TAMBE

IN THE HIGH COURT OF BOMBAY AT GOA.

TAX APPEAL NO.51/2017
WITH
CIVIL APPLICATION NO.136/2017
IN
TAX APPEAL NO. 51/2017
WITH
TAX APPEAL NO. 53/2017
WITH
CIVIL APPLICATION NO.156/2017
IN
TAX APPEAL NO.53/2017
WITH
TAX APPEAL NO.56/2017
WITH
CIVIL APPLICATION NO.161/2017
IN
TAX APPEAL NO.56/2017
WITH
TAX APPEAL NO.55/2017
WITH
CIVIL APPLICATION NO.158/2017
IN
TAX APPEAL NO.55/2017
WITH
TAX APPEAL NO.54/2017
WITH
CIVIL APPLICATION NO.157/2017
IN
TAX APPEAL NO.54/2017

DATTAPRASAD KAMAT
Individual, Residing at White Bungalow, Opp. Hotel Solmar, Panaji, Goa through his Power of Attorney Mr SANJIV U. KAMAT,

son of late Upendra V. Kamat, aged 57 years, married, Chartered Accountant, Indian National, Resident of Taleigao, Tiswadi, Goa. … Appellant.

Versus

ASSISTANT COMMISSIONER OF INCOME TAX- Central Circle, having his office at Central Circle, Pundalik Niwas, Rua-de-Ourem, Panaji, Goa. … Respondent.

WITH
TAX APPEAL NO.119/2017
WITH
CIVIL APPLICATION NO.245/2017
IN
TAX APPEAL NO.119/2017
WITH
TAX APPEAL NO.121/2017
WITH
CIVIL APPLICATION NO.247/2017
IN
TAX APPEAL NO.121/2017
WITH
TAX APPEAL NO.123/2017
WITH
CIVIL APPLICATION NO.249/2017
IN
TAX APPEAL NO.123/2017
WITH
TAX APPEAL NO.122/2017
WITH
CIVIL APPLICATION NO.248/2017
IN
TAX APPEAL NO.122/2017
WITH
TAX APPEAL NO.120/2017
WITH
CIVIL APPLICATION NO.246/2017
IN
TAX APPEAL NO.120/2017

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KAMAT CONSTRUCTION PVT. LTD.,
F/1, Indira Apartments, Caetano Albuquerque Road, Panaji, Goa through its Managing Director, Uday A. Kamat, son of late Anant V. Kamat, aged 72 years, married, Businessman, Indian National, Resident of Miramar-Panaji, Tiswadi, Goa. **…. Appellant.**

Versus

ASSISTANT COMMISSIONER OF INCOME TAX -
Central Circle, having his office at Central Circle, Pundalik Niwas, Rua-de-Ourem, Panaji, Goa. **….Respondent.**

WITH
TAX APPEAL NO.79/2017
WITH
CIVIL APPLICATION NO.194/2017
IN
TAX APPEAL NO.79/2017
WITH
TAX APPEAL NO.86/2017
WITH
CIVIL APPLICATION NO.204/2017
IN
TAX APPEAL NO.86/2017
WITH
TAX APPEAL NO.80/2017
WITH
CIVIL APPLICATION NO.197/2017
IN
TAX APPEAL NO.80/2017
WITH
TAX APPEAL NO.87/2017
WITH

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CIVIL APPLICATION NO.206/2017
IN
TAX APPEAL NO.87/2017
WITH
TAX APPEAL NO.78/2017
WITH
CIVIL APPLICATION NO.192/2017
IN
TAX APPEAL NO.78/2017

UDAY A. KAMAT
Individual, son of late Anant V. Kamat, aged 72 years, married, businessman, Indian National, Residing at White Bungalow, Opp. Hotel Solmar, Panaji, Goa. ... **Appellant.**

Versus

ASSISTANT COMMISSIONER OF INCOME TAX,
Central Circle, having his office at Central Circle, Pundalik Niwas, Rua-de-Ourem, Panaji, Goa. ... **Respondent.**

WITH
TAX APPEAL NO.67/2017
WITH
CIVIL APPLICATION NO.179/2017
IN
TAX APPEAL NO.67/2017
WITH
TAX APPEAL NO.63/2017
WITH
CIVIL APPLICATION NO.173/2017
IN
TAX APPEAL NO.63/2017
WITH
TAX APPEAL NO.66/2017

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WITH
CIVIL APPLICATION NO.178/2017
IN
TAX APPEAL NO.66/2017
WITH
TAX APPEAL NO.64/2017
WITH
CIVIL APPLICATION NO.174/2017
IN
TAX APPEAL NO.64/2017
WITH
TAX APPEAL NO.65/2017
WITH
CIVIL APPLICATION NO.175/2017
IN
TAX APPEAL NO.65/2017

RAMESH ANANT KAMAT
married, Indian National, Residing at H.No.760, Mary's Colony, Near London Hotel, Miramar, Panaji, Goa. ... **Appellant.**

Versus

ASSISTANT COMMISSIONER OF INCOME TAX -
Central Circle, having his office at Central Circle, Pundalik Niwas, Rua-de-Ourem, Panaji, Goa. … **Respondent.**

WITH
TAX APPEAL NO.59/2017
WITH
CIVIL APPLICATION NO.168/2017
IN
TAX APPEAL NO.59/2017
WITH
TAX APPEAL NO.89/2017

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WITH
CIVIL APPLICATION NO.208/2017
IN
TAX APPEAL NO.89/2017
WITH
TAX APPEAL NO.60/2017
WITH
CIVIL APPLICATION NO.169/2017
IN
TAX APPEAL NO.60/2017
WITH
TAX APPEAL NO.58/2017
WITH
CIVIL APPLICATION NO.167/2017
IN
TAX APPEAL NO.58/2017
WITH
TAX APPEAL NO.88/2017
WITH
CIVIL APPLICATION NO.207/2017
IN
TAX APPEAL NO.88/2017

ANJALI KAMAT,
Individual, Residing at White Bungalow, Opp. Hotel Solmar, Panaji, Goa, through her Power of Attorney Holder Mr. SANJIV U. KAMAT, son of late Upendra V. Kamat, aged 57 years, married, Chartered Accountant, Indian National, Resident of Taleigao, Tiswadi, Goa. .... **Appellant.**

Versus

ASSISTANT COMMISSIONER OF INCOME TAX -
Central Circle, having his office at Central Circle, Pundalik Niwas, Rua-de-Ourem, Panaji, Goa. ... **Respondent.**

TAMBE

WITH
TAX APPEAL NO.82/2017
WITH
CIVIL APPLICATION NO.199/2017
IN
TAX APPEAL NO.82/2017
WITH
TAX APPEAL NO.83/2017
WITH
CIVIL APPLICATION NO.201/2017
IN
TAX APPEAL NO.83/2017
WITH
TAX APPEAL NO.81/2017
WITH
CIVIL APPLICATION NO.198/2017
IN
TAX APPEAL NO.81/2017
WITH
TAX APPEAL NO.85/2017
WITH
CIVIL APPLICATION NO.203/2017
IN
TAX APPEAL NO.85/2017
WITH
TAX APPEAL NO.84/2017
WITH
CIVIL APPLICATION NO.202/2017
IN
TAX APPEAL NO.84/2017

Mrs. SMITA UDAY KAMAT,
wife of Uday Anant Kamat, aged 61 years, married, Indian National, Residing at White Bungalow, Opp. Hotel Solmar, Panaji, Goa ... **Appellant.**

TAMBE

Versus

ASSISTANT COMMISSIONER OF
INCOME TAX -
Central Circle, having his office at Central Circle, Pundalik Niwas, Rua-de-Ourem, Panaji, Goa. … Respondent.

WITH
TAX APPEAL NO.68/2017
WITH
CIVIL APPLICATION NO.182/2017
IN
TAX APPEAL NO.68/2017
WITH
TAX APPEAL NO.69/2017
WITH
CIVIL APPLICATION NO.184/2017
IN
TAX APPEAL NO.69/2017
WITH
TAX APPEAL NO.77/2017
WITH
CIVIL APPLICATION NO.190/2017
IN
TAX APPEAL NO.77/2017
WITH
TAX APPEAL NO.70/2017
WITH
CIVIL APPLICATION NO.185/2017
IN
TAX APPEAL NO.70/2017
WITH
TAX APPEAL NO.76/2017
WITH
CIVIL APPLICATION NO.189/2017

TAMBE

IN

TAX APPEAL NO.76/2017

SADHANA RAMESH KAMAT
Individual, wife of Ramesh Anant Kamat, aged 54 years, married, Indian National, Residing at H.No.760, Mary's Colony, Near London Hotel, Miramar, Panaji, Goa. ... **Appellant.**

Versus

ASSISTANT COMMISSIONER OF INCOME TAX -
Central Circle, having his office at Central Circle, Pundalik Niwas, Rua-de-Ourem, Panaji, Goa. ... **Respondent.**

Mr Jitendra Jain with Mr Jas Sanghavi, Mr H. D. Naik and Mr A. D. Naik, Advocates *for the Appellants.*

Ms Susan Linhares, Standing Counsel *for the Respondent.*

CORAM	:	M. S. SONAK & VALMIKI SA MENEZES, JJ.
RESERVED ON	:	26th APRIL, 2023.
PRONOUNCED ON	:	18th AUGUST, 2023.

JUDGMENT (PER : VALMIKI SA MENEZES, J.)

1. These 35 appeals under Section 260A of the Income Tax Act, 1961 were admitted by this Court's order dated 23.8.2017 on the following Substantial Questions of Law:-

A Whether the impugned Judgment and Order of the Tribunal holding that under

the provisions of the Portuguese Civil Code, spouse of the Appellant does not acquire beneficial interest in respect of the shares of subject Companies held by the Appellant and that such right of the spouses can only be ascertained on termination of the marriage by divorce, separation or death, is based on complete mis-appreciation and misconstruction of the provisions of Portuguese Civil Code which contemplates vesting of ownership rights and beneficial interest "IN PRESANTI" in Appellant's wife, as a moiety holder with respect to the immovable and movable assets of Appellant which includes shares of the subject Company ?

B *Whether by virtue of marriage of the spouses under the Law of Communion of Assets (Communion De Bens) applicable in the State of Goa to which the Appellant and his spouse are subject to, each of the Appellant and his spouse acquire 50% ownership rights and/or beneficial interests in respect of all movable and immovable properties forming a part of the estate of Communion De Bens irrespective of the spouse in whose name such assets are acquired and in pursuance thereof the Appellant and his spouse acquired equal rights and beneficial interests i.e. to the tune of 50% in the shares of KCPL, KCRPL and KIPL held in the name of either spouses ?*

C *Whether in view of the correct interpretation of the relevant Articles of the Portuguese Civil Code, it can be inferred that spouse in whose name the movable property (shares in the instant case) of the Communion De Bens is registered in the Members' register*

of each Company, cannot be said to be exclusive beneficial owner of the entire such shares and if at all his beneficial interest is restricted to only 50% of number of such shares and need to be accordingly recognized to decide his beneficial interest in the impugned companies for the purpose of Explanation 2(b) of Section 2(22)(e) of the Act ?

D *Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating that the proceedings under Section 153C were not validly initiated in as much as no new and incriminating facts had been found during the course of search warranting the additions made in pursuance thereof ?*

E *Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating that all the payments received/paid by the various group companies, in which the Appellant is a shareholder were made in the ordinary course of business and did not qualify as 'loans or advances' as postulated under the provisions of Section 2(22)(e) of the Act?*

F *Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating that the amounts received by KCRPL from KCPL were in ordinary course of business and the conditions for invoking the deeming fiction under the provisions of Section 2(22) (e) of the Act could not be invoked in the facts of the present case?"*

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An additional Substantial Question of Law was also directed to be framed by the same order in Stamp Number Main No.2607/2017 (Tax Appeal No.93 of 2017) filed at the behest of the Revenue, which reads as:-

> *Whether in law and on facts, the Hon'ble Income Tax Appellate Tribunal was right in not appreciating the deeming fiction of Section 2(22) (e) of the IT Act as "deemed dividend" ?*

All these appeals arise from common order dated 30.3.2017 passed by the Income Tax Appellate Tribunal, Panaji Bench (for short "ITAT") in Income Tax Appeal No. 34/PAN/2016, which appeal pertains to the Assessment Year 2011-2012. The impugned order is a common order challenged by the parties in all 35 appeals in which common Substantial Questions of Law as enumerated above arise.

2. These Tax Appeals comprise three sets of parties at whose behest they have been filed. The main assessees are three brothers namely Shri Dattaprasad Kamat, Shri Uday Kamat, and Shri Ramesh Kamat. Other appeals are filed respectively by their

spouses Anjali Kamat, Smitha Uday Kamat, and Sadhana Ramesh Kamat. These individual appeals at the behest of three brothers and their spouses are for the Assessment Years 2007-08, 2009-10 to 2012-13 and comprised 29 appeals bearing Nos.51 of 2017, 121 of 2017, 80 of 2017, 81of 2017, 63 of 2017, 69 of 2017, 123 of 2017, 89 of 2017, 60 of 2017, 53 of 2017, 79 of 2017, 67 of 2017, 59 of 2017, 86 of 2017, 82 of 2017, 84 of 2017, 88 of 2017, 120 of 2017, 54 of 2017, 56 of 2017, 87 of 2017, 122 of 2017, 66 of 2017, 78 of 2017, 77 of 2017, 64 of 2017, 55 of 2017, 85 of 2017, 65 of 2017, 58 of 2017, 70 of 2017, 76 of 2017, 83 of 2017, 68 of 2017 and 93 of 2017. Since submissions were common in all appeals, and since issues that arose for a decision on the substantial questions of law raised by the parties were common, during the final hearing of the matter, submissions were made in Tax Appeal No.51 of 2017, which relates to the Assessment Year 2011-2012 in respect of 29 appeals filed on behalf of individuals and in addition to these 29 appeals, 5 appeals, being Tax Appeal Nos.119 to 123 of 2017, respectively, for the Assessment Year 2006-07, 2007-08,

2009-10, 2010-11 and 2011-12 respectively, numbered as Tax Appeals Nos.121, 122, 123, 119, and 120 of 2017, all filed at the behest of a Private Limited Company, namely Kamat Construction Private Limited (KCPL) in which the same substantial questions of law arise are taken up along with individual appeals; the sole appeal filed at the behest of the Revenue is Tax Appeal No.93 of 2017 (Pr. Commissioner of Income Tax Vs Dattaprasad Kamat).

3. These matters have arisen in the following factual backdrop:-

A The Assessees, Shri Dattaprasad Kamat (Tax Appeal No. 51/2017) along with his two brothers Shri Uday Kamat and Shri Ramesh Kamat each held 30-33% shares in various private limited companies which are engaged *inter alia,* in the business of construction and hospitality. The three brothers each hold 30-33% shares in Kamat Inns Private Limited (KIPL), Kamat Housing and Development (India) Private Limited (KHDIPL), Kamat Construction & Resorts Private Limited (KCRPL), Prajakta Investments & Trading Company Private Limited (PIPTL), AVC Investments & Trading Company

Private Limited(AVCPTL).

B Each of the three brothers were married to their spouses in terms of the provisions of the Portuguese Civil Code, as applicable to the State of Goa (hereinafter referred to as "the Code"). Under the Code, in the absence of any ante nuptial agreement between the spouses, each of them has 50% right to their common estate.

C Under the provisions of Section 5A of the Income Tax Act, when the husband and wife are governed by the system of Community of Property known as "Communiao Dos Bens" or Community of Assets under the Portuguese Civil Code of 1860 applicable to the State of Goa, the income of the husband and wife under any head of the income, except income derived from "salaries", shall not be assessed as that of such community of property, and such income of the husband, and of the wife under each head of the income, other than under the head of "salaries" shall be apportioned equally between the husband and the wife.

According to the factual narration set out in the appeals, these three brothers were registered shareholders of KCPL, wherein the appellant was its Managing Director. KCPL was the parent company of the Kamat group which comprises of PIPTL, AVCPTL, KIPL,

KHDIPL and KCRPL. Among these private companies, PIPTL was 100% subsidiary of KCL, merged into KCPL w.e.f. 01.04.2011 while KIPL merged into KCPL also w.e.f. 01.04.2011. The three brothers are registered shareholders of these companies in the proportion of 30-33% each of them.

For the Assessment Year 2011-12, individual appellants/assessees filed their return of income on 29.09.2011 in terms of Section 139(1) of the Act, the income, comprising income from "salaries", income from the business, income from capital gains and from other sources; the return of income was processed under Section 143(1) of the Act on 27.09.2012, and thereafter, there was no further scrutiny proceedings initiated against any of these individual assessees.

D. A search was conducted on 31.01.2012, in the office premises of KCPL and at the residential premises of its Directors, in terms of Section 132 of the Act. Consequent to the search, a notice under Section 153C of the Act came to be issued on 30.07.2012 to the individual Assessees, calling upon them to file their return of income for the Assessment Years 2006-07, 2007-08, 2009-10 to 2011-12.

E In response to these notices, the

appellants/assessees submitted their return of income on 29.08.2012 maintaining that the return of income filed on 29.09.2011 declaring total income of Rs.26,18,704/- should be treated as the Return in response to the notice under Section 153C. Subsequently, notices were issued by the Revenue under Sections 142(1) and 143(2) of the Act calling for further information, which was given by these Assessees. Detailed explanations and submissions were also submitted by the Assessees along with documents supporting various transactions which were questioned in the said notice.

F Subsequent thereto, the Assessment Officer (AO) rejected the explanations and submissions made by the Assessees and held that payments made under various transactions by the Assessees through the aforementioned companies to be payment contemplated under Section 2(22)(e) of the Income Tax Act (hereinafter referred to as "the Act") and held the same to be deemed dividend in the hands of KCPL/KCRPL. Consequently, the AO assessed 1/6th of each sum in the hands of KCPL/KCRPL as deemed dividend under Section 2(22)(e) in the hands of the appellant and finalized assessment order on 28.02.2014, in terms of Section 153C read with Section 143(3) of the Act. By order dated 28.02.2014, the AO made the following additions to the income of

Dattaprasad Kamat (Tax Appeal No.51 of 2017);

(i) As deemed dividend, in terms of Section 2(22)(e) on a protective basis in the hands of the appellant (Dattaprasad Kamat), a sum corresponding to 1/6th of Rs.33,75,991/- received by KCPL from PIPTL, the substantive addition in respect thereof having been made in the hands of KCPL. The AO held that this amount corresponds to half of Rs.11,25,330/- shown as additions in the assessment order.

(ii) As deemed dividend, in terms of Section 2(22)(e) on a substantive basis in the hands of the appellant (Dattaprasad Kamat), a sum corresponding to 1/6th of Rs.4,86,50,000/- received by KCRPL from KCPL, protective addition in respect thereof having been made in the hands of KCPL. This amount corresponds to Rs.1,62,16,666/- shown as the addition in the assessment order.

(iii) Interest under Sections 234B and 234C was also added to the income of the appellant.

(iv) Similar additions under assessment order of the same date were made by the AO in the hands of the wife of the appellant (Dattaprasad Kamat), Anjali Kamat and also in the hands of two other brothers Shri Uday

Kamat and Shri Ramesh Kamat and in hands of their spouses Smitha Uday Kamat and Sadhana Ramesh Kamat.

G. Being Aggrieved by the order of the AO dated 28.02.2014, all these individual assessees preferred an appeal before the Commissioner of Income Tax (Appeals) ("CIT (Appeals)" for short). In these appeals, additional ground was raised in respect of the notice issued under Section 153C of the Act, pursuant to the search. The contentions raised by the Assessees were that the assessment order in terms of Section 153C read with Section 143(3) of the Act was without jurisdiction since the material which the AO has termed as "incriminating material" did not actually come to light during the search and seizure proceedings, but was all throughout disclosed to the AO in all earlier assessment proceedings and shareholding pattern was also a matter of record in all earlier proceedings before the AO.

H. By a common order dated 28.01.2015, CIT (Appeals), allowed the appeals of the Assessees and arrived at the following findings:-

i. That there was no cause for making additions in the income of the Assessees on account of

deemed dividend under Section 2(22)(e) since no monetary benefits have arisen to the individual shareholders of the various companies.

ii. The proceedings under Section 153C of the Act were validly initiated by the AO and the assessment carried out by the AO under Section 153C read with Section 143(3) of the Act was correctly initiated, being based on facts that were collated on the basis of the statement recorded and the material collated during the search of the premises of the said companies.

I. Against the order dated 28.01.2015 of the CIT (Appeals), the Revenue preferred an appeal before the ITAT challenging the deletion of the additions made under Section 2(22)(e) of the Act as deemed dividend. In those appeals, the appellants/assessees also filed cross objections challenging the validity of the proceedings under Section 153C of the Act. By its order dated 13.08.2015, the ITAT allowed the appeals of the Revenue and remanded the issue of deemed dividends under Section 2(22)(e) of the Act to CIT (Appeals) for re-adjudication after giving assessees and AO an adequate opportunity to substantiate their case. According to the order dated 13.08.2015 of the ITAT,

the findings of the CIT (Appeals) were in the form of non-speaking order and the conclusion arrived at by the CIT (Appeals) that there were no violations of the provisions of Section 2(22)(e) of the Act was arrived at without considering the substantial evidence placed by the AO on record to support this claim.

J. On remand, CIT (Appeals) heard the parties, written submissions were filed before the Appellate Authority by both parties, after which CIT (Appeals), by its order dated 22.01.2016, once again allowed the appeals of the assessees and came to the following findings:-

i. That, the deeming provisions of Section 2(22)(e) of the Act were not applicable to the case of the assessees since the nature of the transactions between different companies in which assessees were shareholders, i.e KCPL and KCRPL were made for business transactions and did not amount to deemed dividend.

ii. That, the provisions of Section 2(22)(e) of the Act could not be made applicable to the assessees in view of the fact that the spouses of the assessees were merely beneficiary owners of

the shares in these companies, without being the registered shareholders.

iii. That, on earlier assessment, the predecessor of the AO had deleted additions in the hands of the payee *vide* order dated 28.08.2015 and, as the transaction between PIPTL and KCPL being business transaction as money advanced by PIPTL to KCPL for development and purchase of premises, the same could not be now reassessed.

iv. That, in the transaction between KCPL and KCRPL, an advance of Rs. 4,86,50,000/- paid by KCPL to KCRPL for the purchase of premises were incurred in the course of the business as borne out from agreement and documents produced before the officer and were incurred in the course of business, thus could not be construed as a loan or advance in terms of Section 2(22)(e) of the Act.

v. That, since the assessees, were governed by the provisions of the Portuguese Civil Code applicable to their marriage, beneficial ownership of the shares held by one spouse (husband) as registered shareholders of these

companies, the amount in the hands of these parties was required to be taxed on the basis of 50% to each spouse, in terms of Section 5A of the Act.

vi. That, since under the provisions of Section 5A of the Act, the appellants are governed by the Portuguese Civil Code, the income of the appellants jointly belongs to the appellant and his wife, on such division, the percentage of the beneficial shareholding falls below the limits as required under Section 2(22)(e) of the Act; thus, such addition is made without any basis; CIT (Appeals), while dealing with this contention also accepted the assessees contention that since the wealth tax returns filed by the appellant for earlier years, had divided the investment into shares equally between the two spouses, on the basis of the concept of the communion of assets applicable to them under the Portuguese Civil Code, no additions could be made.

vii The proceedings under Section 153C of the Act were held to be valid on the ground that new facts had emerged during the course of the search, since it was at that point of time

> that the AO had an opportunity for the first time to collate all previous years statements and shareholdings, which constituted suppression on the part of the assessees.

4. Aggrieved by the order passed by the CIT (Appeals), the Revenue preferred an appeal before the ITAT in which the appellants/assessees filed cross-objections. In the cross-objections raised by the assessees, though in the earlier proceedings, they had given up the ground that the assessment under Section 153C by the AO was without jurisdiction, they once again contended that the assessment under Section 153C was without jurisdiction since there was no suppression of the shareholding pattern by the assessees, all disclosure having been made by them since the declaration, in earlier assessments which were accepted.

The ITAT, as referred herein above, has allowed all these appeals at the behest of the Revenue and has upheld both, the legality of the procedure followed by the AO under Section 153C of the Act and the additions made by the AO on the basis of

the income from transaction amongst companies under which assessees hold shares were deemed dividend in the hands of the assessees and their spouses in terms of Section 2(22)(e) of the Act.

5. We have heard the learned Counsel for the parties, and perused the record of these appeals. Parties have filed exhaustive notes of submissions and compilations of case law before us, which have also been considered while deciding these appeals.

