid to the foreign exchequer are allowed to discharge exclusive domestic tax liability, rather than eliminating double taxation of an income, and that is the reason that even in the solitary full credit situation visualized in the Indian tax treaties, in the Indo Namibia tax treaty *(supra),* it's one-way traffic inasmuch as while India, as a relatively developed nation, offers, under article 23(2), full credit for taxes paid in Namibia, whereas, in contrast, Namibia, as a developing nation, offers, under article 23(1), proportionate credit for taxes paid in India. It reinforces our understanding that the full foreign tax credits cannot be inferred to be permissible as a matter of course and normal practice. Just because the coordinate benches have subconsciously taken a stand that seems to be condoning, and in a way legitimizing, a contrary perception, even if that be so, we cannot, particularly after taking a closer look at the situation, follow the same course. When such huge national revenues, involving thousands of crores, are involved in this macro issue, we cannot afford to be superficial, or perfunctory, in our approach. On a separate note, nevertheless, we do uphold

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the claim of the assessee that these taxes paid abroad will be allowed as a deduction in the computation of the business income of the assessee.

81. In the result, the appeal is partly allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 4th day of March, 2021,

Sd/-	Sd/-
Vikas Awasthy	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 4th day of March, 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai

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