6. Shri Jitendra Jain, learned Counsel appearing for the appellants in all these appeals, has placed the following submissions before us:-

(a) That, the five Substantial Questions of Law (A) to (F) on which the assessees' appeals, have been admitted can be broadly summarized under three issues, namely :-

Issue No.1 :- The Substantial Questions of Law (A) to (C) would be covered under this issue. In the light of the fact that the assessee (husband), who holds 33% of the shares, carries such voting right

with the shares, whether his spouse, governed by the Portuguese Civil Code, can be said to be the beneficial owner of half of the 33% of shares and the balance 16.5% is held by his wife as beneficial owner or would he be the beneficial holder of the entire 33% (this issue would arise in all the Assessment Years 2007-08, 2009-10 to 2012-13).

Issue No.2 :- Which covers Substantial Question of Law (D), on which these appeals are admitted would be, if the answer to Issue No.1 is held in the negative, whether transactions recorded in the books of the group companies and the shareholding pattern being available in the public domain, be considered as incriminating material for the purpose of Section 153C of the Act (this issue arises in all appeals except for the Assessment Year 2012-13).

Issue No.3 :- Which would cover Substantial Questions (E) and (F) being if Issue No.2 is answered in the negative, whether the inter-company transactions in the nature of commercial/business transaction can fall within the phrase "loans or advances" for the purpose of Section 2(22)(e) of the Act. (This issue would arise in all Assessment Years 2007-08, 2009-10 to 2012-13).

(b) That, admittedly, the parties are governed by the provisions of the Portuguese Civil Code, by virtue of which, each of their spouses is a moiety holder in the common estate which is indivisible, by virtue of operation of law in these provisions, the wife would be entitled to hold ownership of 50% of the shares held in the name and registered with the companies, in favour of the

husband; that since the husband owns 33% of the shares in each of the companies concerned in the present appeals, his actual entitlement would be only to half of that value, while ownership of the remaining half i.e. 16.5% of the said shares would vest in the wife; and further, that the wife would be beneficial owner of these shares, since each half comprising of 16.5% carrying voting powers/rights corresponding only to 16.5.% of the shares in the company, they being less than the qualifying the 20% referred to in Section 2(22)(e) of the Act, provisions of Section 2(22)(e) of the Act would not be applicable to the case at hand; the voting power of such shares in the company advancing the amount carries less than 10%.

(c) Section 2(32) of the Act defines a person, who has a substantial interest in the

company, in relation to that company, means the person who is the beneficial owner of the shares carrying not less than 20% of the voting power. To ascertain whether such person has a substantial interest in a company or not, three steps may be followed, they being :

Step No.1 - ascertain who is the beneficial owner.

Step No.2 - ascertaining how many shares the beneficial owner actually holds in that company.

Step No.3 – ascertain the voting power attributable to the number of shareholders arrived at in Step No.2.

(d) That, according to the Portuguese Civil Code, in a contract of marriage, the ownership and possession of the common assets vests in both spouses during the subsistence of the marriage, and on this basis, applying the provisions of the various

Articles of the Portuguese Civil Code to the case of husband and wife, wherein the husband is 33% registered holder of the shares in a company, is not the sole assessee, but his wife is the beneficial owner of half of the 33% shares (16.5% shares) in the said company. The learned Counsel for the appellants takes support, for substantiating these arguments from the following judgments :-

i. *Zelia M. Xavier Fernandes E. Gonsalves v. Joana Rodrigues & Ors. (2012) 3 Supreme Court Cases 188;*

ii. *Jose Paulo Coutinho v. Maria Luiza Valentina Pereira & Anr. (2019) 20 Supreme Court Cases 85;*

iii. *CIT v. Purushotam Gangadhar Bhende, (1977) 106 ITR 932;*

iv. *Commissioner of Wealth Tax v. Vasudeva V. Dempo [1981] 131 ITR 291 (Bom);*

v. *Commissioner of Wealth-tax v. Vasudeo V. Dempo [1992] 196 ITR 216 (SC);*

vi. ***CIT v. Ms. Maria Sylvia D'souza (2013) 261 CTR (Bom) 282.***

(e) That, Circular No.684 dated 10.06.1994, issued by the Central Board of Direct Taxes has accepted this position, explaining the reason for insertion of Section 5A in the Act; the same Circular also recognizes the law laid down by this High Court in various decisions, wherein income of communion of the property was assessed in the individual assessment of the spouses equally. All six assessees have in their individual wealth tax returns filed for Assessment Year 1993-94 shown equal ownership of shares in the referred Private Limited Companies, and this position has been accepted by the Revenue.

(f) That, the dictionary meaning of "beneficial owner", according to Mitra's Legal and

Commercial Dictionary, (6th Edition) is "beneficiary's interest in trust property; a corporate shareholder's power to buy or sell the shares, though the shareholder is not registered on the corporation's books as the owner; the expression means such right to the enjoyment of property as exists where the legal title is in one person and the right of such beneficial use or interest is in another and where such right is recognized by law and can be enforced by the Courts at the suit of such owner or someone on his behalf"; that, according to Advanced Law Lexicon, 6th Edition, by P. Ramanatha Aiyar. "Beneficial owner" means "one who though not having an apparent title, is in equity entitled to enjoy the advantage of ownership".

Applying the dictionary meaning of "beneficial owner" to the instant case, the wife

would have 50% right in the dividend from the shares, and sale of shares and, therefore, enjoys all rights arising out of the ownership of the shares, being consequently beneficial owner of these shares to the extent of 50% or half right, as held in the case of ***Dr. Jose Julio D'Costa ..Vs.. Income Tax Officer, 53 ITD 300,*** he submits that even depreciation can be claimed by other spouses/assessees to the extent of 50% shares, in terms of provisions of Portuguese Civil Code applicable to the assessees;

Since the wife is the beneficial owner of half of the shares held by her husband in these companies, if one ascertains the voting power attributable to his share i.e. 16.5% as held by the wife, the wife is the beneficial owner of 16.5% of shares, the voting right attributable to these shares being less than the threshold 20% provided by

Section 2(32) of the Act, provisions of Section 2(22) (e) of the Act could not be made applicable to the present case. Consequently, the additions made by the AO in the hands of the husband assessee as full owner of 33% of the shares were contrary to the provisions of the law.

(g) Section 187C of the Companies Act, 1956, requires a declaration of beneficial interest in the shares of the company to be made, if the interest is created contractually. In the present case, the beneficial ownership is created by operation of law, by applying the provisions of the Portuguese Civil Code giving the spouse the benefit of 50% of the ownership in the shares. Consequently, provisions of Section 187C of the Companies Act, 1956 are not applicable to the person who is governed by the Portuguese Civil Code, and even if for the sake of

argument, they were applicable, at the most, under these provisions, it would only result in imposition of a fine, to be paid by the spouse, but would not result in the spouse ceasing to be beneficial owner of the shares. He submitted that Section 89 of the Companies Act, 2013, which corresponds to Section 187C of the erstwhile Companies Act, 1956, provides that no right in relation to any share in respect of which a declaration is not made by the beneficial owner, shall be enforceable by him. That, even by applying the provisions of new Section 89 of the Companies Act, 2013, to the present case, at the most, the wife would not be able to exercise voting power to the extent of 16.5% of her share through her husband for non-compliance of this provision. Reliance was placed on the judgment of Delhi High Court in the case of ***C.I.T. ..V/s.. Ankitech (P) Ltd. [(2012) 340 ITR 14 (Delhi)***. It

was submitted that the decision of the Delhi High Court has been approved by the Hon'ble Supreme Court in ***C.I.T. .V/s.. Madhur Housing & Development Co.(2018) 401 ITR 152.***

(h) The next submission of Mr Jitendra Jain learned Counsel was to contend, that in the event this Court concludes that the spouses of the appellants are not beneficial owner of the shares held by the appellants in the company, the question raised under Issue No.2 would arise for the Assessment Year 2007-08 to 2011-12; this Issue No.2 would, however, not arise for the Assessment Year 2012-13, since the date of search conducted by the Revenue on 31.01.2012 was during that assessment year. Learned Counsel for the appellants submits that the Issue No.2 as to whether the transactions recorded in the books of the group

companies, and the shareholding pattern being available, both in the public domain and in the material submitted along with the previous years return, could be treated as incriminating material for the purpose of Section 153C of the Act.

He submits that the assessment having been made in the case of all the individual assessees, pursuant to action under Section 132 of the Act, an addition could be made in respect of an assessment year, which has become final, only if incriminating material is found in the course of such search under Section 153A read with Section 153C of the Act. Further, that such incriminating material should be of the nature, which has come to the knowledge of the Revenue during the search and not one that was known to the Revenue during the previous assessment years for which the assessment was

complete; in the present case, the incriminating material claimed by the Revenue, came to its knowledge in the form of the shareholding of the individual assessees in the group companies. It was further submitted that all transactions referred to were in the books of accounts and since an assessee is not required to disclose his shareholding in his returns, the shareholding pattern being otherwise available in public domain on the website of the Registrar of the Companies, one cannot consider that the shareholding pattern was suppressed by the individual assessee and came to the knowledge of the Revenue only during the search and seizure operations conducted on the companies.

In order to buttress this submission, learned Counsel laid reliance upon the following judgments :

a) *Principal Commissioner of Income Tax ..V/s.. Abhisar Buildwell P. Ltd., Civil Appeal No.6580 of 2021;*

b) CIT ..V/s.. Murli Agro Products Ltd., reported in [2014] 49 Taxmann.com 172;

c) CIT ..V/s.. Kabul Chawla, reported in [2016] 380 ITR 573 (Delhi);

d) CIT ..V/s.. Continental Warehousing Corporation (Nhava Sheva) Ltd., reported in [2015] 58 Taxmann.com 78 (Bombay);

e) PCIT ..V/s.. Jignesh P. Shah, reported in [2018] 99 Taxmann.com 111 (Bombay);

f) Underwater Services Company Ltd. ..V/s.. ACIT, reported in [2022] 448 ITR 691 (Bombay),

g) Mani Square Ltd. ..V/s.. ACIT, reported in [2020] 83 ITR (T) 241 (Kolkata Tribunal).

(i) The next submission made by Shri Jitendra Jain, learned Counsel for the appellants covers Substantial Questions of Law (E) and (F), which its contents could be summarized as Issue

No.3, dealing with various transactions showing the flow of funds from one company to another. The transactions are summarized below :

Transaction No.1 :-

The first transaction is between Kamat Inns Pvt. Ltd. (KIPL) advancing money to Kamat Constructions Pvt. Ltd. (KCPL), wherein individual brothers are common shareholders to the extent of 30 - 33% each in both these companies. He submits that Kamat Holiday Homes, a resort owned by KCPL but managed by KIPL was required to pay 15% of its sales as a management fees to KCPL; during the year, KIPL advanced Rs.1.06 crores to KCPL. The AO gave relief of the management fees payable by KIPL to KCPL amounting to Rs.0.59 crores and the balance of Rs.0.46 crores were added by the AO to the income of the individual assessee.

The ITAT has confirmed this addition. It was submitted that the relationship between KIPL and KCPL is on account of business transactions, being management of the resort owned by KCPL, by KIPL, on a consideration of 15% of the sales; the Revenue having accepted the business transactions, has, as a matter of fact accepted that Rs.0.59 crores was the equivalent of 15% sales. CBDT Circular No.19 of 2017 dated 12.06.2017 has directed Assessing Officer not to contest the addition on account of Section 2(22)(e) of the Act, if trade advances are in the nature of commercial transactions.

That the transactions in the nature of advances by KIPL to KCPL squarely fall within the directives of the Circular and the same cannot be construed as a loan or as an advance for the purpose

of Section 2(22)(e). Since the Circular was not in existence at the relevant time, an alternate submission was made, the matter could be remanded back to the Tribunal for de-novo consideration in terms of the CBDT Circular.

Without prejudice to this submission, the appellants submit that out of an amount of Rs.0.46 crores, an amount of Rs.0.20 crores was reimbursement by KIPL to KCPL for supply of sand and for repairs carried out at the resort, as incurred by KCPL. That though this submission was made before the Tribunal, no finding was returned on this aspect, necessitating a remand of the matter to the Tribunal for inviting finding on this point.

Transaction No.2 :-

The second transaction is between KCPL and Kamat Construction and Resorts Pvt. Ltd. (KCRPL), the shareholding of individual

brothers being 30 - 33% in both these companies. With respect to these transactions, the Tribunal has given relief in respect of Assessment Year 2007-08 and only partial relief with respect to Assessment Year 2009-10 to AY 2012-13. To the extent that only partial relief has been granted to the assessees, with respect to AY 2009-10 to AY 2012-13, the appellants are in appeal before this Court.

The reasoning of the Tribunal by its granting partial relief was that KCRPL has used the amounts transferred from KCPL, for making payments to its contractors which finding according to the appellants is perverse, as the Tribunal has not considered the assessees' case that it had also used part of these amounts towards acquisition of premises. In relation to the transactions for Assessment Year 2010-11, the Tribunal has not considered that the nature of transaction was for

enabling KCRPL to meet its interest/repayment liability, which was a transaction akin to an entity financing its own venture, this more so when, KCPL was a guarantor to the credit facility. It was submitted that such transactions would not constitute loans or advances for the purpose of Section 2(22)(e) of the Act, in terms of CBDT Circular No.19 of 2017, for which purpose the matter would require a remand to the Tribunal for fresh adjudication.

Transaction No.3 :-

The third transaction is between Kamat Inns Pvt. Ltd. (KIPL) and KCRPL is for the AY 2007-08, on the basis of which the Tribunal has confirmed addition made by the AO to the income of the assessees in the amount of Rs.22,50,000/-, on the ground that the asseessees have produced no evidence towards the transaction.

It was submitted that these transactions were in the nature of advance made for the acquisition of shares of KCRPL, as this company needed an infusion of share capital since it was in the process of setting up a Five Star Hotel in Panjim City at Goa. It was further submitted that since the transaction was between closely held group companies, there was no requirement of execution of any document between them to record their intention for the advance; lack of such document could not be the reason for making an addition under Section 2(22)(e) of the Act.

Transaction No.4 :-

The fourth and last transaction is between AVCTPL and KCPL for the AY 2010-11, resulting in the Tribunal confirming the order of the AO, making additions of Rs.2,50,000/-. It was

submitted that the Kamat Group had set up a Firm called Kamat Industries and Trading (KIT) to supply the group companies with various items for its construction projects. The said AVCTPL purchased construction material from KIT for which Rs.2.11 Crore was payable by AVCTPL to KIT, which was made directly by KCPL to KIT for the material supplied. It was submitted that such an advance is on account of trade advance and covered by CBDT Circular No.19 of 2017, necessitating such addition to be deleted or in the alternative, the matter be remanded back to the Tribunal for fresh consideration.

(j) Shri Jitendra Jain submitted on behalf of the appellant Kamat Construction Pvt. Ltd. (KCPL) in Tax Appeal Nos.121, 122, 123, 119 and 120/2017 that in these appeals, the arguments on the issue of

applicability of Section 2(22)(e) in assessment proceedings under Section 153A of the Act are reiterated in these appeals. In addition to the submissions in common with the other appeals, the following specific submissions have been made with respect to these five appeals of KCPL.

(i) That, the finding of the Tribunal that the transactions under consideration are not business transactions, there being no evidence to support the same, and further, the same being contrary to and covered by the decision of the Bombay High Court in the case of Universal Medicare; The Tribunal's findings that the knowledge of the shareholding pattern having come to the Revenue only in the course of search conducted at the premises of the group companies, constitute incriminating material to

enable the AO to make addition to the income of individual assessees shareholders under Section 153C of the Act, are contrary to the evidence produced by the assessess, on record. It is the appellant's case that it holds 99.9% shares in the company Prajakta Investment and Trading Pvt. Ltd. (Prajakta), which had advanced various sums in all the assessment years under consideration, and such sums had been given as advance towards a project known as La Campala Project; that such advance does not constitute a loan under Section 2(22)(e) of the Act, since the fact that the said Prajakta was 100% subsidiary of KCPL as recorded in the annual report and accounts of KCPL, the fact being known to the Revenue, cannot constitute incriminating material for the purpose of Section 153A of the Act.

(ii) Alternately, it was submitted that the transaction between holding company and the subsidiary company being on account of business expediency, cannot be termed as a loan for the purpose of Section 2(22)(e) as held by the Hon'ble Supreme Court in ***S. A. Builders Ltd., reported in 288 ITR page 1.***

Based upon these submissions, the appellants claimed that the appeals should be allowed after answering all the Substantial Questions of Law framed by this Court in their favour, and in the alternate, the matters be remanded back to the ITAT for fresh consideration.

7. Per contra, Ms Susan Linhares, learned Counsel for the appellant/Revenue in Tax Appeal No.93 of 2017 and for all the respondents in the remaining appeals, has supported the

assessment orders/additions made by the AO and the impugned order passed by the ITAT, on the basis of following submissions :

a) That, the appellants (Kamat Brothers) are estopped from arguing before this Court raising any substantial question of law based upon the contention that the AO had no jurisdiction to proceed, in terms of Section 153C of the Act, since these appellants, had on their own given up these grounds of challenge, before the CIT (Appeals) in the first round, and before the ITAT in its first round, when the matter was remanded back to the CIT (Appeals), as well as when the matter was heard in the second round before the ITAT.

Learned Counsel for the respondents takes us through the order dated 28.01.2015 of the CIT (Appeals) passed in the first round of this adjudication, wherein para 11 (internal page 73) of the order, it is specifically recorded that in the course of search and seizure, many intra group transactions came to light,

and in the opinion of the ITAT, the AO was duty bound to consider these transactions while passing the assessment order under Section 153C read with Section 143(3) of the Act, as such this ground raised in the appeal was dismissed. It was further submitted by the Revenue that against the order of the CIT (Appeals) in the first round, the ITAT, in its order of remand dated 13.08.2015 has made specific reference in para 8 thereof (internal page 5) of the order that the Advocate representing the assessees did not wish to press ground No.2 in cross-examination for the Assessment Years 2007-08, 2009-10 to 2011-12, and further in para 15 (internal page 9) of the same order of the ITAT, it was recorded that the cross-objection on the ground raised as to the jurisdiction as to the AO proceeded in terms of Section 153C stood withdrawn. Accordingly, the cross-objection was dismissed. This being a matter of record, submissions now raised on

this issue ought not to be entertained by this Court.

b) It was further submitted by the learned Counsel for the Revenue that the assessees, not having complied with the provisions of Section 187C of the Companies Act, 1956, by making the requisite declaration to the company of who would hold the beneficial interest in the shares, the assessees could now not take the advantage and claim to have a beneficial interest in the shares of the companies, in terms of provisions of Portuguese Civil Code applicable to the State of Goa; that in any event, the provisions of the Civil Code dealing with the communion of assets between spouses could not extend to the ownership of shares in a company since it is only the person whose name is found in the Register of Shareholders of the Company, who has the voting right based upon the shares held by him, which

voting right/power cannot be divided between the two spouses.

c) It was further submitted that the appellants are foreclosed from taking an argument that there was no incriminating material to reopen assessment and make additions in terms of Section 153C of the Act, since they have given up this ground in earlier appeals. That this Court would lack the jurisdiction to re-assess the factual finding arrived at by the AO and by the ITAT; as the findings of fact arrived at by the Courts below were upon evaluation of the material on record, and these being findings of fact could not constitute material for framing a substantial question of law.

The learned Counsel for Revenue has placed reliance upon the following judgments to support of her submissions :

1. *C.I.T. ..V/s.. C. P. Sarathy Mudaliar,* reported in *1972 (4) SCC 531;*

2. *C.I.T. ..V/s.. Universal Medicare Pvt. Ltd.,* reported in *2010 SCC Online Bom 4;*

3. *M/s. Howrah Trading Co. Ltd. ..V/s.. CIT,* reported in *1959 Suppl(2) 448 and;*

4. *Rameshwar Lal Sanwarmal ..V/s.. CIT,* reported in *1980 SCR (2) 369.*

8. Broadly, for answering the Substantial Questions of Law (A) to (C), the moot questions that would arise are :

i) Whether the wife can be considered a member/shareholder of the concerned companies, under the Companies Act, 1956, merely by virtue of the operation of the provisions of the Civil Code to her marriage with the husband;

ii) Whether the wife can claim a voting right in the resolutions of the concerned company, in terms of the provisions of the Companies Act, 1956,

without there being any proof of her shareholding or membership in that company, in terms of the provisions of the Companies Act.

For a better understanding of the controversy, it would be apposite to quote certain provisions of the Portuguese Civil Code 1867, as applicable to the State of Goa, whose original text is still in the Portuguese Language, but has been translated in English hereunder.

9. The key provisions of the Code that set out the concept of "Comunhao Dos Bems" or as translated to English, to mean "Communion of assets/properties" are :

> *"Article 1098- Presumed regime of assets* - In the absence of any contract, it is deemed that the marriage is done as per the custom of the country, except when it is solemnized in contravention of the provisions of Article 1058 clauses 1 and 2; because in such a case it is deemed that the spouses are married under the simple Communion of acquired

properties.

Article 1108- Concept of Communion of Matrimonial Estate- The marriage as per the custom of the country consists in the Communion between the spouses of all their properties, present and future, not excluded by law.

Article 1117- Ownership, possession and administration of the assets of the matrimonial estate - The ownership and possession of common assets vest in both the spouses during the subsistence of marriage; however, the administration of the assets of the couple, not excluding the wife's own assets shall lie with the husband.

Sole paragraph – The wife may manage the assets only with the consent of the husband or during his impediment or absence.

Article 1118- Alienation of movable assets of the matrimonial estate- The husband may freely dispose the movable assets of the matrimonial estate of the couple; but

in case he alienates them or binds them by gratuitous contracts, without the consent of the wife, the value of the assets so alienated shall be on account of his moiety.

Article 1119- Alienation of the immovable assets of the matrimonial estate- The immovable assets, whether common or exclusive of either spouse, shall not be alienated or charged in any manner without the consent and agreement of both spouses.

Sole paragraph- In case of dissent or unfounded opposition, the consent of the dissenting spouse may be made good by the order of the Court.

Article 1191- Powers of the husband over immovable properties– It shall not be lawful for the husband to alienate immovable assets nor to be in litigation on questions of property or possession of immovable assets, without the written consent of the wife.

Para 1- Such consent may be made good judicially

when the wife refuses to give it without just cause, or when she is unable to give it.

Para 2- However, the alienation the exclusive assets made by the husband in violation of the provisions of this Article, may be annulled at the request of the wife or her heirs only in case the husband is found liable to pay her or her heirs, there being no other assets by which the liabilities can be met.

Para 3 - In case the said alienation is of common assets, the wife or her heirs or the heirs of the husband with right to the legitimate portion may, in all cases, apply to have the same annulled.

Article 1193 - ***Incapacity of married woman in property matters*** – The wife shall not acquire or alienate assets or incur obligations without authorization of the husband, except in cases where the law specifically permits it.

Sole paragraph - In case the husband denies

authorization, without any reason, the wife may apply to the respective Civil Judge to make such authorization good, and the same shall be granted or rejected after hearing the husband.

Article 1210 - ***Effect of separation of persons*** - From the separation of persons, the separation of assets necessarily follows.

Sole paragraph - Whichever be the regime under which the marriage has been contracted, the wife, in case of her adultery, shall have no right of separation of assets but only for maintenance, except, if it is proved that at the time when she committed adultery, she could have applied for separation from her husband and any of the grounds mentioned in the clause 2 of Article 1204.

Article 1774 - ***Prohibition of disposition of legitime*** – The persons obliged to reserve the legitime may only dispose of the portion which the law commits them to dispose of.

Article 1784 - ***Indisposable portion*** – Legitime means the

portion of the assets that the testator cannot dispose of, because it has been set apart by law for the heirs in straight line descendant or ascendant.

Sole paragraph- This portion consists of half of the proprieties of the testator, save as provided in Clause 2 of Article 1785 and Article 1787."

10. The effect of these provisions of the Portuguese Civil Code, as applicable to the State of Goa, would be the following :

a) Unless there is a registered Ante-Nuptial Agreement executed between the spouses specifically opting for a regime of separation of their assets, the concept of Communion of their properties would apply to their marriage and govern their rights *inter-se*; resultantly, each of the spouses would by virtue of their marriage have equal rights to the entirety of their estate, both to the immovable and movable assets.

b) Their estate is not divisible between them except in the event of dissolution of the marriage by divorce or on the death of one of the spouses. In the event of divorce, the assets would have to be partitioned between the spouses in equal shares by value. In the event of the death of a spouse, the half share of the deceased spouse in the matrimonial estate would devolve on direct lineal descendants or ascendants or co-laterals, in that order. The surviving spouse shall continue to hold the balance undivided half share in the matrimonial estate by virtue of his/her moiety right.

11. The concept of "Moiety" has been explained in Black's Law Dictionary (10th Edition) to mean:

"Half of something, such an estate, also termed mediety."

Applying the concept to the provisions of the Portuguese Code, it would refer to the half-undivided and indivisible right that each spouse enjoys in the common matrimonial estate as a result of the registration

of their marriage. Further applying the legal principle of the right to Moiety to the movable assets of the estate of the spouses, the conceptual ownership of every movable asset, which includes cash, jewellery, and securities, including shares in the company, would vest equally in both spouses.

12. We now advert to a few historical events that are required to be taken note of for a better understanding of the application of the provisions of the Portuguese Code in relation to the matrimonial assets, *vis-a-vis* the laws extended to the territory of Goa by the Union of India, after its annexation/liberation from Portuguese Colonial Rule on 19.12.1961.

13. The territories of Goa, Daman, Diu and Dadra and Nagar Haveli, were part of Portugal, to which the Portuguese Civil Code, 1867 was applicable. The Portuguese Civil Code comprised substantive civil laws, including laws of succession, laws which applied to contract and property, and the civil rights conferred upon the citizens of Portugal and its territories. The Civil Code, in a sense, was truly a common civil code, applicable to all citizens of Portugal, irrespective of

their faith or creed, barring a few customs and usages, which were permitted to certain communities.

14. By a military action, the territory of Goa was annexed by the Government of India through conquest on 20.12.1961, and from that date, Goa, Daman and Diu became a part of the Indian Union by virtue of Article 1(3)(c) of the Constitution of India. In the exercise of powers vested under Article 123(1) of the Constitution of India, an Ordinance was promulgated by the President of India on 05.03.1962, which was known as the Goa, Daman and Diu (Administration) Ordinance, 1962, which was later replaced by an Act of Indian Parliament known as the Goa, Daman and Diu (Administration) Act, 1962 ("Administration Act") w.e.f. 05.03.1962. Simultaneously, by the 12th amendment to the Constitution of India, the territories of Goa, Daman and Diu were included within the first schedule of the Constitution of India w.e.f. 20.12.1961, making these territories an integral part of India. Section 5 of the Administration Act provided that the laws applicable to Goa prior to the appointed date i.e. 20.12.1961, would continue to be in force until amended or repealed by the competent legislature or authority. Section 5 of the Administration

Act reads as under :

> "*Section 5.- Continuance of existing laws and their adaptation.*
>
> *(1) All laws in force immediately before the appointed day in Goa, Daman and Diu or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority.*
>
> *(2) For the purpose of facilitating the application of any such law in relation to the administration of Goa, Daman and Diu as a Union territory and for the purpose of bringing the provisions of any such law into accord with the provisions of the Constitution, the Central Government may, within two years from the appointed day, by order, make such adaptations and modifications, whether by way of repeal or amendment, as may be necessary or expedient and thereupon, every such law shall have effect subject to the adaptations and modifications so made."*

As a consequence of the provisions of Section 5 of the Administration Act, the Portuguese Civil Code 1867 continued to apply to the newly acquired territory of Goa, Daman and Diu and continued to govern the personal rights of the citizens domiciled within these territories.

15. The Goa, Daman and Diu (Laws) Regulation No. 12 of 1962 (GDD Laws Regulation 1) was promulgated by the President of

India on 28.11.1962. By this Resolution, the Acts referred to in its Schedule, which till then were in force in the remaining territories of India to which they extended, were now extended to Goa, Daman and Diu. By these Regulations, the Companies Act 1956 was extended to the territory of Goa and by virtue of amendment to the Companies Act 1956, Section 2A was incorporated therein, extending the Companies Act to the territory of Goa. Though several other Indian enactments were extended in their operation to the newly annexed territory of Goa, none of the Indian Personal Laws, such as the Hindu Succession Act, Indian Succession Act, Hindu Marriage Act etc., were extended to the territory of Goa.

16. The Goa, Daman and Diu (Laws) No. 2 Regulation, 1963 (No.11 of 1963) (GDD Laws Regulation 2) was promulgated by the President of India w.e.f. 29.5.1964 by which several other laws in force in India were extended to the newly annexed territory of Goa. Under Regulation 9 of GDD Laws Regulation 2, the Companies Act 1956 was amended, inserting therein special provisions relating to Companies which were in existence within the territory of Goa prior to its annexation and governed by the "CODIGO COMERCIAL" or the

Portuguese Commercial Code, 1901 ("Commercial Code"). Regulation 9 of GDD Laws Regulation 2 reads as under :

> *"9. Amendment of Act I of 1956.— In the Companies Act, 1956, as extended to the Union territory of Goa, Daman and Diu,—*
>
> *(1) in Section 3 (1) (ii) —*
>
> *(a) the following word and sub-clause occurring after sub-clause (2) of clause (f) shall be omitted and shall be deemed always to have been omitted, namely:—*
>
> *"or*
>
> *(3) in the Union territory of Goa, Daman and Diu or any part thereof, before the commencement of this Act therein";*
>
> *(b) the word "and" at the end of clause (e) shall be omitted and after clause (f), the following clause shall be inserted and shall be deemed always to have been inserted, namely: -*
>
> *(g) The Portuguese Commercial Code (Carta Lei of the 11th April, 1901), in so far as it relates to "Sociedades anonimas";*
>
> *(2) after section 620A, the following section shall be inserted, namely:—*
>
> *Special provision as to companies in Goa, Daman and Diu.—*
>
> *620B. Special provision as to companies in Goa, Daman and Diu.-*
>
> *The Central Government may, by notification in the Official Gazette, direct that for such period or periods with effect from the 26th January, 1963, or any subsequent date, any of the provisions of this Act specified in the notification shall not apply, or shall apply only with such exceptions and modifications or*

adaptations as may be specified in the notification, to —

(a) *any existing company in the Union territory of Goa, Daman and Diu;*

(b) *any company registered in the said Union territory under this Act on or after the 26th January, 1963."*

17. For completeness of the reference to the provisions of law existing under the Portuguese regime in the territory of Goa, we make reference to certain provisions of the Commercial Code, 1901 which regulated the functioning of companies ("Sociedades Comerciais").

Article 105 of the Commercial Code as translated from Portuguese to English reads as under :

"Article 105.*- Commercial societies shall be one of the following types :*

1. Societies with a collective name;

2. Anonymous societies,

3. Partnerships.

Para 1 *- Society in collective name is characterized by joint, several and unlimited liability of all its members.*

Para 2 *- Anonymous Society is one in which the liability of members is restricted to the value of shares which they subscribe towards the capital.*

Para 3 *- A partnership arises when one or more of the members hold themselves liable as if the society was in collective name and another or others merely contribute specific amount limiting their liability to the same.*

18. In the present case, the none of six companies in which the three appellants Kamat Brothers are shareholders were registered under the Commercial Code, but were all registered under the Indian Companies Act, 1956. In these circumstances, we would be called upon to examine the interplay between the provisions of the Civil Code applicable to three sets of spouses, the provisions of the Companies Act, 1956, insofar as it concerns specific rights to a member of a company and its shareholders, and the provisions of Section 5A of the Income Tax Act, 1961 read with Section 2(22)(e) and Section 3(32) of the Income Tax Act, 1961.

19. At this juncture, it would be advantageous to note that the Income Tax Act, 1961 came into force on 01.04.1962, when Goa was already part of Indian Territory. At the relevant time, the provisions of Section 5A of the Act were not enacted; Section 5A was enacted by Act 32 of 1994 by Parliament and was given effect retrospectively from 01.04.1963. The provision was enacted taking into consideration the special law applicable to the State of Goa (Portuguese Civil Code, 1860) and the legal effect of the system of Community of Property applicable to persons covered under the Code within the State of Goa.

Section 5A of the Act reads as under :

> *"5A. Apportionment of income between spouses governed by Portuguese Civil Code.—(1) Where the husband and wife are governed by the system of community of property (known under the Portuguese Civil Code of 1860 as "COMMUNIAO DOS BENS") in force in the State of Goa and in the Union territories of Dadra and Nagar Haveli and Daman and Diu, the income of the husband and of the wife under any head of income shall not be assessed as that of such community of property (whether treated as an association of persons or a body of individuals), but such income of the husband and of the wife under each head of income (other than under the head "Salaries") shall be apportioned equally between the husband and the wife and the income so apportioned shall be included separately in the total income of the husband and of the wife respectively, and the remaining provisions of this Act shall apply accordingly. (2) Where the husband or, as the case may be, the wife governed by the aforesaid system of community of property has any income under the head "Salaries", such income shall be included in the total income of the spouse who has actually earned it."*

The other two provisions of the Act which are brought into play to consider the submissions of the parties before us are Section 2(22)(e) and Section 2(32), which read as under :

> *"Section 2(22) "dividend" includes—*
>
> *(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;*
>
> *(b) any distribution to its shareholders by a company of debentures, debenture-stock, or deposit certificates in any form, whether with or without interest, and any distribution*

to its preference shareholders of shares by way of bonus, to the extent to which the company possesses accumulated profits, whether capitalised or not;

(c) *any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not;*

(d) *any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not;*

(e) *any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987,* ***by way of advance or loan*** *to a shareholder, being a person who is the* ***beneficial owner of shares*** *(not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits)* ***holding not less than ten per cent of the voting power****, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)] or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;*

but "dividend" does not include— ***(i)*** *a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;*

(ia) *a distribution made in accordance with sub-clause (c) or sub-clause (d) in so far as such distribution is attributable to the capitalised profits of the company representing bonus shares allotted to its equity shareholders after the 31st day of*

March, 1964 and before the 1st day of April, 1965;

(ii) *any advance or loan made to a shareholder 4 or the said concern by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company;*

(iii) *any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub clause (e), to the extent to which it is so set off;*

(iv) *any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of section 77A of the Companies Act, 1956 (1 of 1956);*

(v) *any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (whether or not there is a reduction of capital in the demerged company).*

Explanation 1.—*The expression "accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948, and before the 1st day of April, 1956.*

Explanation 2.—*The expression "accumulated profits" in sub-clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in sub-clause (c) shall include all profits of the company up to the date of liquidation, but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place.*

Explanation 2A.—*In the case of an amalgamated company, the accumulated profits, whether capitalised or not, or loss, as the case may be, shall be increased by the accumulated profits, whether capitalised or not, of the amalgamating*

company on the date of amalgamation.

Explanation 3.*—For the purposes of this clause,—*

(a) *"concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company;*

(b) *a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent. of the income of such concern."*

Section 2(32) *.- **Person who has a substantial interest in the company**, in relation to a company, means a person who is the beneficial owner of shares, not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits, carrying not less than twenty per cent. of the voting power."*

20. Whilst making submissions on Substantial Questions of Law (A) to (C), it is the contention of learned counsel for the appellants that post marriage, the husband has ceased to be the owner of 100% of the shares in the companies which are subject matter of the appeals, and his shareholding in these companies would be reduced to only 50%, while his spouse would now hold the balance 50%; it was further the submission of the appellants that the voting power of the husband would be reduced to only 16.5%, the balance voting power lying with shares of the wife post marriage. Under these circumstances, it was submitted that the provision of Section 2(32) and Section 2(22)(e) of the Act would not get triggered. It is the further submission of the

appellants that since the beneficial ownership of the shares of the wife is created by operation of law, i.e. via the Civil Code, the provisions of Section 187C of the Companies Act, 1956, would not be applicable since they would apply only where a contract creates beneficial interest; thus, it was submitted that the provisions of Section 187C of the Companies Act, 1956 are not applicable to persons governed by the Portuguese Civil Code.

In other words, the argument of the appellants, if accepted, would have the effect of making the provisions of Section 187C, which was enacted by Act 41 of 1974 w.e.f. 01.02.1975, applicable to all classes of shareholders or members in relation to a company, but not to shareholders or members to whom the provisions of the Portuguese Civil Code and the system of community of assets would apply. In order to examine the propositions and arguments put forth by the appellants, we would be required to examine certain provisions of the Companies Act, 1956.

21. On registration of the Memorandum of a Company, the effect of such memorandum and articles are specified in Section 36 of the Companies Act, which is reproduced hereunder:

"Section 36. Effect of Memorandum and Articles

(1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company."

A "Member" in relation to a company is defined under Section 41 of the Companies Act, which reads as under :

"Section 41. Definition of "Member"

(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

(3) Every person holding equity share capital of company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company."

22. The share capital and voting rights of members of the company are referred to under Part-IV of the Companies Act, 1956.

Section 87 of that Act deals with the voting rights of members of the Company, which reads as under :

> *"Section 87. Voting Rights :*
>
> *(1) Subject to the provisions of section 89 and sub-section (2) of section 92 :*
>
> *(a) every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital, on every resolution placed before the company ; and*
>
> *(b) his voting right on a poll shall be in proportion to his share of the paid-up equity capital of the company.*
>
> *(2)(a) Subject as aforesaid and save as provided in clause (b) of this sub-section, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares.*
>
> *Explanation. - Any resolution for winding up the company or for the repayment or reduction of its share capital shall be deemed directly to affect the rights attached to preference shares within the meaning of this clause.*
>
> *(b) Subject as aforesaid, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, be entitled to vote on every resolution placed before the company at any meeting, if the dividend due on such capital or any part of such dividend has remained unpaid -*
>
> *(i) in the case of cumulative preference shares, in respect of an aggregate period of not less than two years preceding the date of commencement of the meeting ; and*
>
> *(ii) in the case of non-cumulative preference shares, either in respect of a period of not less than two years ending with the expiry of the financial year immediately preceding the commencement of the meeting or in respect of an aggregate*

period of not less than three years comprised in the six years ending with the expiry of the financial year aforesaid.

***Explanation**. - For the purposes of this clause, dividend shall be deemed to be due on preference shares in respect of any period, whether a dividend has been declared by the company on such shares for such period or not, -*

***(a)** on the last day specified for the payment of such dividend for such period, in the articles or other instrument executed by the company in that behalf ; or*

***(b)** in case no day is so specified, on the day immediately following such period ;*

***(c)** Where the holder of any preference share has a right to vote on any resolution in accordance with the provisions of this sub- section, his voting right on a poll, as the holder of such share, shall, subject to the provisions of section 89 and sub-section (2) of section 92, be in the same proportion as the capital paid-up in respect of the preference share bears to the total paid-up equity capital of the company."*

23. Part-VI of the Companies Act, 1956 deals with the Management and Administration of companies. Chapter-I of this part contains the general provision dealing with the management of the companies, while Chapter-II thereof, deals with the Directors and functioning Board of Directors of the Company. Section 150 of this Act falls under Chapter-I requires every company to maintain a Book or Register of its members. Section 150 thereof reads as under :

"Section 150. Register of Members :

***(1)** Every company shall keep in one or more books a register of its members, and enter therein the following particulars : -*

> *(a) the name and address, and the occupation, if any, of each member ;*
>
> *(b) in the case of a company having a share capital, the shares held by each member, distinguishing each share by its number except where such shares are held with a depository, and the amount paid or agreed to be considered as paid on those shares ;*
>
> *(c) the date at which each person was entered in the register as a member ; and*
>
> *(d) the date at which any person ceased to be a member : Provided that where the company has converted any of its shares into stock and given notice of the conversion to the Registrar, the register shall show the amount of stock held by each of the members concerned instead of the shares so converted which were previously held by him.*
>
> *(2) If default is made in complying with sub-section (1), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues."*

Section 150A of the Companies Act stipulates that the register and index of beneficial owners maintained by depository shall be deemed to be an index of members for the purpose of that Act.

Section 164 of this Act stipulates that the registered members shall be *prima facie* evidence of any matters authorised to be inserted therein by the Act.

24. We then refer to the provisions of Section 187C of the Companies Act, 1956, which specifies the effect of a shareholder member of a company claiming to hold a beneficial interest in such share, not making a declaration in the prescribed form. This provision was inserted into the Companies Act with w.e.f. 01.02.1975. Section 187C of that Act reads as under :

> ***"Section 187C. Declaration By Persons Not Holding Beneficial Interest In Any Share :***
>
> *(1) Notwithstanding anything contained in section 150, section 153B or section 187B, a person, whose name is entered, at the commencement of the Companies (Amendment) Act, 1974 (41 of 1974), or at any time thereafter, in the register of members of a company as the holder of a share in that company but who does not hold the beneficial interest in such share, shall, within such time and in such form as may be prescribed, make a declaration to the company specifying the name and other particulars of the person who holds the beneficial interest in such share.*
>
> *(2) Notwithstanding anything contained elsewhere in this Act, a person who holds a beneficial interest in a share or a class of shares of a company shall, within thirty days from the commencement of the Companies (Amendment) Act, 1974, or within thirty days after his becoming such beneficial owner, whichever is later, make a declaration to the company specifying the nature of his interest, particulars of the person in whose name the shares stand registered in the books of the company and such other particulars as may be prescribed.*
>
> *(3) Whenever there is a change in the beneficial interest in such shares the beneficial owner shall, within thirty days from the date of such change, make a declaration to the company*

in such form and containing such particulars as may be prescribed.

(4) Notwithstanding anything contained in section 153 where any declaration referred to in sub-section (1), sub-section (2) or sub-section (3) is made to a company, the company shall make a note of such declaration, in its register of members and shall file, within thirty days from the date of receipt of the declaration by it, a return in the prescribed form with the Registrar with regard to such declaration.

(5)(a) If any person, being required by the provisions of sub-section (1), sub-section (2) or sub-section (3), to make a declaration, fails, without any reasonable excuse, to do so, he shall be punishable with fine which may extend to one thousand rupees for every day during which the failure continues.

> *(b) If a company fails to comply with the provisions of this section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees for every day during which the default continues.*

(6) Any charge, promissory note or any other collateral agreement, created, executed or entered into in relation to any share, by the ostensible owner thereof, or any hypothecation by the ostensible owner of any share, in respect of which a declaration is required to be made under the foregoing provisions of this section, but not so declared, shall not be enforceable by the beneficial owner or any person claiming through him.

(7) Nothing in this section shall be deemed to prejudice the obligation of a company to pay dividend in accordance with the provisions of section 206, and the obligation shall, on such payment, stand discharged.

(8) The provisions of this section shall not apply to the trustee referred to in section 187B and after the commencement of Companies (Amendment) Act, 2000."

25. Thus, we see that under the Companies Act, 1956 :

a) It is only a person who agrees, in writing, to subscribe his name to the Memorandum of Articles of a Company or a person who holds equity share capital in such company, and whose name is entered in its record as beneficial owner of such shares, who can claim to be a member of such company.

b) A Memorandum of Articles of the Company binds the company to its members in terms of the covenants contained therein, which in effect, is a contract that binds only those persons who have been admitted as the members of the company.

c) No third person who may claim beneficial ownership of a share can have any relationship with the company in terms of its Memorandum of Articles of Association unless such person who is entered into the register of beneficial owners and declaration to that effect has been given by the holder of the beneficial interest, in the prescribed form under Section 187C.

d) Any charge or agreement created in relation to any share of the company by the ostensible owner of the shares, shall not be enforceable by the beneficial owner in the absence of the necessary declaration to be made and registered, in terms of Section 187C(i).

e) It is only a member of a company, limited by shares who shall have a voting right in respect of such capital, on every resolution of that company, which voting right shall be in proportion to his share in the capital of the company; no third person who may claim to hold a beneficial interest in the shares of the company would have a right to vote, unless such third person has his name registered in the members of the company as having a beneficial interest, in terms of Section 187C of the Act.

26. We shall now deal with the three primary submissions made by Mr Jitendra Jain, learned Counsel for the appellants, covering Substantial Questions of Law (A) to (C), which, as argued, proceed on

the basis of the following three propositions put forth by the appellants :

(a) That, by virtue of the applicability of the provisions of the Portuguese Civil Code and applying the concept of ownership to the communion of assets of matrimonial estate between the spouses, the wife of each appellant, by operation of law, holds 50% of the shares in the concerned companies, which are otherwise held and registered in the name of the husband.

(b) That, by virtue of the operation of, and applicability of the provisions of the Portuguese Civil Code to persons of Goan domicile, as a class, the provisions of Section 187C of the Companies Act, 1956, could not be made applicable to such class, though the provision would apply in all vigour to all other classes of members, whose names are registered in the register of holder of beneficial interest in such shares.

(c) That, as a consequence of the applicability of legal provisions of community of property under Portuguese

Civil Code to the spouses, the voting power of an assessee husband would be reduced to half of the actual voting power, he would possess in normal course by virtue of his shareholding in the company, the voting power of the other half being in the hands of the wife; consequently, the wife being a beneficial holder of half of the shares (notwithstanding the fact that there is no declaration to that effect in terms of Section 187C of the Companies Act, 1956), the provisions of Section 2(32) and of Section 2(22)(e) of the Income Tax Act, would not be triggered.

27. To support the first proposition set out in Para 26(a) above, the appellants have cited several judgments rendered by this Court, the Hon'ble Supreme Court and also by the ITAT, under the provisions of the Portuguese Civil Code, Income Tax Act and the Wealth Tax Act. We shall forthwith deal with these judgments. *CIT ..V/ s.. Purushottam Gangadhar Bhende* (supra), was a judgment rendered by the Division Bench of this Court, which decided the issue as to whether income being rent from house property derived by a husband and wife to whom the provisions of the Common Civil Code applied

(Communion Property) is liable to be assessed in equal shares in the hands of each of the spouses separately. This was a judgment rendered prior to the insertion of the special provision of Section 5A in the Income Tax Act, recognising and giving effect to the provisions of the Portuguese Civil Code to persons domiciled in the State of Goa. After considering the import of Articles 1108, 1117, 1118 and the provisions of Article 10 of the Portuguese Commercial Code, this Court has held in *Purushottam Gangadhar Bhende* (supra) as under :

> "*I must next proceed to consider the relevant articles of the Portuguese Civil Code, translations of which have been tendered and marked exhibits "A" and "B" before us, as already stated above. Article 373 lays down that "things" are either immovable or movable; Article 375 then sets out what are "immovables" by virtue of law; Article 376 enacts that all material things which are not immovable properties are "movable" and clause "one" of Article 377 lays down that by the words "movable things or movable estates" must be understood only material objects which by their nature are movable. These Articles, in my opinion, show that money is not included within the term "movables" as used in the Portuguese Civil Code.*
>
> *Article 1096 which occurs under the heading "general provisions" permits consorts to stipulate before the celebration of marriage and within the limits prescribed by law whatever they think proper in respect of their estate, and Article 1097 provides that such agreement must be by way of a public deed. Article 1098 enacts that in the absence of any such agreement, the marriage shall be deemed to have been celebrated as per the custom of the country and Article 1099 lays down that in such cases the provisions of Article 1108 to*

1124 would be applicable. It is an agreed position between the parties that the marriage in the present case was a marriage celebrated as per the custom of the country and Articles 1108 to 1124 are applicable, as far as the husband and wife in the present case are concerned.

Article 1108 lays down that marriage as per the custom of the country consists in communion between the consorts, of all their estates, present and future, not excluded by law; and Article 1109 enlists what is excluded from the communion. It is not necessary to deal with the same, but it is pertinent to note that in the unique para. (proviso) it is laid down that the incommunicability of the estate mentioned in Article 1109 does not cover the fruits of and the income from the estate. Articles 1110 to 1116 are a group of articles dealing with debts, and amongst them, Article 1113 provides that debts are communicable when acquired during the subsistence of the matrimony by the act or conduct of both the consorts, or by the husband with the consent of the wife, or by the wife with the authorisation of the husband, or by the wife alone in a case falling under Article 1116 with which we are not concerned. Article 1114 provides that the personal estate of the husband is liable for repayment of debts acquired by him without the consent of the wife during the subsistence of the matrimony, and that in the absence of any personal estate of the husband, the same are to be repaid "from his half share in the common estate", though immunity from recovery is granted in such cases till the dissolution of the marriage or separation of the estate between the consorts.

That brings me to Article 1117 which is a very important provision for the purpose of the present case. Article 1117 enacts in unequivocal terms that "the dominion and possession" of the common estate vest in both the consorts during the subsistence of the matrimony, though the management of the estate of the couple belongs to the husband. The same Article, however, provides, that the wife may manage the estate of the couple by consent of the husband, or during his absence or his suffering from some impediment. The word "dominion" has its derivation from the term "dominium" which is a term of Roman law often

retained in legal use and means "lordship" or "ownership". The Shorter Oxford English Dictionary, 3rd edition, therefore, gives at page 551, the meaning of the word "dominion" in law (third meaning) as being "ownership; property; right of possession, and that is the sense in which the word "dominion" is used in Article 1117. Article 1118 empowers the husband to freely dispose of the movable properties of the couple, but in case he alienates or binds under a gratuitous contract any such property without the consent of the wife, the value of the properties so alienated is to be "taken into account" towards the husband's half share. The use of the words "dispose", "alienates" and "contracts", as well as the definition of the term "movable things" or "movable assets" in Articles 373 to 377 referred to above, in my opinion, show that Article 1118 does not apply to money and cannot, therefore, apply to the income from communion property which the husband may receive in the form of cash. What is more, Article 1471 shows that where the legislature of Goa intended to refer to money, it has provided for it in distinct terms and has not included it in the term "movables" as used therein. Similarly, Article 1119, which relates to immovable properties, whether belonging exclusively to either of the consorts or belonging to them in common, provides that they cannot be alienated or any charge created thereon without common consent and agreement. Articles 1118 and 1119, therefore, in my opinion, also show that the wife has certainly an interest both in the movable as well as the immovable properties of the communion. Indeed, Mr. Joshi has not contended that communion properties belong to the husband only, but the whole dispute in this reference has been in regard to the question as to whether, during the subsistence of the communion, the share of either spouse can be said to be definite and ascertainable within the meaning of those terms in Section 26 of the Income Tax Act, 1961. Article 1120 lays down that the husband is not allowed to repudiate any estate without the consent of the wife, but the liability, if any, for "pure acceptance", without the consent of the wife, would fall only on his half share and on the estate belonging exclusively to him.

Articles 1121 to 1124 are again important in so far as they deal with what happens on the termination of the communion of husband and wife. Article 1121 lays down that the communion terminates by dissolution of the marriage or by separation in conformity with law; and Article 1122 enacts in the clearest possible terms that in case of death of one of the consorts, the survivor is to hold and manage the conjugal estate till the finalisation of the partition which in the language of Indian law means that the survivor would be a constructive trustee for the heirs or legatees of the deceased spouse till partition. Article 1123 then lays down that on partition between the consorts or their heirs, the property is to be divided equally and each spouse is to pay what he or she owes to the common estate and the next Article 1124 provides that the wife is to be given credit for what is due to her prior to the payment of the credits of the husband, and in case the common estate is insufficient for payment of her entire claim, the husband is liable to pay the same out of his own estate, except in the case of a debt not imputable to him. This Article further provides that the husband is not to enjoy a similar right of claim against the personal estate of the wife, presumably because it is he who has been in management of the communion property and is, therefore, responsible for the situation contemplated by Article 1124.

Article 1189 states that the management of all the properties of the conjugal society belongs to the husband, but in the case of his absence or his suffering from any impediment, the wife may manage the same. Articles 1191 and 1193, however, impose restrictions on the rights of management of the husband or the wife, as the case may be; Article 1191 provides that the husband cannot, in the course of his management, alienate immovable properties or move the Court in respect of any dispute relating to the same, without the consent of the wife. Article 1203 lays down that the conjugal society can be interrupted either with regard to person or property of the consorts, or only with regard to property. Article 1204 states that it is permissible to the spouses to obtain the separation of persons and assets on the same grounds on which they could obtain a divorce under the law applicable to them, but Article 1210 lays down that the

separation of persons necessarily means a separation of estate, with the result that whilst there can be a separation of their estate simpliciter, there cannot be separation of persons without the necessary consequence of the separation of estate also. Article 1216 provides that the disposition between living consorts of the immovable properties which have devolved on each of them after separation depends on the consent of both, and in case either of them unreasonably withholds his or her consent, that difficulty can be solved by approaching the Court. Article 1219 gives the wife a right to apply for a separation of estate simpliciter in a case in which she finds herself in manifest danger of losing her property due to maladministration by her husband. Article 1220 provides that the separation may fall on the estate which the wife might have brought to the conjugal society or which may have devolved to her thereafter, and on the half share of the properties which the spouses have acquired during matrimony. Article 1226 lays down that the separation of estate simpliciter does not release the wife from her obligation to contribute towards the expenses of the couple out of the income of her properties in proportion to her assets in relation to the assets of the husband. In order to understand these Articles in their proper perspective, it must be remembered that they relate to a situation in which, though the spouses are separate in estate, the matrimonial bond continues. Article 1471 states that gifts of movables or money made by the husband without the consent of the wife must be placed to the account of his moiety, except in a case in which they are by way of reward, or are of little importance. The last Article of the Portuguese Civil Code to which I need refer is Article 1766 in which it is provided that persons married as per the custom of the country are not allowed, under the penalty of the transaction being null, to dispose of specific properties belonging to the conjugal society, except when such properties have been allotted to that spouse on partition, or the other spouse has consented to it, or in certain other cases to which it is unnecessary to refer. Article 10 of the Commercial Code enacts that the payment of the commercial debts of the husband, which are to be made through his half share in the common assets, can be prayed for before the dissolution of the marriage or separation; and the wife must be summoned so

that, if she so desires, she may apply for judicial separation of the assets within the period provided in that Article.

In my opinion, the only Articles that need consideration in support of Mr. Joshi's contention that the shares of the husband and wife in communion property are not definite and ascertainable within the terms of Section 26 of the Income Tax Act, 1961, are Articles 1104, 1216 and 1220. In my opinion, however, none of the said three Articles really help Mr. Joshi. Article 1104 applies only to the particular case of an ante-nuptial agreement in a marriage under Articles 1096 and 1097, and can have no application to the present case which is not a case of such an agreement that is one of a marriage according to the custom of Goa. In the case of a separation of estate, Article 1220 provides for the reciprocal divesting of properties brought in at the time of the marriage, but with regard to properties acquired during the marriage, it adopts the only practical course of a reciprocal vesting of half of it in each of the spouses. Article 1216 does not militate against the assessee's contention because there being only a separation, the bond of matrimony continues to subsist and the power of disposal is, therefore, on the lines of that under Articles 1119, 1191 and 1193 which were applicable prior to that separation.

On a careful consideration of all the above provisions of the Portuguese Civil Code, as well as of Article 10 of the Commercial Code, the following legal propositions emerge :

> ***(i)*** *During the subsistence of a marriage celebrated as per the custom of Goa, the ownership and possession of "the common estate", immovable as well as movable, vests in both the husband as well as the wife. This is laid down in express terms in Article 1117. Articles 1118 and 1119 as well as 1766 are also consistent with that legal position;*
>
> ***(ii)*** *Proposition No. 1 applies to the corpus as well as the income of all communion property, immovables as well as movable. The unique para.*

(proviso) to Article 1109 lays down that even the income of property excluded from the communion is communion property. A fortiori the income from the communion property itself must be communion property;

(iii) *Under Articles 1117 and 1189, the husband has only a right of management, but even that right is not an absolute right so as to amount to the "ownership" of the income, in view of the provisions of Articles 1118, 1119, 1191 and 1219. Moreover, under the very Articles 1117 and 1189, even the wife can be in management in certain contingencies, her right being similarly fettered under the provisions of Article 1193;*

(iv) *In the corpus as well as the income of communion property, immovable as well as movable, the husband and the wife each have, during the subsistence of a marriage celebrated as per the custom of Goa, a fixed and certain half share which can be ascertained on the termination of the communion by divorce, separation or death (Articles 1121 to 1124, 1203, 1204, 1210, 1216, 1220 and 1226). What is most important in this connection is that it is an admitted position that on the death of one of the spouses, communion property does not devolve by survivorship, but the half share of the deceased spouse goes by succession to his or her own heirs or legatees by virtue of Articles 1122 and 1123. There is a consistent reference to the half share of each of the consorts throughout the different Articles dealing with various situations (vide Articles 1112 to 1114 of the Portuguese Civil Code, and Article 10 of the Commercial Code dealing with the incidence of debts, and Portuguese Civil Code Article 1118, dealing with the disposal of the movable property as well as articles 1120, 1123, 1220, 1463, and 1471).*

The final conclusions in the judgment are as under :

> *In the result, I hold that under the Portuguese Civil Code read with Article 10 of the Commercial Code, in the case of a husband and wife married according to the custom of Goa, each of them has a definite and ascertainable share in the corpus as well as in the income, the management alone being with the husband. As Mr. Mehta has rightly contended, restrictions on the enjoyment or management of the property which are to be found in the Portuguese Civil Code do not contravene any requirement of Section 26 of the Income Tax Act, 1961. The Tribunal was, therefore, right in the view which it took that Section 26 applied, and the question referred to us must be answered against the Commissioner.*
>
> *We answer the question referred to this Court as follows:*
>
> *On the facts of the case, and having regard to the relevant provisions of the Portuguese Civil Code and Article 10 of the Commercial Code, the respective half shares of the husband and wife in the income from the house property which is the property of the communion of the husband and wife married according to the custom of Goa, should be assessed separately in equal shares in the hands of each of them, and not in the hands of "the body of individuals" of the communion of husband and wife, for the relevant assessment year."*

28. *Purushottam Bhende* (supra), holds that in terms of the provisions of the Civil Code, each spouse has a definite and ascertainable right in the corpus as well as the income of the communion estate, and as a consequence, the respective half share of the husband and wife in the **income** of the house property is to be

assessed separately in equal shares in each of their hands. However, the judgment does not answer the question which is before us, which is whether the provisions of the Companies Act, specifying the right of ownership and the right to vote of a shareholder registered with the company, are applicable to shareholders' spouses governed by the provisions of the Civil Code.

29. *Commissioner of Wealth Tax ..V/s. Vasudeva V. Dempo* (supra), was a judgment of a Division Bench of this Court which decides whether spouses married under the Portuguese Civil Code are entitled to deduction under Section 5 of the Wealth Tax Act, 1957 separately. Whilst dealing with this issue, heavy reliance was placed on Bhende's case (supra). However, the real question before the High Court was whether the communion between husband and wife under the Portuguese Civil Code, would bring into being, an "Association of Persons" or whether this would be assessed as a "Body of Individuals", for the purpose of the provisions of the Wealth Tax Act, 1957. The reasoning of the High Court is recorded in the judgment as under :

> *"**10.** Now, the first question which arises for our determination in this reference is whether the communion between the consorts created by the provisions of the*

Portuguese Civil Code brings into being an association of persons as understood either under the I.T. Act or the W.T. Act. It was submitted by the learned counsel for the Commissioner that in the I.T. Act, Parliament had, at the time of introduction of Sections 80C(g), 80CC and 80L(1)(c), recognised that the husband and wife, governed by the system of community of property in force in Goa, Daman and Diu, would constitute an association of persons. Now, when these three statutory provisions of the I.T. Act are properly scrutinised, it is found that far from supporting the submission of Mr. Joshi, the Legislature has given indication that the husband and the wife governed by the system of community of property in Goa would not be an association of persons but only a body of individuals for which special provision was required to be made in the three Sections above noted. On this aspect of the matter, it may be apposite to refer to an earlier decision of this Court in CIT v. Purushottam Gangadhar Bhende [1977] 106 ITR 932, where the provisions of the Portuguese Civil Code as well as Article 10 of the Commercial Code were considered. However, in that decision, the Division Bench, to which one of us, namely, myself, was a party, was not required to give its conclusion as to whether the husband and the wife who constituted the communion by reason of the provisions of the Portuguese Civil Code could be regarded as an association of persons or not. The short question which fell for determination in the said decision was whether the shares of the two could be regarded as definite and ascertainable. If the answer to the question was in the affirmative, as it was ultimately found to be by the Bench, then it did not matter whether the two constituted an association of persons or not, since Section 26 of the I.T. Act, 1961, contained express prohibition against the income from property being taxed in the hands of the husband and the wife as an association of persons. However, Vimadalal J. (who delivered the principal judgment in Bhende's case [1977] 106 ITR 932 (Bom)), on a careful consideration of the various provisions of the Portuguese Civil Code as well as Article 10 of the Commercial Code, extracted certain legal propositions, which are set out at p. 940 of the report In Bhende's case [1977] 106 ITR (Bom). The four propositions are as under :

"(i) During the subsistence of a marriage celebrated as per the custom of Goa, the ownership and possession of 'the common estate', immovable as well as movable, vests in both the husband as well as the wife. This is laid down in express terms in Article 1117. Articles 1118 and 1119 as well as 1766 are also consistent with that legal position;

(ii) Proposition No. 1 applies to the corpus as well as the income of all communion property, immovable as well as movable. The unique para (proviso) to Article 1109 lays down that even the income of property excluded from the communion is communion property. A fortiori the income from the communion property itself must be communion property;

(iii) Under Articles 1117 and 1189, the husband has only a right of management, but even that right is not an absolute right so as to amount to the 'ownership' of the income, in view of the provisions of Articles 1118, 1119, 1191 and 1219. Moreover, under the very Articles 1117 and 1189, even the wife can be in management in certain contingencies, her right being similarly fettered under the provisions of Article 1193;

(iv) In the corpus as well as the income of communion property, immovable as well as movable, the husband and the wife each have, during the subsistence of a marriage celebrated as per the custom of Goa, a fixed and certain half share which can be ascertained on the termination of the communion by divorce, separation or death (Articles 1921 to 1124, 1203, 1204, 1210, 1216, 1220 and 1226). What is most important in this connection is that it is an admitted position that on the death of one of the spouses, communion property does not devolve by survivorship, but the half share of the deceased spouse goes by

> *succession to his or her own heirs or legatees by virtue of Articles 1122 and 1123. There is a consistent reference to the half share of each of the consorts throughout the different Articles dealing with various situations (vide Articles 1112 to 1114 of the Portuguese Civil Code, and Article 10 of the Commercial Code dealing with the incidence of debts, and Portuguese Civil Code Article 1118, dealing with the disposal of the movable property as well as Articles 1120, 1123, 1220, 1463 and 1471)."*

14. *It is true that joint rights in the properties of the spouses come into being as a result of the marriage under the provisions of the Portuguese Civil Code in the absence of an ante-nuptial agreement providing for their separate holding of respective property. From this it does not follow that the prospective husband and wife are associating (or getting married) with the purpose, object or motive of constituting themselves as joint holders of the property. On a proper view of the provisions of the Code, the communion of property would be a necessary incidence of the marriage but cannot be regarded as the object or purpose of the marriage. Mr. Joshi rightly stressed that the definition of "association of persons" in which the aspect of earning profit or income was emphasized to be considered under the W.T. Act. But by accepting his caveat it would not follow that the basic approach indicated in the judgments earlier referred to has to be totally abandoned. In order to constitute an association of persons, there must be, for the purpose of the W.T. Act, an association or coming together for the purpose of owning, holding or acquiring wealth. That is not the character of the communion formed as a result of the marriage under the Portuguese Civil Code. As earlier observed, even the Legislature seems to have accepted this position when it referred to this as a body of individuals rather than as an association of persons in the three Sections under the I. T. Act earlier referred to.*

15. *In our view, therefore, the Tribunal was entirely right in observing that no association of persons could have come into*

> *existence as a result of the marriage of the assessee with his wife. If that be so, then Section 4(1)(b) of the said Act or r. 2 of the W.T. Rules would not be available to the revenue for bringing about the result which was ought to be brought about."*

30. The question raised in *Commissioner of Wealth Tax ..V/s.. Vasudeva V. Dempo* (supra), which was also a judgment rendered prior to the inclusion of Section 5A in the Income Tax Act, went up in appeal before the Hon'ble Supreme Court in ***Commissioner of Income Tax ..V/s. Vasudeo V. Dempo*** reported in ***1993 Supp. (1) SCC 612***, wherein the Hon'ble Supreme Court has held thus :

> *"5. We have heard learned Counsel for the parties at length. We do not propose to express any considered opinion as learned Counsel appearing for the Department fairly accepted that the Act had been amended on April 1, 1989, and what was provided in the circular has how been incorporated in the Schedule itself. That lends support to the view taken by the High Court. Further, the Department; as is clear from the circular, at all points of time, intended that the spouses in Goa should be treated as individuals and granted exemption accordingly. We, however, consider it necessary to observe that the circulars issued by the Department are normally meant to be followed and accepted by the authorities. We do not find any justification for the officers not following it nor was the Department justified in pursuing the matter further in this Court."*

31. Thus, we see that what was held in *Vasudeva V. Dempo* (supra), was that persons married under the system of communion of

estate, in terms of the Portuguese Civil Code, were a body of individuals and not an association of persons for the purpose of the Wealth Tax Act. The judgment reiterates the position held in *Bhende's* case, but still does not answer the questions which we are called upon to decide in this case. In our view, all the judgments referred above do not advance the argument of the appellants on their first proposition set out in Para 26(a) above.

32. In ***Commissioner of Income Tax ..V/s. Govind B. C. Ghanekar***, this Court was dealing with a reference under the Income Tax Act, 1961 as to whether gifts made by the husband to his wife were "revocable transfers" within the meaning of Section 61 of the Income Tax Act. Whilst dealing with this issue and examining the provisions of Article 1181 of the Portuguese Civil Code, which deals with the gifts made *inter vivos* between spouses, it was held as under :

> *"8. On a conjoint reading of Sections 60, 61, 62 and 63, it is abundantly clear that the income from revocable transfers of assets is to be included in the hands of the transferor for the purpose of charge of income-tax. What is a revocable transfer will depend on various factors including, of course, the operation of law. If the law itself provides that a certain transfer shall be revocable, it cannot be held to be irrevocable with reference to the provisions of Section 63 of the Act. Section 63 specifies certain situations in which a "transfer" shall be deemed to be "revocable". The object of this provision*

is to enlarge the meaning of "revocable transfers" for the purposes of Sections 60, 61 and 62 and to include certain transfers therein which otherwise might or might not fall within that expression. It is not intended to restrict the normal meaning of the expression "revocable transfer".

9. *On a careful reading of Sections 61, 62 and 63 of the Act, we are of the clear opinion that the expression "revocable transfer" has been used therein in the sense it is understood in the legal world subject only to the enlargement of its scope by the deeming provision contained in Section 63.*

10. *Article 1181 of the Portuguese Civil Code is in the following terms :*

> ***"1181.*** *The gifts between consorts may be freely cancelled at any time by the donors.*
>
> *(1) For such purposes, there is no need of the wife being authorised by the husband or by judicial decree.*
>
> *(2) The cancellation shall be expressed."*

11. *The above Article which is applicable to the gifts in question clearly goes to show that the gifts by the husband to his wife are revocable gifts.*

12. *Section 63 of the Income Tax Act, 1961, does not have the effect of rendering gifts which are "revocable" by operation of law or otherwise, "irrevocable".*

13. *In view of the above discussion, we are of the clear opinion that having regard to the relevant provisions of the Portuguese Civil Code, the gift made by Mr. Govind Ghanekar to his wife were "revocable gifts" within the meaning of Section 61 of the Income Tax Act, 1961. The question referred to us is therefore, answered in the affirmative, i.e., in favour of the Revenue and against the assessee."*

In our opinion, the ratio laid down in *Govind Ghanekar* (supra), is completely inapplicable to the facts of the present case, as the question of law formulated therein was whether gifts between spouses made under the Civil Code could be considered as revocable transfers within the meaning of Section 31 of the Income Tax Act, 1961.

33. *Timblo Irmaos Ltd.* (supra), cited by the appellants, was a judgment of the Single Judge of this Court called upon to decide whether objections raised as to maintainability of a Plaint signed by the Principal Officer of a company created under the Portuguese Commercial Code on 11.04.1901, could be instituted, after the extension of the Companies Act, 1956, to the newly acquired territory of Goa. Whilst dealing with the decision, the learned Single Judge holds thus :

> *"5. It cannot be disputed and indeed not disputed that under the Portuguese Commercial Code read with law of 11th April 1901 Sociedade por Cotas which is akin to private limited company was to be incorporated and as I see it, there is a dispute that appellants had been so constituted. After the event of Liberation of Goa the Companies Act 1956 was brought into force with effect from 26th January 1963. Needless to say that after the extension of the Companies Act 1956 any new company or corporation to be incorporated had to be under that Act and further needless to say they are required to be registered accordingly with the Registrar of*

Companies nominated for that area. After the extension of the Companies Act to the territory of Goa G.S.R. 1349 published in Gazette of India dated 19.09.1964, Pt.II states by way of addition to Sub-section (2) of Section 34 to this effect :-

> *"Provided that any sociedade por quotas responsibilidade limitada formed under the Portuguese Commercial Code may be incorporated as a company under this Act and upon such incorporation, such a society shall be deemed to be a company under the Act with effect from the date of its formation under the Portuguese Commercial Code, as if the Act had been in force on the date of its formation under that Code, so however, that anything done or any action taken before the date of its incorporation under this Act such society shall be governed, as far as may be, by the Portuguese Commercial Code."*

6. *Section 34 of the Companies Act, 1956 speaks of effect of registration. The reading of the proviso in its application to the Territory of Goa, Damn and Diu now makes it clear that an option was given to the Sociedade por Cotas to get themselves converted as companies under the Companies Act, 1956 in which case they would be treated as if they were companies incorporated under that Act with retrospective effect of the formation under the Portuguese Commercial Code as if the Companies Act, 1956 had been in force on the date of such formation. The Proviso also makes it clear that those sociedade por Cotas which have not opted for their incorporation under the Companies Act, 1956 shall otherwise continue to be governed under the Portuguese Commercial Code. If this be the position, it is not possible to hold that appellants which are still a Sociedade por Cotas incorporated under the Portuguese Commercial Code read with law of 11th April 1901 can be said to have no existence despite the enforcement of the Companies Act, 1956. Appellant continues to be a Sociedade under that law save, except and subject to new laws with regard to the corresponding provisions made applicable to the State of Goa regard being had to the*

> *provisions of the General Clauses Act. I am, therefore, unable to support the judgment and decree dismissing the suit on the ground that the pleadings were not signed and verified as required by the provisions of the Code of Civil Procedure, which are required to satisfy the provisions of the Companies Act to have either the principal officer or the Secretary or the Director to verify pleadings for assuming responsibility. If under the Portuguese Commercial Code the Attorney could represent the Sociedade por Cotas for all purposes it must be held that the suit had been properly instituted."*

What may be culled out from this judgment is, that companies created under the Portuguese Commercial Code, 1901, would continue to be in existence, notwithstanding, the fact that the Companies Act, 1956, had been extended to the territory of Goa since 26.01.1963. Consequently, plaints at the behest of companies under the Commercial Code could be maintained.

In the present case, none of the companies in which the appellants are shareholders were created under the Portuguese Commercial Code but were all brought into existence under the Companies Act 1956, much after the liberation of Goa. *Timblo Irmaos Ltd.* (supra) in no way supports the argument of the appellants that the provisions of the Companies Act, 1956, insofar as it deals with the

beneficial interest of a shareholder under Section 187C are inapplicable to Goan to whom the Portuguese Civil Code would apply.

34. In ***CIT ..V/s.. Vasudeo V. Dempo*** reported in ***(1995) 213 ITR 466*** the question of law which arose for determination was whether income from other sources and income from capital gains were not assessable in the hands of the spouses married under the Portuguese Civil Code as a "Body of Individuals" but was assessable separately in the hands of the individual spouses. Relying upon *Purushottam Gangadhar Bhende* (supra) and on *Vasudeo V. Dempo* (supra), this Court held that the spouses cannot be considered as a body of individuals. Whilst deciding whether income such as dividend, interest and capital gains could be taxed in the hands of the spouses together as a body of individuals, this Court has based its reasoning purely upon the fact that the spouses, not having come together with the object of producing an income, would not be considered to be a body of individuals. This Court, in *CIT ..V/s.. Vasudo V. Dempo* (supra), in its judgment of 06.12.1993, has held as under :

> *"6. In the present case, when two persons got married as a result of which a communion of interest in various types of property or income arises under the Portuguese Civil Code,*

> *they cannot be considered as having come together with the object of producing an income. Therefore, they cannot be considered as a body of individuals. In the case of Commissioner of Wealth-tax v. Vasudeo V. Dempo, reported in (1992) 196 ITR p. 216, the Supreme Court considered the case of the very assessees on the question of wealth-tax. The Supreme Court has cited with approval the discussion of the High Court on the question of construction of the expression "association of persons". It said that even though joint rights in the properties of the spouses came into being as a result of marriage under the provisions of the Portuguese Civil Code, it did not follow that husband and wife got married with the purpose or object or motive of constituting themselves as joint holders of the property. The communion of property was a necessary incidence of marriage, but it cannot be regarded as the object or purpose of marriage. Hence, no association of persons could have come into being as a result of the marriage of the two assessees in the absence of any ante-nuptial agreement to that effect. The Court, therefore, held that wealth-tax exemption under Section 5 of the Wealth Tax Act is admissible to each one of the spouses as individuals.*
>
> *7. We make it clear that in the present reference, we are not concerned with business income arising to the communion and hence we are not concerned with the judgment of the Division Bench of Dr. Saraf and U. T. Shah, JJ. dated 22nd/23rd April, 1993 in Income-tax Reference No. 124 of 1980 in so far it deals with business income.*

This judgment does not make any reference or decide the issue as to what would be the effect, *qua* the Companies Act, in relation to the rights of the spouses *inter-se* and of each in relation to the company in which the individuals spouses held shares. That, in fact,

would be the question which we are dealing with and shall presently address.

35. We now refer to a judgment of the Division Bench of this Court in ***CIT ..V/s.. Modu Timblo (individual) (and vice versa)*** reported in ***(1994) 206 ITR 647***. In this matter, three questions of law were referred to the High Court, which we reproduce below :

> *"(1) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in holding that the income from business, share income from partnership firms and interest earned on bank accounts have to be assessed in the hands of the 'body of individuals' consisting of Mr. and Mrs. Modu Timblo ?*
>
> *(2) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in holding that the dividend income received by the communion of interest of husband and wife marred under the Portuguese Civil Code is liable for assessments in equal shares in the hands of each of the consorts without taxing it in the hands of the body of individuals ?*
>
> *(3) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is right in holding that the entire managing director's remuneration and perquisites have to be assessed in the hands of Mr. Modu Timblo, individual, and not one-half of the same ?*

In this case, the Income Tax Appellate Tribunal had taken a view that in cases, where the spouses were married under the

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Portuguese Civil Code, the income derived from different sources would be taxed in the hands of the individuals spouses or in the hands of the husband and wife, as a communion in the following manner :

> *"(A) **Salaries :** This would be assessed in the hands of the individual earning the salary;*
>
> *(B) **Interest on Securities :** This will have to be assessed equally, but separately, in the hands of the husband and the wife;*
>
> *(C) **Income from house property :** This has to be assessed separately in equal shares in the hands of the husband and the wife under Section 26 of the Act as held in Bhende's case, [1977] 106 ITR 932 (Bom);*
>
> *(D) (i) **Income from business :** Income from any business carried on by the communion or on its behalf will be the income of the body of individuals and will have to be assessed in that status.*
>
> *(ii) **Income from profession :** Income from profession will have to be fully assessed in the hands of the individual who earns the professional income as in the case of salary. It noted, however, that there might be exceptions when there is a combined effort in the nature of business or profession.*
>
> *(E) **Capital gains :** The assessability of capital gains in the hands of the body of individuals or the individuals constituting the communion will depend upon the facts of each case;*
>
> *(F) **Income from other sources :** Different types of income under this head may have to be assessed differently on the facts of each case."*

The ITAT also held that remuneration from the Private Limited Company in which Mr Modu Timblo was a Director, including the perquisites earned by him, would be assessed fully in his hands, individually and not in the hands of the spouses, applying the principle laid down in *Purushottam Gangadhar Bhende* (supra).

36. In this judgment, one of the contentions raised by the assessee, which was recorded at para 13 thereof, was that on a correct reading of the rights of the husband and wife under the Portuguese Civil Code and the decisions of this Court (in the case of *Purushottam Bhende* (supra) and ***Additional CIT ..V/s.. Valentino F. Pinto, (1984) 150 ITR 408***), even the salary income earned by any of the members of the communion i.e. husband or wife, would accrue or arise in equal shares to each of them in as much as salary is also property. A further submission was made therein by the assessee that even assuming that the entire amount of income from any source arises either to the husband or the wife, by virtue of the Code, a half share of such income will get diverted by **overriding title or a charge by operation of law** to the other spouse and, as such, only half of the income can be assessed in the hands of the husband or the wife to whom it accrues.

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Before referring to the manner in which this Court has dealt with the above submission, which is of relevance to the decision of this matter, we may add that as of 23.04.1993, when this Court rendered judgment in *CIT ..V/s. Modu Timblo* (supra), the provisions of Section 5A had not been inserted into the Income Tax Act, which was done only on 01.04.1994.

37. In ***CIT ..V/s.. Modu Timblo (individual) (and vice versa)*** reported in ***(1994) 206 ITR 647***, this Court has dealt with the question of whether the earlier judgments rendered in *Valentino F. Pinto* (supra) and *Purushottam Bhende* (supra) had laid down an absolute proposition that for purpose of the Income Tax Act, "all income" of the communion between husband and wife, whose marriage was registered under the Portuguese Civil Code, would include "business income" and "salaries" and in that regard has observed as under :

> ***"24.*** *In view of the foregoing discussion, we are of the clear opinion that the communion of husband and wife married under the custom of Goa and governed by the Portuguese Civil Code constitutes "a body of individuals" for the purposes of the Income Tax Act and it will have to be decided in respect of each head of income whether the income has accrued or arisen to the body of individuals as such or to its members individually. For that purpose, we will have to deal with each head of income. Before doing so we may refer to rival submissions of both the parties based on the decision of this*

> *court in Addl. CIT v. Valentino F. Pinto, Mapuca [1984] 150 ITR 408 and observations made therein that the ratio of the decision of this court in Purushotam Gangadhar Bhende's case [1977] 106 ITR 932 will apply to "all income". We have carefully considered the said decision. For reasons to be discussed a little later, we are of the opinion that so far as it relates to income from all sources other that business, these observations are only causal observations which do not form a binding precedent. So far as the decision pertains to "business income", it is a decision per incuriam and, as such, it cannot be a binding precedent."*

Further, this Court has considered the real ratio of the decision in *Valentino F. Pinto* (supra) and in *Purushottam Bhende* (supra), and has made the following observations therein :

> *"28. However, while concluding, the court used somewhat guarded language when it observed (at page 410) : "This ratio would seem to apply to all types of income and cannot be restricted to house property. If that be so, the two questions referred to us can be answered without further elaborate discussion, either factual or legal." The circumstances under which the court had to decide this case are evident from the factual situation set out above. It is evident that the court's attention was not drawn to the distinction in the matter of treatment of income under the head "House property" and income under other heads which had been created by the Legislature it self by virtue of specific provision contained in Section 26 of the Act. It was not brought to the notice of this court that the decision of this court in Purushotam Gangadhar Bhende's case [1977] 106 ITR 932 had been rendered on application of Section 26 of the Act which applied only to house property income and to no other income. Under the circumstances, the same ratio cannot apply to income falling under heads other than "income from house property". The said decision, therefore, is a decision per incuriam, so far as it pertains to income from business which was the subject-matter*

of controversy before it because, evidently, in that case this court acted in ignorance of the relevant provisions of the Act. The general observations therein are casual observations so far as they relate to income from other heads because the treatment of income falling under any other head was not the subject-matter of consideration before this court in that case. Such broad observations were neither necessary for the decision of that case not justified on the basis of the discussions contained therein."

38. In *Modu Timblo (individual) (and vice versa)* (supra), this Court then goes on to hold thus :

> ***"32.*** *As observed by the Supreme Court in CIT v. Imperial Chemical Industries (India) (P.) Ltd. [1969] 74 ITR 17 (at page 25) : "the true test for the application of the rule of diversion of income by an overriding title is whether the amount sought to be deducted in truth never reached the assessee as his income".*
>
> ***33.*** *Applying the above test, we are of the clear opinion that the principle of diversion of income by overriding title has no application in the case of communion of husband and wife governed by the Portuguese law. In that view of the matter, for the purpose assessment, it will be necessary to decide in respect of every income whether it has accrued or arisen to the communion as a body of individuals or to both the husband and wife separately in proportion to their shares in the property or to any one of them, as in the case of "salary".*
>
> *…..*
>
> ***40.*** *We may take up income from house property first. The income from house property derived by a communion of husband and wife governed by the Portuguese Civil Code will not be assessed in the hands of the communion but in view of Section 26 of the Act, the share of each such person in the income of the property shall be assessed in his or her*

individual hands. This aspect also stands concluded by the decision of this court in Purushotam Gangadhar Bhende's case [1977] 106 ITR 932. We are not concerned in the present case with interest on securities. We, therefore, need not deal with the same.

41. *So far as interest from bank accounts, fixed deposits, etc., is concerned, which falls under the last head, viz., "Income from other sources", it may be observed that this is a residuary head and various incomes may fall under it because income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income-tax under this head if it is not chargeable to income-tax under any other head specified in Section 14. In the instant case, we are called upon to decide the assessability of income from "interest" and "dividend" which was received from investment of funds which belonged in equal shares to both the husband and wife. There was no question of management or effort in deriving the above income. It is not a case where the income was derived from money-lending business or in the course of dealing in shares where different considerations may apply. In the instant case, we do not find anything to hold that the income from these two sources was derived by the two co-owners as "a body of individuals". The fact that it was received by one of them for and on behalf of both is not determinative. This income therefore, has to be assessed in equal shares separately in the hands of both the husband and wife in the status of individuals. This conclusion of ours gets full support from the decision of the Supreme Court in G. Murugesan and Bros. v. CIT [1973] 88 ITR 432. In this case, the Supreme Court had to decide about the assessability of income from dividend from shares which stood in the joint names of a number of persons. The question was whether the dividend income in such a case could be assessed in the hands of the joint owners in the status of an association of persons. The Supreme Court held that in the case of receiving dividends from shares, Where there is no question of any management, it is difficult to draw an inference that two or more shareholder functioned as an "association of persons" from the mere fact that they jointly owned one or more shares, and jointly received the dividend declared.*

42. So far as the "profits and gains of business or profession" are concerned, having held that the communion constituted a body of individuals which is a separate taxable entity under Section 4 of the Act read with Section 2(31) thereof, in the absence of any special provision to the contrary, we do not find any reason to hold that the income is not assessable in the hands of the "body of individuals". The income from business therefore, will be assessable in the hands of the combination as "a body of individuals" and the same cannot be divided equally among the two members of the communion for the purpose of assessment in their hands separately. While computing the income, deduction shall, however, be available in respect of life insurance premium, etc., paid for effecting insurance on the life of husband or wife or the child by virtue of the special provision contained in Section 80C(2)(g) of the Act.

43. So far as the salary income is concerned, it was contended by learned counsel for the assessee that this income is also property and, therefore, belongs equally to the husband and wife no matter who earns the salary. In that view of the matter, according to learned counsel, the income from salary should be divided equally between the husband and wife for the purpose of assessment and assessed accordingly. We have given very careful consideration to the above submission. We, however, find it difficult to accept the same, because such a conclusion will go counter to all know principles of law regarding accrual or arising of income from salary. In this connection, it may be mentioned that salary has been defined in Section 15 of the Act. What is chargeable to tax under the head "Salaries" is :

> *"(a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;*
>
> *(b) any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him;*

> *(c) any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer, if not charged to income-tax for any earlier previous year."*

44. *For the removal of doubts, in the Explanation, it has been declared that where any salary paid in advance is included in the total income of any person for any previous year, it shall not be included again in the total income of the person when the salary becomes due.*

45. *The above definition clearly goes to show that what is assessed under the head "Salaries" is the salary due to the assessee from an employer or a former employer. In the instant case, the husband was the employee. It was he who was employed. The salary accrued to him and it was payable to him by the employer. The employer, while doing so, was not concerned with the customary laws of his employee. It is impossible to comprehend that the income from salary can be said to arise to a person who is not in employment. The customary law or specific law of Goa determines the rights of the husband and wife in the property and income. It cannot make the wife also an employee where the husband is employed nor, by reference to such law, can it be said that half of the salary due to the husband for the services rendered by him will accrue to the wife. In matters like this, the customary law has no relevance. Situated thus, we are of the clear opinion, that the income from salary is the income of the person who is the employee which in the instant case was the husband and that being so, it was assessable in the manner laid down in Section 15 to 17 of the Act, in his hands alone and no part of it can be assessed in the hands of the wife. The interest of the wife in the said income by virtue of the customary law may, at the most, amount to application of income after it has accrued or arisen to the husband who is the employee. Serious anomalies would arise if we were to agree with the contention of the assessee that income from salary derived by one person is to be treated as income derived by two persons, because in that case, the person who is not an employee, who does not have anything to do with the employer and does not receive*

> *anything from him, will be deemed to be in receipt of salary from the employer and will also be entitled to standard deduction which is intended to cover expenses incidental to the earning of such income. It may also be observed that though the standard deduction is expressed in terms of percentage of the salary, there is a ceiling fixed for such allowance. If the income is assessed in entitled to claim standard deduction which, in a given case, may far exceed the ceiling or may go up to double the amount of the ceiling. We find it extremely difficult to accept such a submission. We, therefore, reject the same. We hold that the whole of the income from salary is assessable in employment and to whom it is due from the employer. The same will apply to remuneration received by a person working as managing director of a company because such remuneration will be assessed as income from salaries."*

39. The conclusions drawn by this Court in the above judgment, that salary or remuneration received by a Director of a company cannot be assessed as property/income of the communion in relation to the Portuguese Civil Code, are based upon the principle that customary law or specific law of Goa would have no relevance in matters of this sought, especially where the remuneration was received by the husband by virtue of his relationship with the company as its Director. The judgment would further hold that by virtue of the application of customary law or specific law of Goa to the spouses, the wife could not claim to be an employee of the company and claim half

the remuneration paid to her husband by virtue of being a Director of a Company.

The judgment holds that the remuneration of the Director of a Company could not confer on the other spouse the right to half the share in the remuneration, but in the case of income from "house property" or from "other sources" or from "profits and gains of business or profession", whilst relying upon the ratio laid down in the case of *Purushottam Bhende* (supra), it holds that the right of communion between spouses would also apply to the income under these three heads, since such income will be assessible in the hands of the communion.

40. Post the insertion of Section 5A in the Income Tax Act, 1961, which provision was introduced by way of an amendment under the Finance Act, 1994, which was brought in to force on 01.04.1994, though with retrospective effect from 01.04.1963, this Court had further occasion to deal with an interesting question of law, wherein the exclusion of income from salary being clubbed with the income of the spouses under other heads was challenged. This Court examined the

legality of the exclusion of income from salary of one of the spouses from being treated as part of and being included in the total income of both the spouses, and being treated as income of only the spouse, who had actually earned such salary in the case of ***Goa Salaried Tax Payers Association ..v/s.. Union of India***, reported in ***(2001) 249 ITR 195***.

The challenge to the exclusion of income from salaries from computing the income of the husband and wife was on the ground that there could be no discrimination by excluding the head of income from salary from being treated as the income of the spouses together in their hands, merely because the source of salary may originate in a contract of service with an employer. Whilst rejecting this contention on behalf of the assessee, this Court has followed the ratio of the judgment laid down in *Modu Timblo (individual)* (supra), which upheld the Revenue's contention that treating income from salary earned by one of the spouses, separately, whilst computing the income of both spouses to which the Civil Code applied, was valid. We quote below the relevant extracts from *Goa Salaried Tax Payers Association ..v/s.. Union of India* (supra) :

"***24.*** *Therefore, the contention of the petitioners is that they were also to be included in the category for giving benefit of assessment by sharing the income between the spouses is a matter of policy. That policy may not fit in the square of logic. As contended by respondent No. 2 in the reply there is a discernible dissimilarity between the salaried persons and the other persons as has been exposed by the Division Bench of this court in the case of Modu Timblo [1994] 206 ITR 647. According to us, Parliament is justified in grouping the salaried persons as separate and distinct in that context. One has to understand the reality and practical problems in making the classification particularly in taxation laws. Take for example in Goa in a Central Government office there may be employees who are coming from other States and also employees who are citizens of Goa. All are receiving salary equally and their salaries and service conditions are equal and similar. All the salaried people are entitled to compute their income under the provisions of the Income-tax Act. It is difficult or it is not practical for Parliament to discriminate that salaried persons again on the basis of their origin or historical background for the purpose of assessment of income-tax. Parliament or the Legislature will have to take into account the reality or practicality of the circumstance subsisting in imposing taxation. The Supreme Court has observed in Kerala Hotel and Restaurant Association v. State of Kerala, thereof as follows* (page 259 of 77 STC) :

> *"We are here concerned with the constitutional validity of a legislative provision which has the effect of making the cooked food sold in the posh eating houses alone exigible to sales-tax while exempting from that levy the cooked food sold in the moderate eating houses. Reasonableness of the classification has to be decided with reference to the realities of life and not in the abstract. A discernible dissimilarity between those grouped together and those excluded is a pragmatic test, if there be a rational nexus of such classification with the object to be achieved. In the abstract all cooked food may be the same since its efficacy is to appease the hunger*

> *of the consumer. But when the object is to raise only limited revenue by taxing only some category of cooked food sold in eating houses and not all cooked food sold anywhere, it is undoubtedly reasonable to tax only the more costly cooked food. The taxed cooked food being the more costly variety constitutes a distinct class with a discernible difference from the remaining tax-free cooked food. A blinkered perception of stark reality alone can equate caviar served with champagne in a luxury hotel with the gruel and buttermilk in a village hamlet on the unrealistic abstract hypothesis that both the meals have the equal efficacy to appease the hunger and quench the thirst of the consumer. Validity of a classification under our Constitution does not require such a blurred perception."*
>
> *(underlining supplied)*

25. *As observed by the Supreme Court a discernible dissimilarity is there in the case of salaried persons other than the persons who have other sources of income. A different treatment has been meted out even for the computation of income and the manner of payment of tax, reduction, etc. Therefore, in this context we are not able to find out any arbitrariness in excluding the salaried persons from the benefits that have been conferred by way of Section 5A of the Income-tax Act. The argument of learned counsel for the petitioners that once Section 14 is operated and classified the income assessed in the manner provided in the Income-tax Act, then after left over in the net income that is to be shared between husband and wife taking into account the principle of community of property. According to him, what really is meant by Section 5A is the charging of income. We cannot agree to this submission. The computation of income of course is done under Section 14 of the Act. But, Section 5A too, according to us, has prescribed another manner of computation of income as regards the spouses of Goan origin who follow the rule of community of property. Therefore, Section 5A has also laid down a computation. To sum up we*

> *are not agreeable to the argument advanced by learned counsel for the petitioners for the classification made to the salaried persons for denying the benefit of Section 5A."*

41. *Goa Salaried Tax Payers Association ..v/s.. Union of India* (supra), lays down that though Section 14 of the Income Tax Act, sets out the manner of computing the income, which may be from the five heads specified therein, the new provision of Section 5A, applicable to Goans, whose marriage was governed by the Civil Code has also prescribed another manner of computation of income as regards spouses of Goan origin governed under the system of communion of assets.

The ratio laid down in this judgment, therefore, does not advance the arguments raised by the appellants in any manner.

42. In the case of ***Smt. Antoneta Cicilia Fernandes .V/s. Smt. Rita Maria Fernandes and others*** reported in ***1996 (3) Bom. C.R. p.10***, relied upon by the appellants, this Court was dealing with a question as to whether the wife could object to the execution of a decree against the assets of her husband, who was one of the partners in the partnership firm, judgment debtor in the matter, on the basis that she was not a

partner of the firm, so had no liability towards the debt or could be held liable by virtue of her marriage under the regime of communion of assets.

Whilst rejecting the contention of the wife, who had objected to the execution, this Court, in the facts of that case has held thus :

> *"9. We are unable to accept this submission of the learned Counsel again. As rightly contended by Mr. Bruto DCosta, learned Counsel for the respondent No.1, it is an acknowledged position in this case that the husband of the appellant is a partner of the respondent No.3s firm entrusted even to operate its accounts. The deed of partnership clearly indicates that the husband of the appellant is not merely a sleeping partner and instead it reveals that he was active in the partnership business of the firm. As a partner of the firm he took up the work of the construction of the respondent NO.1s building and hence by reason of his activity incurred the liability which has thus a commercial activity as its source. It was therefore submitted that Article 10 is not at all attracted in this case since the liability sought to be enforced is not from the appellants husband moiety. Further, according to the learned Counsel, the appellant also lost the last chance to prove that the activity of her husband which is the source of liability incurred by respondent No.3 firm, was not for the common gain of the couple when the matter was remanded to the Civil Court for the purpose of inquiry under Order XXI, Rule 15 of the Civil Procedure Code. Having failed to establish this requirement it is not open now to the appellant to claim that the commercial activity of her husband which has originated the liability sought to be enforced by respondent No.1 is not meant for the common gain of the couple.*

> ***10.*** *There is indeed great force in the argument and in this regard the submissions of the learned Counsel deserve acceptance. Article 10 of the Commercial Code merely records the cases arising out of commercial debts of the husband whose payment has to be made from his moiety on the common properties, while Article 15 concerns to all debts originated from the commercial acts contracted solely by the husband in the exercise of his activity as a businessman. Thus, in our view, the factual situation of the present controversy seems to take it straightaway within the purview of Article 15 of the Commercial Code. We have therefore no hesitation in holding that the liability of the appellant sought to be enforced by respondent No.1 in execution of the decree is to be deemed as joint and common liability for which the entire properties are liable. Hence the attachment and sale of the common assets cannot be faulted with in view of the presumption arising out of Article 15 of the Commercial Code which presumption was not at all rebutted by the appellant inspite of the opportunity made available to her."*

43. We then refer to ***CIT ..V/s.. Maria Sylvia D'Souza***, reported in ***(2013) 261 CTR (Bom.) 282***, cited by the appellants in support of their contention that the spouse (wife of appellant) would by law own 50% of the assets belonging to the communion, which according to them, would include 50% ownership of the shares in the concerned company. In that matter, the question of law before this Court was, whether the ITAT was justified in holding the 50% of the share of the deceased husband would go to the legal heirs and 50% to the assessee wife, by overlooking the fact that all the fixed deposits

received were standing in the name of the wife assessee. This judgment was rendered post amendment of the Income Tax Act, after insertion of Section 5A, which came into force on 01.04.1994, and holds thus :

> ***14.*** *The CIT(A) as well as the Tribunal have held that in terms of Section 5A of the Act which was brought into force in the year 1994 with retrospective effect from 1st April, 1963, the assessee and her husband were governed by the system of Community of Assets ('Communiao Dos Bens') which is in force in the State of Goa. The Tribunal held that after the death of husband of the assessee, only 50 per cent of the share in the FDRs would pass on to three sons and one daughter and the assessee would be entitled to 50 per cent of the share and, therefore, the directions given by the CIT(A) to the AO to consider 50 per cent of the interest amount in the hands of the assessee as her undisclosed income for the block period, cannot be faulted. In our view, the Tribunal has rightly placed reliance upon Section 5A of the Act and Articles 1122 and 1123 of Portuguese Family Civil Law which is in force in the State of Goa and dismissed the appeal preferred by the revenue against the order passed by the CIT(A).*
>
> ***15.*** *In our view, the reliance placed by the Revenue on the judgment in the case of Jose Filipe Alvares (supra) is totally misplaced. Even in the said case, in view of amendment to IT Act by introduction of Section 5A with retrospective effect, the Division Bench of this Court declined to answer the question referred to it and remitted the matter to the Tribunal to decide afresh in the light of Section 5A of the Act. In our view, the ratio of the said judgment does not advance the case of the Revenue. Similarly reliance placed on Section 283 of the Act is also misplaced inasmuch as it is not at all applicable in the present case.*
>
> ***16.*** *We are of the considered view that the submission made on behalf of the Revenue that the assessment ought to have been on the basis of the BOI is totally misplaced.*

> *17. In view of the above, we do not find any merit in the present appeal. The substantial question of law formulated in this appeal is accordingly answered against the Revenue. Consequently, the appeal is dismissed."*

This judgment was dealing with a case, where the question raised was, whether 50% of the share in fixed deposits of the deceased husband would, on his death, devolve by succession on the children, even though the fixed deposit receipt stood in the name of the living spouse. In the present case, we are not faced with deciding in what manner the succession to the shares held by the appellants would devolve on the heirs, were the appellants to pass away. Obviously, that would be decided by the succession law applicable to the spouses. The judgment, does not however, throw any light on the question before us, which is whether the wife would have a voting right in the company, in which her husband, the appellant, is the sole registered shareholder and member of such companies. The ratio of the above judgment is certainly not applicable to the facts of the present case, nor would it advance the submission sought to be made by the appellants.

44. ***Zelia M. Xavier Fernandes E. Gonsalves ..Vs/.. Joana Rodrigues and others***, reported in ***(2012) 3 SCC 188***, cited by the

appellants decides the question as to whether a member of a Panchayat under Goa Panchayat Raj Act, 1994, who was married under the Civil Code, is disqualified from membership of that Panchayat. The ratio of this judgment is founded upon the fact that the husband of such member was awarded a contract by the Panchayat. By operation of law (Portuguese Civil Code), the member became entitled to a share in the profits of the contract awarded to the member's husband. The question was, whether by operation of law, that member was disqualified under the Panchayat Raj Act, since she had a monetary interest in the contract awarded to the husband. Whilst referring to the provisions of Articles 1098 and 1108 of the Portuguese Civil Code and to the provisions of Section 5A of the Income Tax Act, the Hon'ble Supreme Court has held as under :

> *"15. There is no dispute that the Respondent 4 and the appellant are husband and wife and are governed by the provisions of the 1860 Code. By virtue of Article 1098 and Article 1108 thereof, in the absence of any contract, the marriage between the appellant and the Respondent 4 is governed by the system `Communiao dos bens' i.e. community of property. Accordingly, on marriage, the property of the spouses gets merged. Each spouse, by operation of law, unless contracted otherwise, becomes 50% shareholder in all their properties, present and future and each spouse is entitled to a one-half income of the other spouse.*

16. *Section 5A(1) of the Income Tax Act provides that where the husband and wife are governed by the system of "Communiao dos bens" in force in the State of Goa the income of the husband and the wife under any head of income shall not be assessed as that of such community of property but such income of the husband and the wife from all sources, except from salary, shall be apportioned equally between the husband and the wife and the income so apportioned shall be included separately in the total income of the husband and of the wife respectively and the remaining provisions of the Income Tax Act shall apply accordingly. Sub-section (2) of Section 5A provides that where the husband or the wife governed by system of community of property has any income under the head "salaries", such income shall be included in the total income of the spouse who has actually earned it.*

17. *In P. Ramanatha Aiyar's The Law Lexicon, 2nd Edition (Reprint 1999) the term "interest" is explained thus:*

> *"Interest.- Legal concern, right, pecuniary stake the legal concern of a person in the thing or property or in the right to some of the benefits or use from which the property is inseparable; such a right in or to a thing capable of being possessed or enjoyed as property which can be enforced by judicial proceedings. The word is capable of different meanings, according to the context in which it is used or the subject-matter to which it is applied. It may have even the same meaning as the phrase "right title and interest" but it has been said also to mean any right in the nature of property, but less than title. The word is sometimes employed synonymous with estate, or property.*
>
> *'Interest means concern, advantage, good; share, portion, part, or participation.*
>
> *A person interested is one having an interest; i.e. a right of property, or in the nature of property, less than title.*
>
> *The word `interest' is the broadest term applicable to claims in or upon real estate, in its*

> *ordinary signification among men of all classes. It is broad enough to include any right, title, or estate in or lien upon real estate. One who holds a mortgage upon a piece of land for half its value is commonly and truly said to be interested in it."*

The word "interest" has a basic meaning of participation in advantage, profit and responsibility. "Interest" is a right, title or share in a thing.

18. *Section 10(f) speaks of monetary interest. The general rule that the wife's interest is not necessarily the husband's interest has no application where the husband and the wife are governed by the system "community of property" because under that system, on marriage, each spouse is entitled to a one-half income of the other spouse unless contracted otherwise. During the subsistence of marriage, the husband and the wife each have a share in the corpus as well as the income of communion property.*

19. *There is no doubt that Section 10(f) contemplates that share or monetary interest (direct or indirect) has to be in the contract itself. The expression "in any contract" means in regard to any contract. Could it be said that the appellant had no indirect share or monetary interest in regard to her husband's contract with the Village Panchayat Raia when, by operation of law, she is entitled to the profits of that contract? The answer has to be in the negative.*

20. *Money acquired by the appellant's husband from the contract with the Village Panchayat Raia is "community property" and, therefore, the conclusion is inescapable that the appellant has indirect share, or, in any case, monetary interest in the contract awarded to her husband by the Village Panchayat Raia as the profits from the contract shall be apportioned equally between her and her husband. There is no evidence of exclusion of the appellant from her husband's assets and income. The provisions contained in Articles 1098 and 1108 of the 1860 Code and Section 5A of the Income Tax Act give the appellant a participation in the profits of the contract and advantages like the apportionment of income*

> *from that contract. The appellant, by operation of law, becomes entitled to share in the profits of the contract awarded to her husband by the Village Panchayat. From whatever way it is seen, the appellant's participation in the profits of the contract does constitute an "indirect monetary interest" in the contract for collection of market fee awarded to her husband within Section 10(f) prohibiting the member of the Village Panchayat from having such an interest."*

45. There is no doubt that in Para 15 of this judgment, the Hon'ble Supreme Court, after referring to the provisions of the Civil Code, 1860, holds that on marriage, the property of the spouses gets merged and each of the spouse, by operation of law, becomes 50% shareholder in all their properties entitling each spouse to half the income of the other spouse. The judgment, however, was referring to this provision for the purpose of interpreting the word "interest" in Section 10(f) of the Panchayat Raj Act, meaning "monetary interest in a contract". It was in this context that the Hon'ble Supreme Court has interpreted that even where the spouse, a member of Panchayat, participates in the profits of the contract awarded to her husband, such profit of the contract would constitute "indirect monetary interest" for the purpose of disqualifying a member, in terms of Section 10(f) of the Panchayat Raj Act.

We are therefore of the view, that the ratio of the judgment is distinguishable and not directly applicable in context of the question before us, which essentially is, whether, for the purpose of Section 2(22)(e) of the Act, the husband could be considered to be holding 50% of the shares in the concerned companies for the benefit of the wife, notwithstanding the fact that the shares were exclusively allotted to and standing in the name of the husband in the register of the company.

46. We then deal with the judgment of the Hon'ble Supreme Court in ***Jose Paulo Coutinho ..V/s.. Maria Luiza Valentina Pereira and another***, reported in ***(2019) 20 SCC 85***, cited by the appellants to contend that the Portuguese Civil Code being a Special Act, applicable only to a person domiciled in Goa, the appellants, and their spouses, by virtue of the operation of this law, would each own 50% of the shares in the concerned company, notwithstanding the fact that the 100% of the shares were held by the husband and stood in the name of the husband in the register of the shareholders of that company.

On going through this judgment, we note that the question for decision before the Hon'ble Supreme Court was, whether succession to the property of a Goan situated outside the territory of the State of Goa, in India, will be governed by the Portuguese Civil Code, 1867, as applicable to the State of Goa, or, whether the provisions of the Indian Succession Act, 1925 would become applicable to the succession of the estate situated outside the territory of Goa.

47. Whilst answering the above question, in *Jose Paulo Coutinho* (supra), the Hon'ble Supreme Court formulated the following issues for its determination :

> *"**I.** Whether the Portuguese Civil Code can be said to be a foreign law and the principles of private international law are applicable?*
>
> ***II.** Whether the property of a Goan domicile outside the territory of Goa would be governed by the Code or by Indian Succession Act or by personal laws, as applicable in the rest of the country e.g. the Hindu Succession Act, 1956, Muslim Personal Law (Sharit) Application Act, 1937, etc.?*
>
> ***III.** What is the effect of the grant of probate by the Bombay High Court in respect of the Will executed by JMP?*

***I.** Whether the Portuguese Civil Code can be said to be a*

> *foreign law and the principles of private international law are applicable?"*

Whilst answering the first issue, *Jose Paulo Coutinho ..V/s.. Maria Luiza Valentina Pereira and another* (supra), holds as under :

> ***"22**. We are clearly of the view that these laws would not have been applicable unless recognised by the Indian Government and the Portuguese Civil Code continued to apply in Goa only because of an Act of the Parliament of India. Therefore, the Portuguese law which may have had foreign origin became a part of the Indian laws, and, in sum and substance, is an Indian law. It is no longer a foreign law. Goa is a territory of India; all domiciles of Goa are citizens of India; the Portuguese Civil Code is applicable only on account of the Ordinance and the Act referred to above. Therefore, it is crystal clear that the Code is an Indian law and no principles of private international law are applicable to this case. We answer question number one accordingly."*

Whilst answering the question set out in issue No.II, the Hon'ble Supreme Court makes reference to Article 24 and to Article 1737 of the Code and then decides, whether it would be the Civil Code or the Indian Succession Act, that would apply to succession of properties belonging to the estate of deceased Goan outside the territory of Goa, in the following manner :

> ***"24.** It is interesting to note that whereas the Founders of the Constitution in Article 44 in Part IV dealing with the*

Directive Principles of State Policy had hoped and expected that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard. Though Hindu laws were codified in the year 1956, there has been no attempt to frame a Uniform Civil Code applicable to all citizens of the country despite exhortations of this Court in the case of Mohd. Ahmed Khan v. Shah Bano Begum and Sarla Mudgal v. Union of India.

25. *However, Goa is a shining example of an Indian State which has a Uniform Civil Code applicable to all, regardless of religion except while protecting certain limited rights. It would also not be out of place to mention that with effect from 22-12-2016 certain portions of the Portuguese Civil Code have been repealed and replaced by the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012 which, by and large, is in line with the Portuguese Civil Code. The salient features with regard to family properties are that a married couple jointly holds the ownership of all the assets owned before marriage or acquired after marriage by each spouse. Therefore, in case of divorce, each spouse is entitled to half-share of the assets. The law, however, permits pre-nuptial agreements which may have a different system of division of assets. Another important aspect, as pointed out earlier, is that at least half of the property has to pass to the legal heirs as legitime. This, in some ways, is akin to the concept of "coparcenary" in Hindu law. However, as far as Goa is concerned, this legitime will also apply to the self-acquired properties. Muslim men whose marriages are registered in Goa cannot practice polygamy. Further, even for followers of Islam there is no provision for verbal divorce.*

26. *It is in this context that we shall have to decide whether the property of late JMP situated in Bombay i.e. outside the territory of Goa would be governed by the Code or by the Indian Succession Act. As pointed out earlier, this is not a conflict of international law. The Indian Parliament has made the earlier Portuguese Civil Code applicable in the State of Goa. It is in this light that we shall now read Article 24 on which great reliance has been placed by the learned Single*

Judge in the impugned judgment. ……

27. *In our view, this article has no applicability to the facts of the present case. When a law is adopted or applied in a new situation, it has to be read in that context. We have to read Article 24 in context of the annexation of the territories of Goa by conquest and their becoming an inherent part of India. There are no Goan citizens; there can be domiciles of Goa but all are citizens of India. As Indian citizens, under Article 19 of the Constitution, they are free to move to any part of the country, reside there and buy property subject to the local laws and limitations. Therefore, a domicile of Goa, who starts living in Bombay or in any other part of India, cannot be said to be Portuguese by any stretch of imagination and he cannot be said to be living in a foreign country. Indian citizens living in India cannot, by any stretch of imagination, be said to be living in a foreign country. This person is only a Goan domicile living outside Goa in India, which is his country. Therefore, Article 24, in our opinion, has no applicability.*

28. *This brings us to the issue as to what will be the law which would be applicable. The parties are ad idem that the Code applies…….*

29. *Article 1766 provides that a married person shall not on the penalty of nullity dispose of certain and specific properties of the couple except if the said properties have been allotted to the said person. The Article reads as follows:*

> ***"1766. Prohibition of disposition of the assets of spouses.-*** *Those married as per the custom of the country shall not, under penalty of nullity, dispose of certain and specific properties of the couple, except if the said properties have been allotted to them in partition, or are not included in the communion, or if the disposition has been made by one of the spouses in favour of the other, or if the other spouse has given consent by authentic form."*

The basis of this article is that both spouses are equal owners

of the entire property of the couple – acquired before or after marriage. Therefore, the disposition of some part of the property without the consent of the other spouse can be termed a nullity. We are referring to this Article only to highlight the fact that in case the Civil Code is to apply this would also be a factor to be taken into consideration because can it be said that this article will only apply to the properties within the territory of Goa and not to properties in other parts of the country i.e. India?

30. *Article 1774 reads as follows:*

> *"**1774. Prohibition of disposition of legitime.**- The persons obliged to reserve the legitime may only dispose of the portion which the law permits them to dispose of."*

A domicile under his personal law is obliged to reserve a legitime which can be disposed of only in accordance with the laws of inheritance. As pointed out earlier, in most of the cases, the legitime would be half. Again, the question would arise that is this legitime to be calculated by taking into consideration only the immovable properties in Goa or by taking all the properties of the deceased into consideration? Once we have come to the conclusion that the Civil Code is an Indian law and the domiciles of Goa, for all intent and purposes, are Indian citizens, would it be prudent to hold that the Civil Code, in matters of succession, would apply only in respect to properties situated within the territories of Goa? We do not think so.

31. *Succession is governed normally by the personal laws and where there is a Uniform Civil Code, as in Goa, by the Civil Code. Once Article 24 is not to be taken into consideration then it is but obvious that all the properties whether within Goa or outside Goa, must be governed by the Civil Code of Goa. If we were to hold otherwise, the consequences could be disastrous, to say the least. There would be no certainty of succession. It would be virtually impossible to determine the legitime which is an inherent part of the law of succession. The rights of the spouses to have 50%*

of the property could easily be defeated by buying properties outside the State of Goa. In the case of a Hindu Goan domicile it would lead to further complications because if we were to accept the judgment of the learned Single Judge and the arguments of the respondents, for the properties in Goa, the Civil Code would apply but for the properties outside the territory of Goa, the Hindu Succession Act will apply. Similarly, for Muslims within the State of Goa, Civil Code would apply and outside Goa, the Muslim Personal Law (Shariat) Application Act, 1937 would apply. This would lead to many uncalled for disputes and total uncertainty with regard to succession.

32. *There must be unity in succession. The Portuguese law is based on the Roman law concept of hereditas i.e. inheritance to the entire legal position of a deceased man. This concept of universal succession is described in the Comparative Analysis of Civil Law Succession,7 as under:*

> ***"18.*** *In "Comparative Analysis of Civil Law Succession", Villanova Law Review Vol. 11 Issue 2, the concept of 'universal succession' and 'hereditas' has been described as*
>
> *"…… succession by an individual to the entirety of the estate, which includes all the rights and duties of the decedent (de cujus), known collectively as the hereditas under Roman law. The succession to the whole of the estate could be by one heir (heres) or several (heredes), they taking jointly regardless of whether the succession was testate or intestate. The estate (hereditas), which passed in Roman succession was the sum of all the rights and duties of the deceased person (persona) except for his political, social and family rights which were not considered inheritable. Transfer of title to the heirs was deemed to occur simultaneously with the individual's death and was a complete transfer of title at that time."*

33. *Though we have held that this is Indian law, since it is a*

law of Portuguese origin, we may have to take guidance from the way in which the law has been applied to come to the conclusion to see what is the intention of the law. Therefore, all the properties of the person whose inheritance is in question have to be calculated and considered as one big conglomerate unit and then the rules of succession will apply.

34. *There is a conflict between the Indian Succession Act, the Hindu Succession Act, the he Muslim Personal Law (Shariat) Application Act, 1937, etc. and the Portuguese Civil Code with regard to the laws of inheritance but this conflict has to be resolved. In our view, the Parliament of India, after conquest of Goa, by adopting the Portuguese Civil Code accepted that the Goan domiciles were to be governed by that law in matters covered under the Code and specifically included in the laws which were made applicable. The Indian Parliament did not make applicable all Portuguese laws but the laws which were applied would apply with full force. The Goa, Daman and Diu (Administration) Act, 1962 is a special law dealing with the domiciles of Goa alone. This special law making the Portuguese Civil Code applicable is an exception carved out of the general laws of succession namely Indian Succession Act, Hindu Succession Act, he Muslim Personal Law (Shariat) Application Act, 1937 and other laws.*

35. *It is a well settled principle of statutory interpretation that when there is a conflict between the general law and the special law then the special law shall prevail. This principle will apply with greater force to special law which is also additionally a local law. This judicial principle is based on the latin maxim generalia specialibus non derogant, i.e., general law yields to special law should they operate in the same field on the same subject. Reference may be made to the decision of this Court in R.S. Raghunath v. State of Karnataka, CTO v. Binani Cements Ltd. And Atma Ram Properties (P) Ltd. v. Oriental Insurance Co. Ltd.*

36. *As far as Goa is concerned, there is a specific judgment in this regard i.e. Justiniano Audusto De Piedade Barreto v. Antonio Vicente Da Fonseca, though relating to the interpretation of Section 29 of the Limitation Act, 1963,*

which deals with local and special laws. Dealing with the issue of the Portuguese Civil Code, the Court held that it could not escape from reaching the conclusion that the Portuguese Civil Code is a local law within the ambit of Section 29(2) of the Limitation Act, 1963. A special law is a law relating to a particular subject while a local law is a law confined to a particular area or territory. In our considered view, the Portuguese Civil Code, in matters of succession, is both a special law and a local law. It is special and local because it deals with laws of succession for the domiciles of Goa only. In para 14 of this judgment, the Court held as follows:

> ***"14.*** *We, therefore, arrive at the conclusion that the body of provisions in the Portuguese Civil Code dealing with the subject of Limitation of suits etc. and in force in the Union Territory of Goa, Daman and Diu only is "local law" within the meaning of Section 29(2) of the Limitation Act, 1963. As stated earlier these provisions have to be read into the Limitation Act, 1963, as if the Schedule to the Limitation Act is amended mutatis mutandis. No question of repugnancy arises. We agree with the Judicial Commissioner that the provisions of the Portuguese Civil Code relating to Limitation continue to be in force in the Union Territory of Goa, Daman and Diu."*

37. *In view of the aforesaid, we are clearly of the view that the Portuguese Civil Code being a special Act, applicable only to the domiciles of Goa, will be applicable to the Goan domiciles in respect to all the properties wherever they be situated in India whether within Goa or outside Goa and Section 5 of the Indian Succession Act or the laws of succession would not be applicable to such Goan domiciles.*

…...

40. *In view of the above discussion, we answer the question framed in Paragraph 1, holding that it will be the Portuguese Civil Code, 1867 as applicable in the State of Goa, which shall govern the rights of succession and inheritance even in respect*

of properties of a Goan domicile situated outside Goa, anywhere in India.

48. Thus, in *Jose Paulo Coutinho* (supra), the real question was which law would apply to the succession of the estate of a person of Gaon origin. Thus, the ratio laid down in that judgment was based upon the principle that there must be unity in succession, Portuguese Law is based on the Roman Law concept of hereditas or universal succession.

We are of the view that this judgment was rendered for deciding the law applicable to the succession of the estate of a deceased, and the principle laid down therein would be of no assistance to the appellants in furthering their case raised in the Substantial Questions of Law (A) to (C) above.

49. As set out in the preceding paragraphs, the argument put forth by the appellants that for the purpose of ascertain whether the provision of Section 2(32) read with Section 2(22)(e) would be attracted to present case, it was submitted that first it would have to be ascertained as to who is the beneficial owner of the shares carrying not less than 20% voting power in the company receiving the

amount/money; on ascertaining the "beneficial owner" of such shares, the next step is to ascertain how many shares the beneficial owner actually holds, while third step would be, after ascertaining quantity of shares actually held in such company, one would have to ascertain the voting power attached to such shares.

50. The appellants have relied upon the dictionary meaning of the word "beneficial owner", which as per **Mitra's Legal and Commercial Dictionary**, 6th Edition, means "*A beneficiary's interest in trust property; a corporate shareholder's power to buy or sell the shares, though the shareholder is not registered on the corporations books as the owner. The expression means such right to enjoyment of property as exist, where the legal title is in one person and the right of such beneficial use or interest is in another and where such right is recognized by law and can be enforced by the Courts at the suit of such owner or someone on his behalf.*"

As per **Advanced Law Lexicon,** 6th Edition by P. Ramanath Aiyar, beneficial owner means "*One who, though not*

having apparent title, is in equity entitled to enjoy the advantage of ownership".

51. The appellants also rely upon the meaning of the term "Moiety" in the Black's Law Dictionary, which is "*A half of something (such as an estate), Also termed* ***mediety****. A portion less than half; a small segment. In federal custom's law a payment made to an informant who assist in the seizure of contraband, the payment being no more than 25% of the contraband's net value*".

The concept of "moiety" is embodied in the provisions of Article 1108 of the Portuguese Civil Code, 1867, which in effect, is the half undivided and indivisible right that each spouse has in the common estate of the communion between them, which comes into existence on their marriage. This communion between the spouses is of all their assets, present and future, not excluded by law, in which each spouse a moiety holder (to the extent of half of the indivisible share in the communion).

52. Relying upon the provisions of the Portuguese Civil Code that governs the moiety rights between the parties, the appellants have

submitted that since the ownership of the common assets vests in the wife to the extent of 50% of the communion, as moiety holder, the wife would be entitled to 50% of the ownership of all shares held by her husband in the companies, with which we are concerned with in the matter; consequently, it is submitted that since the husband holds only 33% of the shares in the company, half of those shares along with the voting power/right attached to that half (16.5%) would vest in the wife, thus, the number of shares and the voting power attached there to being less than the threshold of 20% of the voting power in the company receiving the money, the provisions of Section 2(22)(e) of the Act would not be applicable.

The second leg of the argument on behalf of the appellants is that the provisions of Section 187C of the Companies Act, 1956, which require registration of the beneficial ownership in the register of the company, are not applicable to persons governed by the Portuguese Civil Code, by virtue of the fact that the wife, by virtue of marriage, automatically becomes the owner of 50% of the shares held by the husband in such company. It is further the submission of the appellants that the provisions of Section 187C of the Companies Act

would apply only if the beneficial interest in the shares of the company are created contractually, and it would not apply in the present case, since the beneficial ownership of the shares has been created by operation of law, as in this case, the right of ownership in the common estate of the spouses was created under the system of community of assets under the Portuguese Civil Code.

We proceed to analyse these submissions in the subsequent paragraphs.

53. The provisions of the Portuguese Civil Code, 1867, continued to be in force after the annexation of the territory of Goa into the Indian Union by virtue of the provisions of Section 5 of the Goa, Daman and Diu (Administration) Act, 1962. Further, by virtue of the Goa, Daman and Diu (Laws) Regulation No. 12 of 1962 (GDD Laws Regulation 1) promulgated on 28.11.1962, the Companies Act, 1956 was extended to the territory of Goa and by virtue of amendment to the Companies Act, 1956, Section 2A was incorporated therein extending the Companies Act to the territory of Goa.

54. If we accept the argument of the appellants, that the provisions of Section 187C of the Companies Act would not be applicable to a person, who is governed by the Portuguese Civil Code, in view of the fact that half the ownership of any shares held by one spouse would vest in the other spouse, in terms of the provisions of the Code, we would be faced with a situation that wherever the provisions of the Companies Act may be in conflict with those of the Portuguese Civil Code, conflicting provisions of the Companies Act would be inapplicable to citizens of India, whose marriage is governed by the Portuguese Civil Code. As noted by the Hon'ble Supreme Court in the case of *Jose Paulo Cutinho* (supra), the Civil Code may be a Code of Portuguese origin, but after the conquest and annexation of Goa, this Code became applicable to the domiciles of Goa by an Act of Indian Parliament, and thus, became Indian Law, as much as the Companies Act, 1956.

We also can visualise a situation where, if the argument of the appellants is accepted, it would have the effect of making the provisions of Section 187C, which was enacted by Act 41 of 1974 w.e.f. 01.02.1975, applicable to all classes of shareholders or members in

relation to a company, but not to shareholders or members to whom the provisions of the Portuguese Civil Code would apply and govern the rights of spouses *inter-se* under the system of community of assets. Equally, the argument would have to address a situation where there could be sets of shareholders, to some of whom Portuguese Law would apply, and their spouses could claim ownership in the shares held by the other spouse in a company, along with the right to vote on resolutions, while another set of shareholders, to whom the Portuguese Code does not apply by virtue of the fact that they may be domiciled in other parts of India, to which other personal laws would apply;

55. Would the wife, as in the case, of the appellant, by virtue of the application of the provisions of the Portuguese Civil Code, automatically have a right to become a "member" of a company or its "shareholder" and enjoy the rights of such shareholder under the Companies Act, 1956?

To answer this query, we would have to do a combined examination of the provisions of Sections 36, 41, 87 and 150 of the Companies Act, 1956. The effect of registration of a Memorandum of

a Company and its Articles of Association are set out in Section 36 of the Companies Act. The Memorandum of a Company, therefore, binds the company to its members in terms of the covenants and rules set out in the Articles of Association. The Memorandum is, therefore, a contract of sorts, creating a privity between the incorporated company, which is a juristic entity and its members. No person other than or Member who has subscribed to the Memorandum has any rights or control or can intermeddle with the affairs of the company.

56. A "Member", in relation to a company, is defined under Section 41 of the Companies Act, and shall be a person, who subscribes to the Memorandum of a Company or a person, who agrees in writing to become a member of a company and whose name is entered in its register of members or a person holding equity share capital of company and whose name is entered as beneficial owner in the records of the company shall be deemed to be a member.

Here again, the Companies Act does not admit any person other than the above three categories of persons, as members of a company, who shall take membership of a company either by virtue of

having subscribed to its Memorandum or who has agreed **in writing** to become a member of the company and entered his name in the register of members or who holds shares of the company and whose **name is registered as a beneficial owner** in the register of the company. A person whose name is not registered as one holding beneficial interest in any share of the company is therefore clearly excluded, in terms of Section 41(3) of the Act, from claiming to hold any beneficial interest in any share of the company or to have a claim of being a beneficial owner of such a share. Clearly, therefore, the wife of the appellant is not a member of the companies with which we are concerned in these appeals by virtue of one of the three modes of becoming a member.

57. Part-IV of the Companies Act, 1956 deals with the share capital and voting rights of members of the company. By virtue of Section 87 of that Act, it is only a member of a company limited by shares and holding any equity share capital therein who shall have a right to vote, in respect of such capital, on every resolution of that company. Further, the voting right of such a member on a poll shall be in proportion to his share of the paid-up equity capital of the company.

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Thus, clearly, the Companies Act, which is a Code in itself, specifies who is a member in relation to the company and the voting power of such member shareholders of that company. The Act does not envisage a situation where by virtue of a personal law applicable to a shareholder of a company, the spouse of such shareholder could claim voting rights in a poll to pass resolutions or, for that matter, claim a privity of contract to bind herself to the Memorandum of a Company and the Articles of Association of such company. Neither can such spouse claim, by virtue of being a moiety holder in the common estate, the management of a company in which her husband is a member or shareholder, as will be presently examined by us.

58. Section 150 under Chapter-I of Part-VI of the Companies Act, 1956, deals with Management and Administration of Companies and requires every company to maintain a Book or Register of its members. By an amendment to this Act w.e.f. 13.12.2000, the provisions of Section 152A were inserted deeming the Register and Index of Beneficial Owners to be an Index of Members and the Register and Index of Debenture Holders.

Section 187C was inserted in this Act w.e.f. 01.02.1975, casting a duty upon a person, who does not hold the beneficial interest in a share of a company, but whose name is entered in the register of its members to declare to the company in the prescribed form the particulars of the person, who actually holds the beneficial interest in such shares. Sub-section (2) of Section 187C also enjoins the holder of such beneficial interest, independent of the fact whether the member, who does not hold such interest, has made a declaration under Sub-section (1) of Section 187C, to also declare to the company in the prescribed form, of the beneficial interest held by him in such shares.

59. In our opinion, a reading of the aforequoted provisions of the Companies Act would result in the following conclusions :

a) It is only a person who agrees, in writing, to subscribe his name to the Memorandum of Articles of a Company or a person who holds equity share capital in such company and whose name is entered in its record as beneficial owner of such shares, who can claim to be a member of such company.

b) A Memorandum of Articles of the Company binds the company to its members in terms of the covenants contained therein, which in effect, is a contract that binds only those persons who have been admitted as members of the company.

c) No third person who may claim to be beneficial ownership of a share can have any relationship with the company in terms of its Memorandum of Articles of Association, unless such person who is entered into the register of beneficial orders and declaration to that effect has been given by the holder of the beneficial interest, in the prescribed form under Section 187C.

d) Any charge or agreement created in relation to any share of the company by the ostensible owner of the shares, shall not be enforceable by the beneficial owner in the absence of the necessary declaration to be made and registered, in terms of Section 187C(i).

e) It is only a member of a company, limited by shares who shall have a voting right in respect of such capital, on every resolution of that company, which voting right shall be in proportion to his share in the capital of the company; no third person who may claim to hold a beneficial interest in the shares of the company would have a right to

vote unless such third person has his name registered in the members of the company as having a beneficial interest, in terms of Section 187C of the Act.

60. The next question, then, would be to analyse whether the words "shareholder" and "beneficial owner of shares" deployed in the provisions of Section 2(22) of the Income Tax Act, 1961, which defines "dividend", is to be given the very same meaning, interpretation and extent as when the same words are used in the Companies Act, 1956.

Whilst considering this question, we must take note that Section 2(6A) of the Income Tax Act, 1922, provided for a similar definition to the word "dividend" as the one contained in Section 2(22) of the Income Tax Act, 1961. Section 2(6A) of the Income Tax Act, 1922, read as under :

> *"2(6A) "dividend" includes—*
>
> *(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;*
>
> *(b) any distribution by a company of debentures, debenture-stock or deposit certificates in any form, whether with or without interest, to the extent to which the company possesses accumulated profits, whether capitalised or not;*

(c) any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not;

(d) any distribution by a company on the reduction of its capital to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not;

(e) any payment by a company, not being a company in which the public are substantially interested within the meaning of section 23A, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder or any payment by any such company on behalf or for the individual benefit of a shareholder, to the extent to which the company in either case possesses accumulated profits;

but "dividend" does not include—

(i) a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;

(ii) any advance or loan made to a shareholder by a company in the ordinary course of its business where the lending of money is a substantial part of the business of the company;

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of clause (e), to the extent to which it is so set off;

Explanation.—The expression "accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948,and before the 1st day of April, 1956."

61. It would be further of advantage to our discussion to record, that Section 2(22) in the Income Tax Act, 1961, admitted of the very same two categories of payments considered as dividend under the 1922 Act i.e. payments made as advance or loan to a shareholder and, payments made for the individual benefit of a shareholder. In the 1961 Act, an additional condition was added to the definition of "dividend" by incorporating the condition that such recipient shareholder, being the beneficial owner of the shares, should have a shareholding in that company, which carries not less than 20% of the voting power. The provision of Section 2(22) was further amended in 1987 w.e.f. 01.04.1988 by substituting the provision of shareholding not less than 10% of the voting power, by reducing the percentage of voting power from 20% to 10% and by creating a new category of payment as dividend i.e. payment to any concern in which such shareholder was a member or partner in which he has a substantial interest being shares carrying at least 20% of the voting power.

62. In interpreting the meaning of the words "shareholder" and "beneficial owner of shares" in Section 2(22) of the Income Tax Act, 1961, we refer to the judgment of the Hon'ble Supreme Court in

Howrah Trading Company Ltd. (supra), which was a judgment rendered on the interpretation of these very words in the provisions of Section 16(2) of 1922 Act. The facts of that case were that the assessee claimed the dividend income from certain shares purchased by him under a blank transfer, but the transfers had in fact not been registered with various companies to which the shares belonged. The applicant's claim was that the shares, although not registered in his name in the books of a company were his property and dividend income should be grossed up under Section 16(2) and credit for the tax deducted should be allowed to the applicant. After referring to various provisions of the Companies Act, the Hon'ble Supreme Court has held thus :

> *"The position of a shareholder who gets dividend when his name stands in the register of members of the company causes no difficulty whatever. But transfers of shares are common, and they take place either by a fully executed document such as was contemplated by Regulation 18 of Table A of the Indian Companies Act 1913, or by what are known as blank transfers. In such blank transfers, the name of the transferor is entered, and the transfer deed signed by the transferor is handed over with the share scrip to the transferee, who, if he so chooses, completes the transfer by entering his name and then applying to the company to register his name in place of the previous holder of the share. The company recognises no person except one whose name is on the register of members, upon whom alone calls for unpaid capital can be made and to whom only the dividend declared by the company is legally payable. Of course, between the transferor and the transferee, certain equities arise even on the execution*

and handing over of 'a blank transfer', and among these equities is the right of the transferee to claim the dividend declared and paid to the transferor who is treated as a trustee on behalf of the transferee. These equities, however, do not touch the company, and no claim by the transferee whose name is not in the register of members can be made against the company, if the tranferor retains the money in his own hands and fails to pay it to him.

A glance at the scheme of the Indian Companies Act, 1913, shows that the words " member ", " shareholder " and " holder of a share " have been used interchangeably in that Act. Indeed, the opinion of most of the writers on the subject is also the same. …….

The words " holder of a share " are really equal to the word shareholder and the expression "holder of a share" denotes, in so far as the company is concerned, only a person who, as a shareholder, has his name entered on the register of members. A similar view of the Companies Clauses Consolidation Act, 1845, was taken in Nanney v. Morgan(1). The learned Lord Justices held that under Section 15 of that Act, the transferee had not the benefit of a legal title till certain things were done, which were indicated by Lopes, L.J., in the following passage:

> *"Therefore the transferor, until the delivery of the deed of transfer to the secretary, is subject to all the liabilities and entitled to all the rights which belong to a shareholder or stockholder, and, in my opinion until the requisite formalities are complied with, he continues the legal -proprietor of the stock or shares subject to that proprietorship being divested, which it may be at any moment, by a compliance with the requisite formalities. (1) (1888) 37 Ch. D. 346, 356." …...*

The same position obtains in India, though the completion of the transaction by having the name entered in the register of members relates it back to the time when the

> *transfer was first made. See Nagabushanam v. Ramachandra Rao. ……*
>
> *The question that falls for consideration is whether the meaning given to the expression "shareholder" used in Section 18(5) of the Act by these cases is correct. No valid reason exists why " shareholder " as used in Section 18(5) should mean a person other than the one denoted by the same expression in the Indian Companies Act, 1913. In re Wala Wynaad Indian Gold Mining Company (5), Chitty, J., observed: "I use now myself the term which is common in the Courts, I a shareholder', that means the holder of the shares. It is the common term used, and only means the person who holds the shares by having his name on the register". …..*
>
> *The words of Section 18(5) must accordingly be read in the light in which the word " shareholder " has been used in the subsequent Sections, and read in that manner, the present assessee, notwithstanding the equitable right to the dividend, was not entitled to be regarded as a "shareholder" for the purpose of Section 18(5) of the Act. That benefit can only go to the person who, both in law and in equity, is to be regarded as the owner of the shares and between whom and the company exists the bond of membership and ownership of a share in the share capital of the company. In view of this, we are satisfied that the answer given by the Calcutta High Court on the question posed by the Tribunal was correct."*

63. Thus, we see that in Howrah Trading Company Ltd. (supra), the Supreme Court has held that the words "member", "shareholder" and "holder of a share" have been used interchangeably in the Companies Act even though they may carry the same meaning. The judgment further holds that the word "shareholder" contained in Section 18(5) of the Income Tax Act, 1922, would be

given the very same meaning as those words as assigned to them in the Companies Act. The judgment further lays down the principle that a person can be considered to be the owner of a "share" of a company, in law and in equity, and the benefit of the dividend of such share can go only to a person with whom there exists a bond of membership and ownership of such a share in the share capital of the company.

64. In ***C.I.T. Andhra Pradesh ..V/s.. C. P. Sarathy Mudaliar,*** reported in ***(1972) 4 SCC p. 531***, the Supreme Court was considering whether the words "shareholder" in Section 2(6A) in the 1922 Act, which is a provision similarly Section 2(22) in the 1961 Act, could carry the same meaning as has been assigned to the word, under the Companies Act. This judgment takes support from the ratio laid down in Howrah Trading Co. Ltd. (supra), and has held thus :

> ***"9.*** *Section 2(6A)(e) gives an artificial definition of "dividend". It does not take in dividend actually declared or received. The dividend taken note of by that provision is a deemed dividend and not a real dividend. The loan granted to a shareholder has to be returned to the company. It does not become the income of the shareholder. For certain purposes, the Legislature has deemed such a loan as "dividend". Hence,*

Section 2(6A) (e) must necessarily receive a strict construction. When Section 2(6A) (e) speaks of "shareholder", it refers to the registered shareholder and not the beneficial owner. The H. U. F. cannot be considered as a shareholder either under Section 2(6A) (e) or under Section 23A or under Section 16(2) read with Section 18(5) of the Act. Hence a loan given to an H. U. F. cannot be considered as a loan advanced to a "shareholder" of a company.

10. *Our conclusion in this regard receives support from the decisions of this Court. In Howrah Trading Co. Ltd. v. Commissioner of Income-tax, Central, Calcutta (36 ITR 215), this Court had to examine the case of a person who had purchased shares of a company under a blank transfer but in whose name the shares had not been registered in the books of the company. The question was whether he could be considered as a "shareholder" in respect of such shares for the purpose of Section 18(5) of the Act, because of his equitable right to the dividend on such shares and therefore entitled to have that dividend grossed up under Section 16(2) by addition of income-tax paid by the company in respect of those shares and claim credit for the tax deducted at the source. This Court held that he cannot be considered as a "shareholder", the reason being that he had not been registered as a shareholder.*

11. *In Commissioner of Income tax, Bombay City II, v. Shakuntala & ors. (43 I.T.R. p. 352), a Hindu undivided family which was the beneficiary of certain shares in a company in which the public were not substantially interested held those shares in the names of different members of the family. The Income Tax Officer applied the provisions of Section 23A of the Act (before its amendment in 1955) and passed an order that undistributed portion of the distributable income of the company shall be deemed to be distributed, and the amount appropriate to the shares of the family were sought to be concluded in the income of the family. In that case again this Court ruled that the word "shareholder" in Section 23A meant the shareholder registered in books of the company and the amount appropriate to the shares had to be included in the incomes of the members of the family, in whose names the shares stood in the register of the company; and as the Hindu*

undivided family was not a registered shareholder of the company, that amount could not be considered as the income of the family under Section 23A.

12. *From the above decisions it is clear that when the Act speaks of the "shareholder" it refers to the registered shareholder.*

13. *Mr. Sen contended that the above two decisions cannot be considered to have laid down the law correctly in view of the decision of this Court in Kishanchand Lunidasing Bajaj v. Commissioner of Income-tax, Bangalore (60 I.T.R. p. 500). Therein the question was whether a H. U. F. could be charged to tax in respect of dividends received by some of the coparceners of that family in respect of shares held by them, those shares having been purchased from out of the family funds. This Court ruled that the dividends paid to the shareholders was the income of the family and that being so, the same was assessable in the hands of the Hindu undivided family. We see no conflict between this decision and the decisions earlier referred to. In the Case of actual receipt of dividends there is a receipt of income. That income is received on behalf of the family. Hence, the same was assessable in the hands of the family. In the case of deemed dividends under Section 2(6A)(e) the family does not get any income at all. The dividend referred to by that provision is only a deemed dividend and not a real dividend. Hence, no income is either received by the family or accrued to it. Therefore, the only person who is deemed to have received that income can be assessed in respect of that income.*

14. *Coming to the facts of the present case the loans advanced to shareholders alone can be deemed as dividends. No loans had been advanced to shareholders as seen earlier. Hence, the shareholders did not get any income. Hence Section 2(6A) (e) became inapplicable."*

65. Thus, in *C. P. Sarathy Mudaliar (supra),* placing reliance on the view taken earlier in *Howrah Trading Company. Ltd.*

(supra), the Supreme Court has taken a further expanded view in its interpretation, holding that the word "shareholder" found in Section 2(6A)(e) of the 1922 Act, refers to the registered shareholder, and not to the beneficial owner; it has further taken the view that the word "shareholder" in the Income Tax Act, would always refer to a "registered shareholder".

This judgment also clarifies that in Section 2(6A)(e) in the 1922 Act, which is similar to the provisions of Section 2(22) of the 1961 Act, creates a deeming fiction, whereby the dividend referred to therein is not a real dividend and the person deemed to have received it does not actually get any income. The judgment further holds that the only person, who is deemed to have received that income can be assessed in respect of the dividend, that person alone being a shareholder.

66. In ***C.I.T. ..V/s. Universal Medicare (Pvt. Ltd.),*** reported in ***(2010) 190 Taxmann 144***, this Court was considering Clause (e) of Section 2(22) of the Income Tax Act, 1961, and whether the deeming fiction in that provision would apply to a transaction of a

loan other than a "shareholder". Whilst examining these provisions, it has laid down the following ratio :

> *"8. Clause (e) of Section 2(22) is not artistically worded. For facility of exposition, the contents can be broken down for analysis:*
>
> > *(i) Clause (e) applies to any payment by a company not being a company in which the public is substantially interested of any sum, whether as representing a part of the assets of the company or otherwise made after the 31 May 1987;*
> >
> > *(ii) Clause (e) covers a payment made by way of a loan or advance to (a) a shareholder, being a beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power; or (b) any concern in which such shareholder is a member or a partner and in which he has a substantial interest;*
> >
> > *(iii) Clause (e) also includes in its purview any payment made by a company on behalf of or for the individual benefit, of any such shareholder;*
> >
> > *(iv) Clause (e) will apply to the extent to which the company, in either case, possesses accumulated profits. The remaining part of the provision is not material for the purposes of this Appeal. By providing an inclusive definition of the expression 'dividend', Clause 2(22) brings within its purview items which may not ordinarily constitute the payment of dividend. Parliament has expanded the ambit of the expression 'dividend' by providing an inclusive definition.*
>
> *9. In order that the first part of Clause (e) of Section 2(22) is attracted, the payment by a company has to be by way of an advance or loan. The advance or loan has to be made, as the*

case may be, either to a shareholder, being a beneficial owner holding not less than ten per cent of the voting power or to any concern to which such a shareholder is a member or a partner and in which he has a substantial interest. The Tribunal in the present case has found that as a matter of fact no loan or advance was granted to the assessee, since the amount in question had actually been defalcated and was not reflected in the books of account of the assessee. The fact that there was a defalcation seems to have been accepted since this amount was allowed as a business loss during the course of assessment year 2006-2007. Consequently, according to the Tribunal the first requirement of there being an advance or loan was not fulfilled. In our view, the finding that there was no advance or loan is a pure finding of fact which does not give rise to any substantial question of law. However, even on the second aspect which has weighed with the Tribunal, we are of the view that the construction which has been placed on the provisions of Section 2(22)(e) is correct. Section 2(22)(e) defines the ambit of the expression 'dividend'. All payments by way of dividend have to be taxed in the hands of the recipient of the dividend namely the shareholder. The effect of Section 2(22) is to provide an inclusive definition of the expression dividend. Clause (e) expands the nature of payments which can be classified as a dividend. Clause (e) of Section 2(22) includes a payment made by the company in which the public is not substantially interested by way of an advance or loan to a shareholder or to any concern to which such shareholder is a member or partner, subject to the fulfillment of the requirements which are spelt out in the provision. Similarly, a payment made by a company on behalf, of for the individual benefit, of any such shareholder is treated by Clause (e) to be included in the expression 'dividend'. Consequently, the effect of Clause (e) of Section 2(22) is to broaden the ambit of the expression 'dividend' by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder. Consequently in the present case the payment, even assuming that it was a dividend, would have to be taxed not in the hands of the assessee but in the hands of the shareholder. The

> *Tribunal was, in the circumstances, justified in coming to the conclusion that, in any event, the payment could not be taxed in the hands of the assessee. We may in concluding note that the basis on which the assessee is sought to be taxed in the present case in respect of the amount of Rs.32,00,000/- is that there was a dividend under Section 2(22)(e) and no other basis has been suggested in the order of the Assessing Officer."*

67. Thus, it can be seen that in Universal Medicare (supra), this Court reiterated that the provisions of Section 2(22) could apply only to the shareholder individually receiving the benefit of such loan; the judgment further holds that the effect of clause (e) of Section 2(22) is to broaden the ambit of the expression "dividend" by including certain payments which the company has made as a loan or advance for the individual benefit of a shareholder, but however, the definition does not alter the position that the dividend has to be taxed in the hands of the shareholder alone.

68. In ***Rameshwar Lal Sanwarmal ..V/s.. C.I.T.***, reported in ***AIR 1980 SC 372***, whilst considering the meaning of the words "deemed dividend" in Section 2(6A)(e) of the 1922 Act, and whether such a deeming fiction could be applied to an assessee who was not a registered shareholder of the company, after considering its

earlier judgment rendered in C. P. Sarathy Mudaliar (supra), the Supreme Court has held as under :

> *"3. Now two distinct aspects were comprised in this question and both were argued before the High Court. One was whether the loans advanced to the three business concerns of the assessee could be regarded as "deemed dividend" within the meaning of Section 2(6A) (e) and the other was whether these loans, even if regarded as "deemed dividend" could be taxed in the hands of the assessee. The High Court decided both these aspects of the question in favour of the assessee and held that the word "share-holder" in Section 2(6A)(e) meant registered shareholder or in other words, a shareholder whose name is recorded in the register of the company as the holder of the shares and since the advance in the present case was made to the assessee which was not a registered shareholder, it could not be regarded as "deemed dividend" within the meaning of Section 2(6A) (e) and that even if it be assumed that the advance was liable to be regarded as "deemed dividend" under Section 2(6A) (e), it could be taxed as dividend income only of the registered shareholder and not of the assessee. This view taken by the High Court rendered it unnecessary to decide the other four questions and the High Court accordingly declined to consider them. The result of this decision was that the assessment made by the Revenue Authorities was set aside in so far as it included the loans advanced by the company to the three business concerns of the assessee as deemed dividend and taxed it in the hands of the assessee.*
>
> *4. The revenue, being aggrieved by the decision of the High Court, preferred an appeal after obtaining special leave of this Court. Now it seems that through some inadvertence which is difficult to understand, the revenue attacked only that part of the order of the High Court which held that the "deemed dividend" could be assessed to tax only in the hands of S. M. Saharia, the registered shareholder and not in the hands of the assessee which was merely the beneficial owner cf the shares. Neither in the statement of case filed on its behalf*

nor in the course of the arguments the revenue assailed the correctness of the view taken by the High Court that since the assessee was not a registered shaleholder, loans advanced to the assessee could not be regarded as "deemed dividend" under Section 2(6A)(e). The result was that the only question that came to be considered by this Court was whether the "deemed dividend under Section 2(6A)(e) could be taxed in the hands of the beneficial owner of the shares or it could be brought to tax only in the assessment of the registered shareholder and the view taken was that where the shares acquired with the funds of one person are held in the name of another, it is the former who is assessable to tax on the dividend on those shares and this principle would apply equally on the "deemed dividend" under Section 2(6A)(e). This Court did not consider whether the loans granted to the three business concerns of the assessee could at all be regarded as 'deemed dividend' within the meaning of Section 2(6A)(e) when the assessee was not a registered shareholder and the decision of the High Court to the effect that the assessee not being a registered shareholder, the loan advanced to it advanced not be regarded as 'deemed dividend' under Section 2(6A)(e) remained undisturbed. Now obviously, so long as the decision of the High Court on this point was not overruled, the question whether the amount of the loans was taxable as 'deemed dividend' in the hands of the assessee could not be answered in favour of the revenue. But sometimes even Homer nods and through same unfortunate inadvertence for which the counsel appearing on behalf of the assessee in that case must accept full responsibility, this Court discharged the answer given by the High Court in favour of the assessee and in its place substituted an answer, in favour o the revenue. This decision of the Court is reported in Commiserion of Income Tax v. Rameshwar Lal Sanwarmal (supra).

……

9. *Now in the present case it was common ground that the loans were advanced to the three business concerns of the assessee which was a Hindu Undivided Family and this Hindu Undivided Family was not the registered holder of any shares in the company but it was the beneficial owner of certain*

> *shares which stood in the name of the Manager and Karta, Shri S. M. Saharya. The loans were thus advanced to the beneficial owner of the shares and not to the registered shareholder and hence they could not be regarded as loans advanced to a 'shareholder' of the company within the meaning of Section 2(6A)(e). Section 2(6A)(e) was accordingly not attracted and the amounts of the loans could not be taxed as deemed dividends in the hands of the assessee. We accordingly answer the first question in favour of the assessee so far as this aspect is concerned. In view of this answer to the first question, it is not necessary to consider the other two questions decided by the High Court on remand. The learned counsel appearing on behalf of the assesses, in fact, did not press them."*

69. Thus, *Rameshwar Lal Sanwarmal* (supra) clearly takes a view that the word "shareholder" in Section 2(6A)(e) should mean a registered shareholder whose name is recorded in the register of the company as the holder of the share; the advances and loans made to persons, who are not registered shareholders, could not be regarded as "deemed dividend" within the meaning of that provision, and thus, could not be taxed as dividend income. This judgment further holds that the loans advanced to a beneficial owner of shares, whose name was not registered as such in the registers of the company, could not be treated as deemed dividend and consequently could not be regarded as a loan advanced to "shareholder" of the company within Section 2(6A)(e) of the 1922 Act.

70. We make further reference to the judgment of the Supreme Court rendered in ***CIT ..V/s. Shakuntala and others*** reported in ***AIR 1966 SC 719***, which was referred to by the Supreme Court, whilst rendering judgment in *C. P. Sarathy Mudaliar (supra)*, which was dealing with the interpretation of Section 23-A of the Income Tax Act, 1922. The relevant passages of *Shakuntala* (supra), are quoted below :

> *"**5.** ….. The section in effect creates a fictional or notional dividend-income which is not in fact received by the shareholder. The notional dividend is deemed to have been distributed as on the date on which the accounts of the previous year were laid before the company in a general meeting. It is clear from the section that an order made under it is not in itself an order of assessment; it has to be followed by an assessment on the shareholder either under Section 23 or under Section 34. Under the express terms of the section, the artificial or notional income has to be included in the total income of the shareholders for the purpose of assessing his total income. The High Court has referred to its earlier decision in 1946-14 ITR 748: (AIR 1947 Bom 264) (supra). That decision laid down that where a share stood registered in two or more names, the registered holders treated as an association of persons must be regarded as the "shareholder" under Section 23-A and they must be assessed accordingly. It further laid down that Section 23-A did not say anything about equities or beneficial ownership; it was a procedural section not a charging section. It created a notional incomes which was wholly artificial and did not in fact exist in the pocket of any shareholder. In a later decision in Shri Shakti Mills Ltd. v. Commissioner of Income-tax, Bombay City, 1948-16 ITR 187: (AIR 1948 Bom 394), the same High Court held that the expression "shareholder" mentioned in Section 18(5) of the Act meant the person who was shown as a*

"share-holder" in the register of the company and it was only the shareholder of a company who was entitled to the procedure of processing permissible under Sections 16(2) and 18(5) of the Act. This view was accepted by this Court in Howrah Trading Co., Ltd. v. Commissioner of Income-tax, Central Calcutta, 1959-36 ITR 215: (AIR 1959 SC 775), where it said that no valid reason existed as to why the expression 'shareholder' as used in Section 18(5) should mean a person other than the one denoted by the same expression in the Indian Companies Act, 1913. A reference was made to the decision of the Bombay High Court in Shri Shakti Mills Ltd. v. Commissioner of Income-tax, Bombay City, 1948-16 ITR 187: (AIR 1948 Bom 394) and other decisions bearing on the subject. Similarly, we see no reason why the expression 'shareholder' in Section 23A should not have the same meaning, namely, a shareholder registered in the books of the company. It would be anomalous if the expression "shareholder' has one meaning in Section 18(5) and a different meaning in Section 23-A of the Act; for that would mean that a Hindu undivided family treated as a shareholder for the purpose of Section 23-A would not be entitled to the benefit of Section 18(5) of the Act.

7. We do not think that either of the two points urged by the appellant is really decisive of the question. The question is really one of interpretation of Section 23A, and we must interpret Section 23A with reference to its own terms. The section in express terms says that "the proportionate share of each shareholder shall be included in the total income of the shareholder for the purpose of assessing his total income". The section does not talk of the beneficial owner of the share. It talks of the shareholder only. Section 18(5) of the Act deals with grossing up of dividend and two expressions occur therein: "owner of the security" and the "shareholder". So far as the expression "owner of the security" is concerned it may perhaps include a beneficial owner; but it has been decided by this Court that the expression "shareholder" in Section 18(5) means the shareholder registered in the books of the company. As we have earlier said, no good reason exists as to why the expression "shareholder" in Section 23-A shall not have the same meaning. Sub-sections (3) and (4) of Section 23-A also

> *make the position clear: they talk of members of the company and a Hindu undivided family as such is not a member of the company."*

71. *Shakuntala* (supra), following the ratio laid down in *M/s. Howrah Trading Co. Ltd.* (supra), has also specifically held that the expression "owner of the security" may perhaps include a beneficial owner, but the expression "shareholder" can mean only a shareholder registered in the books of the company, and that expression shall have the same meaning in the other provisions of the Income Tax Act, as has been assigned to the word in the Companies Act. Of course, the judgment further goes to hold that a Hindu Undivided Family as such can never be a "member" of a company.

A challenge was thrown to the validity of Sections 12(1B) and Section 2(6A)(e) of the Income Tax Act, 1922, as its stood in 1955, in ***Navneetlal C. Javeri ..V/s.. Assistant Commissioner of Income Tax***, and rejected before the Bombay High Court, which was therefore heard by the Supreme Court in appeal. The appeal was ultimately dismissed by a majority view, upholding the vires of these provisions in a judgment reported in (1965) 56 ITR 198. Whilst examining the legislative history of that provision, which is akin to Section 2(22)(e) of

the Income Tax Act, 1961, the Supreme Court has also considered the purpose for which, the deeming provision was enacted in the following words :

> *"13. In dealing with Mr. Pathak's argument in the present case, let us recall the relevant facts. The companies to which the impugned section applies are companies in which at least 75 per cent of the voting power lies in the hands of persons other than the public, and that means that the companies are controlled by a group of persons allied together and having the same interest. In the case of such companies, the controlling group can do what it likes with the management of the company, its affairs and its profit within the limits of the Companies Act. It is for this group to determine whether the profits made by the company should be distributed as dividends or not. The declaration of dividend is entirely within the discretion of this group. When the legislature realized that though money was reasonably available with the company in the form of profits, those in charge of the company deliberately refused to distribute it as dividends to the shareholders, but adopted the device of advancing the said accumulated profits by way of loan or advance to one of its shareholders, it was plain that the object of such a loan or advance was to evade the payment of tax on accumulated profits under Section 23A. It will be remembered that an advance or loan which falls within the mischief of the 'impugned section is advance or loan made company which does not normally deal in money- lending is made with full knowledge of the provisions contained impugned Section. The object of keeping accumulated without distributing them obviously is to take the benefit lower rate of super-tax prescribed for companies. This was defeated by Section 23A which provides that in the case distributed profits, tax would be levied on the shareholders on the basis that the accumulated profits will be deemed to have been distributed amongst them. Similarly, Section 12(1B) provides that if a controlled company adopts the device of making a loan or advance to one of its shareholders, such shareholder will be*

> *deemed to have received the said amount out of the accumulated profits and would be liable to pay tax on the basis that he had received the said loan by way of dividend. It is clear that when such a device is adopted by a controlled company, the controlling group consisting of shareholders have deliberately decided to adopt the device of making a loan or advance. Such an arrangement is intended to evade the application of Section 23A. The loan may carry interest and the said interest may be received by the company; but the main object underlying the loan is to avoid payment of tax. It may ultimately be repaid to the company and when it is so repaid, it may or may not be treated as part of accumulated profits. It is this kind of a well-planned device which Section 12(1B) intends to reach for the purpose of taxation."*

72. We then refer to a judgment of a Division Bench of the Delhi High Court in ***C.I.T. ..V/s.. Ankitech Pvt. Ltd.***, reported in ***(2011) 11 Taxman 100 Delhi***, wherein the Delhi High Court was dealing with the question of whether an advance or loan not made to a shareholder directly, but made to an assessee, in which such shareholder who had received the advance, was also a member/shareholder and had a substantial interest in the assessee, would be covered by the deeming fiction in Section 2(22)(e) of the Income Tax Act, 1961. In this judgment, after referring to the judgment in *Universal Medicare Pvt. Ltd* (supra) of this Court and to *C. P. Sarathy Mudaliar (supra)* of the Supreme Court, the Delhi High Court has held thus :

*"**11.** It is clear from the above that under the 1922 Act, two categories of payments were considered as dividend viz., (a) any payment by way of advance or loan to a shareholder was considered as dividend paid to shareholder; or (b) any payment by any such company on behalf of or for the individual benefit of a shareholder was considered as dividend. In the 1961 Act, the very same two categories of payments were considered as dividend but an additional condition that payment should be to a shareholder being a person who is the beneficial owner of shares and who has a substantial interest in the company viz., shareholding which carries not less than twenty per cent of the voting power, was introduced. By the 1987 amendment with effect from 1st April, 1988, the condition that payment should be to a shareholder who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power was substituted. Thus, the Percentage of voting power was reduced from twenty per cent to ten per cent. By the very same amendment, a new category of payment was also considered as dividend viz., payment to any concern in which such shareholder is a member or a partner and in which he has a substantial interest. Substantial interest has been defined to mean holding of shares carrying 20 per cent of voting power.*

***13.** The Special Bench held that the intention behind this provision is to tax dividend in the hands of the shareholders.*

***22.** Insofar as the provisions of Section 2(22)(e) are concerned, we have already extracted this provision and taken note of the conditions/requisites which are to be established for making provision applicable. In Commissioner of Income Tax Vs. C.P. Sarathy Mudaliar [1972] 83 ITR 170, the Supreme Court had traced out the assessee of this provision in the following manner:*

> *Any payment by a company, not being a company in which the public are substantially interest, of any sum (whether as representing a part of the assets of the company or otherwise) made after 31.05.1987 by way of advance or loan.*

First limb

a) *to a shareholder, being a person who is the beneficial of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten percent of the voting power,*

Second limb

b) *or to my concern in which, such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)*

Third limb

c) *or any payment by any such company on behalf, or for the individual benefit, or any such shareholder, to the extent to which the company in either case possesses accumulated profits.*

23. *It is rightly pointed out by the Bombay High Court in Universal Medicare (P) Ltd. (supra) that Section 2(22)(e) of the Act is not artistically worded. Be as it may, we may reiterate that as per this provision, the following conditions are to be satisfied:*

(1) *The payer company must be a closely held company.*

(2) *It applies to any sum paid by way of loan or advance during the year to the following persons:*

(a) *A shareholder holding at least 10 of voting power in the payer company.*

(b) *A company in which such shareholder has at least 20% of the voting power.*

(c) *A concern (other than company) in which such shareholder has at least 20 per cent interest.*

> *(3) The payer company has accumulated profits on the date of any such payment and the payment is out of accumulated profits.*
>
> *(4) The payment of loan or advance is not in course of ordinary business activities.*
>
> *25. Further, it is an admitted case that under normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by legal fiction created under Section 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to 'dividend'. Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to 'shareholder'. When we keep in mind this aspect, the conclusion would be obvious, viz., loan or advance given under the conditions specified under Section 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/members and such dividend cannot be given to non-members. The second category specified under Section 2(22)(e) of the Act, viz., a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of 'deeming shareholder', then the Legislature would have inserted deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned counsels for the Revenue would stand answered, once we look into the matter from this perspective."*

73. It appears that the judgment of the Delhi High Court dated 11.05.2011, passed in *Ankitech Pvt. Ltd.* (supra), was relied upon

by the Delhi High Court to dispose of another tax appeal ITA No.462 of 2009, which came to be challenged before the Supreme Court in appeal and disposed of by the Supreme Court alongwith about 63 other similar appeals in terms of order dated 05.10.2017 passed in ***Commissioner of Income Tax ..V/s.. Madhur Housing and Development Company***, reported in ***(2018) 93 Taxman.com 502***, in the following terms :

> *"The impugned judgment and order dated 11.05.2011 has relied upon a judgment of the same date by a Division Bench of the High Court of Delhi in ITA No.462 of 2009.*
>
> *Having perused the judgment and having heard arguments, we are of the view that the judgment is a detailed judgment going into Section 2(22)(e) of the Income Tax Act which arrives at the correct construction of the said Section. We do not wish to add anything to the judgment except to say that we agree therewith.*
>
> *These appeals are disposed of accordingly."*

74. However, the question raised in *Ankitech Pvt. Ltd.* (supra), which was apparently settled with the approval of the Supreme Court in *Madhur Housing Development Company* (supra), was once again agitated before the Supreme Court in the case of *National Travel Services* (supra). The Supreme Court, after examining the definition of "dividend" in Section 2(6A) of the Income Tax Act, 1922, the

considerations rendered in *C. P. Sarathy Mudaliar* (supra), *Rameshwar Lal Sanwarmal* (supra), and then reconsidering the view taken by the Delhi High Court in *Ankitech Pvt. Ltd.* (supra), placed the matter before Hon'ble the Chief Justice of India to constitute a Larger Bench of Three Judges to have a re-look at the entire question raised in *Ankitech Pvt. Ltd.* (supra), in the following terms :

> *"3) The question that arises in these appeals is as to whether Section 2(22)(e) of the Act gets attracted inasmuch as a loan has been made to a shareholder, who after the amendment, is a person who is the beneficial owner of shares holding not less than 10% of the voting power in the Company, and whether the loan is made to any concern in which such shareholder is a partner and in which he has a substantial interest, which is defined as being an interest of 20% or more of the share of the profits of the firm.*
>
> *5) This provision came up for consideration before a Bench of this Court in CIT v. C. P. Sarathy Mudaliar, (1972) 4 SCC 531. In the context of the assessee being a Hindu Undivided Family, the question of law set out in the aforesaid judgment is as follows:*
>
> > *"Whether, on the facts and in the circumstances of the case, the amounts of Rs.5790 and Rs.39,085 could be deemed to be the dividend income of the Hindu Undivided Family in the respective assessment years?"*
>
> *After setting out the aforesaid Section, this Court held:*
>
> > *"6. Before a payment can be considered as dividend under Section 2(6-A)(e), the following conditions will have to be satisfied:*
> >
> > *1. It must be a payment by a company not being a company in which the public are*

substantially interested within the meaning of Section 23A of any sum whether as representing a part of the assets of the company or otherwise by way of advance or loan.

2. (a) *It must be an advance or loan to a shareholder, or*

(b) *a payment by the company on behalf or for the individual benefit of the shareholder, and*

3. *To the extent to which the company in either case possesses accumulated profits."*

6. *After stating that there is no dispute that the first and last conditions are satisfied, in the said case, the Court went into Condition 2(a). This was answered by the Court as follows:*

"8. *The only surviving question is whether a loan advanced by a company to an HUF, which is the real owner of the shares, can be considered as a loan advanced to its shareholder. It is well settled that an HUF cannot be a shareholder of a company. The shareholder of a company is the individual who is registered as a shareholder in the books of the company. The HUF, the assessee in this case, was not registered as a shareholder in books of the company nor could it have been so registered. Hence, there is no gainsaying the fact that the HUF was not the shareholder of the company. Mr. Sen did not contend otherwise.*

9. *Section 2 (6-A)(e) gives an artificial definition of "dividend". It does not take in dividend actually declared or received. The dividend taken note of by that provision is a deemed dividend and not a real dividend. The loan granted to a shareholder has to be returned to the company. It does not become the income of the shareholder. For certain purposes, the Legislature has deemed such a loan as "dividend". Hence, Section 2(6-A) (e) must necessarily receive a strict construction. When Section 2(6-A)(e) speaks of "shareholder", it refers to the*

registered shareholder and not the beneficial owner. The HUF cannot be considered as a shareholder either under Section 2(6-A)(e) or under Section 23-A or under Section 16(2) read with Section 18(5) of the Act. Hence, a loan given to an HUF cannot be considered as a loan advanced to a "shareholder" of a company."

7) *This judgment was followed by another judgment of this Court in Rameshwari Lal Sanwarmal v. CIT, (1980) 2 SCC 371, which again arose in the context of a Hindu Undivided Family. Sarathy Mudaliar's case was followed in this judgment, and it was expressly stated that there was no conflict between this judgment and another judgment, namely, CIT v. Rameshwari Lal Sanwarmal, (1972) 4 SCC 342, and that the Revenue's contention to refer Sarathy Mudaliar's case to a larger Bench was turned down.*

8) *The effect of these two judgments is clearly to hold that before Section 2(6-A)(e) of the 1922 Act can be attracted, the "shareholder" referred to in the said provision must be a shareholder whose name is on the register of members of the Company.*

9. *When the Income Tax Act, 1961 came into force and repealed the 1922 Act, the definition of "dividend" contained in Section 2(22)(e) was as follows:*

"Section 2. ***Definition*** *– In this Act, unless the context otherwise requires-*

(22) *"****dividend****" includes-*

(e) *any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder, being a person who has a substantial interest in the company or any payment by any such company on behalf, or for the individual benefits, of any such shareholder, to the extent to which the*

> *company in either case possesses accumulated profits;"*

9) *A cursory look at the aforesaid definition would go to show that the shareholder referred to in the aforesaid provision would continue to be a shareholder who is on the register of members of the Company with one additional feature, namely, that such shareholder should be a person who has a substantial interest in the Company. Admittedly, the aforesaid additional feature would make no difference to the position of law laid down in the aforesaid two decisions.*

15) *This then brings us to the Division Bench judgment in the present case. In para 17, after referring to various judgments referred to by us hereinabove, the Division Bench posed two questions to be answered by it as follows:-*

> *"**(1)** To attract the first limb of Section 2(22)(e) of the Act, is it necessary that the person who has received the advance or loan is a shareholder and also beneficial owner. To put it otherwise, whether both the conditions are required to be satisfied will depend upon the interpretation to be given to the words "being a person who is a beneficial owner of shares....." which was inserted by amendment in the aforesaid provision carried out by the Finance Act, 1987 w.e.f. 1-4-1988?*
>
> ***(2)*** *Whether the assessee who is a partnership firm can be treated as "shareholder" because of the reason that it has purchased the shares in the name of the two partners."*

16) *It answered the first question by stating that the expression "being a person who is a beneficial owner of shares" would be in addition to the shareholder first being a registered shareholder of the Company. The Division Bench then states that, therefore, in order to attract Section 2(22)(e) both conditions have to be satisfied. So far as the second question is concerned, the Division Bench went on to state that a*

partnership firm can be treated as a shareholder but that it is not necessary that it has to be a registered shareholder.

17) *We are of the view that it is very difficult to accept the reasoning of the Division Bench. It is not enough to say that Ankitech's case refers to the second limb of the amended definition, whereas the present case refers to the first limb, for the simple reason that the word "shareholder" in both limbs would mean exactly the same thing. This is for the reason that the expression "such shareholder" in the second limb would show that it refers to a person who is a "shareholder" in the first limb.*

18) *This being the case, we are of the view that the whole object of the amended provision would be stultified if the Division Bench judgment were to be followed. Ankitech's case, in stating that no change was made by introducing the deeming fiction insofar as the expression "shareholder" is concerned is, according to us, wrongly decided. The whole object of the provision is clear from the explanatory memorandum and the literal language of the newly inserted definition clause which is to get over the two judgments of this Court referred to hereinabove. This is why "shareholder" now, post amendment, has only to be a person who is the beneficial owner of shares. One cannot be a registered owner and beneficial owner in the sense of a beneficiary of a trust or otherwise at the same time. It is clear therefore that the moment there is a shareholder, who need not necessarily be a member of the company on its register, who is the beneficial owner of shares, the Section gets attracted without more. To state, therefore, that two conditions have to be satisfied, namely, that the shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect. Also, what is important is the addition, by way of amendment, of such beneficial owner holding not less than 10% of voting power. This is another indicator that the amendment speaks only of a beneficial shareholder who can compel the registered owner to vote in a particular way, as has been held in a catena of decisions starting from R. Mathalone v. Bombay Life Assurance Co. Ltd., [1954] SCR 117.*

> ***19)*** *This being the case, we are prima facie of the view that the Ankitech judgment (supra) itself requires to be reconsidered, and this being so, without going into other questions that may arise, including whether the facts of the present case would fit the second limb of the amended definition clause, we place these appeals before the Hon'ble Chief Justice of India in order to constitute an appropriate Bench of three learned Judges in order to have a relook at the entire question.*
>
> ***20)*** *Ordered accordingly."*

75. Thus, we see that though the view taken by the Delhi High Court in *Ankitech Pvt. Ltd.* (supra) has not been set aside, it has been referred to a Larger Bench of Three Judges in order to have a re-look at the question whether the second postulate, that the assessee, who is a partnership firm, can be treated as a "shareholder" because of the reason that it had purchased the share in the name of the two partners, would also have to be satisfied.

At this juncture, we must note that in the case of Ankitech Ltd. (supra), the question involved was whether individual partners in a firm could be treated as shareholders for the purpose of Section 2(22)(e) being a registered owner of the share and at the same time treating themselves to be the beneficial owner of the share on behalf of the partnership firm.

The question in the present case is quite different. This is not a case where the registered shareholder (husband) is claiming to be holding shares on behalf of a partnership firm, as being the real beneficial shareholder, but the wife is claiming, without being a registered shareholder in the company, to be the beneficial holder of such shares to the extent of 16.5%, without any voting right, as held by us in the preceding paragraphs. Precisely for that reason, the question now referred to the Larger Bench in National Travel Services (supra), would not be of any avail or assistance to the appellants in the present case.

76. The principles laid down by the Supreme Court in *C. P. Sarathy Mudaliar* (supra), *Howrah Trading Com. Ltd.* (supra) and *CIT vs Shakuntala* (supra), that under the scheme of the Companies Act, the words "member", "shareholder" and "holder of a share", which have been used interchangeably, would be given the very same meaning assigned to these words when used in the provisions of the Income Tax Act. Applying this principle to the interpretation of these words in the provisions of Clause (e) of Section 2(22) of the Income Tax Act, 1961,

we are of the considered opinion that for the purpose of this provision, the "beneficial owner of shares", "shareholder" and "member" in the company referred therein, shall only be the registered shareholder or registered beneficial owner of a share whose name is found in the register of members/shareholders of the company under Section 150 or register of beneficial owner under Section 152A of the Companies Act, 1956.

We are of the further considered opinion that in the absence of any declaration in terms of Section 187-C (2) of the Companies Act, 1956, by the wife of the appellant, claiming to be the holder of the beneficial interest in 50% of the shares held by and registered in the name of the appellant-husband as its holder in the Register of Members, it would be the husband appellant who is the exclusive holder of the entire 33% of the shares along with the full voting right/power attached to such shares. We hold that the wife would have no voting powers under the scheme of the Companies Act attached to any of the shares, which have been exclusively registered in the name of the husband.

77. On analysis of the various judgment cited by the appellants on the concept of communion assets under the Portuguese Civil Code in relation to the provisions of the Income Tax Act, 1961, quoted by us in paragraphs 6 (d) above, we are of the view that none of these answer the question whether, in the scheme of the Companies Act, 1956, a spouse could claim actual ownership and voting rights in such company, via the provisions of the Civil Code.

The wife, in the present case, clearly does not claim to have subscribed to the Memorandum of Articles of the concerned companies or claim to have had a name entered into the Register or Members of these companies. Obviously she does not participate in the passing of any resolutions of these companies or exercise of any voting rights in terms of Section 187 of the Companies Act, 1956, as she does not hold any shares in the companies. As stated by us earlier, a member of a company would be one, as held in Howrah Trading Com. Ltd. (supra), who the company recognizes as the person to whom dividends declared by it are legally payable; the Memorandum of Articles of the company essentially binds the members/shareholders of the company to itself through the various covenants contained therein, which

regulate and restrict the liabilities of the shareholders, in relation to the company which is a separate juristic entity.

78. Clearly, the provisions of the Civil Code could not create any right in a spouse, who is not registered shareholder of the company, by operation of law, in relation to other shareholders of that company including her spouse, as the provisions of the Company Act, 1956 exclusively regulate this relationship between the company and a shareholder. Even otherwise, on an assumption that there may be a conflict in this area, between the creation/conferment of rights between spouses inter se under the Civil Code (Communion of assets) and the provisions of the Companies Act, 1956, which regulates the incorporation of a company as a legal entity and further regulates the relationship with its members/shareholders, this conflict if any, can be ironed out, by adopting a harmonious approach between the two statues. Clearly, the Portuguese Civil Code would confer a right on the spouse who does not hold the shares in such company, to have a notional 50% right to the value of such shares, which notional value forms the spouses moiety. However, the wife, in this case would never have the actual right or ownership of the share.

79. We can also view this question from a slightly different angle. Under the Civil Code, the contract of marriage between the spouses stands dissolved either by the death of one of the spouses or by decree of divorce.

In the event of the death of the shareholder spouse, the shares held by that spouse would devolve to the children of the deceased shareholder or be allotted in Inventory Proceeding to decide rights of succession on the spouse, subject to the company in which such shares are held, accepting the allottee of such shares, in terms of Section 109 read with Section 111 of the Companies Act, 1956. In the event of the surviving spouse not being allotted the shares, 50% of the value of such shares would belong in the totality of the value of the estate to that surviving spouse as moiety right.

In the event of dissolution of marriage by divorce, the same principle as enunciated above, would apply, in that the divorced spouses would be required to partition their entire matrimonial estate in equal halves by value, in an Inventory Proceeding or by a Partition Deed. In such Partition Proceedings, the spouse holding the shares

may be allotted such shares, while the other spouse may be allotted half of the value of such shares; or conversely, if the shares held in the company by one spouse are allotted to the other spouse, half of their value would be allotted in terms of money (owelty) or allotment of any other assets of higher value to equate the shares.

79A. The appellants placed reliance on the judgment of this Court in *Commissioner of Wealth Tax vs Vasudeva V. Dempo*, which was upheld in favour of the Wealth Tax Assessee by the Supreme Court in *CIT ..Vs.. Vasudeo V. Dempo*, to argue that the Revenue has accepted the principle that the assets of spouses married under the Civil Code and their income would be considered as one unit or conferring joint rights on both the spouses in equal shares; the further argument advanced by the appellants was that the acceptance of the concept would lead to the logical conclusion that the wife would be entitled to half the assets/wealth including the shares held by the husband, as part of the common estate.

79B. We are not impressed with this argument and extending the ratio laid down in the judgment of *Vasudeo V. Dempo*

(supra), to the facts of the present case and the question of law raised herein.

Vasudeo V. Dempo (supra), was a matter which arose under the Wealth Tax Act, 1957, in which the assessees, husband and wife, each sought deductions under Section 5 of that Act separately. The question of law referred to for decision of the High Court was whether the Wealth Tax Tribunal was right in law in holding that each of the spouses married under Portuguese Civil Code was entitled to such deductions under Section 5 of that Act, separately. Whilst on this subject, we must note that under the Wealth Tax Act "assets" are defined and the basis of charge of Wealth Tax which is set out in Section 3 of that Act is on the value of the net wealth, calculated in terms of the methods set out in the schedule to the Act. The judgment in *Vasudeo V. Dempo* (supra), was therefore rendered on the basis that spouses married under the Civil Code would constitute a body of individuals and would each have a right to claim deductions under Section 5 of that Act. As referred to in those judgments, the assessment of wealth tax was calculated on the "value" of the movable properties consisting mostly of shares of limited companies and deposits in banks;

thus, the concept which formed the basis of calculation of the wealth was its "value" and not based upon the beneficial right to specific shares in a company. These judgments, therefore, are of no assistance to the arguments raised by the appellants.

80. Thus, in our opinion, under no circumstances would the provisions of the Civil Code confer or create an ownership right in the shares, of a company or give the right of voting, in proportion to the share in the capital of the company, to the other spouse. The provisions of Clause (e) of Section 2(22) of the Income Tax Act, 1961, in the present case would, therefore, fully apply to the husband appellant, who would be the owner of the entire 33% share in each of the concerned companies with the entire voting power (which is more than 20% in such company, to the exclusion of the wife). Consequently, we reject the submission that the wife of the spouse, married under the provisions of Portuguese Civil Code, by operation of law, would be entitled to the beneficial ownership of the shares of the husband/spouse. For reasons stated above, we further reject the submission that the provisions of Section 187C of the Companies Act, 1956, are not applicable to persons governed by the Portuguese Civil

Code. Consequently, we answer Substantial Questions of Law (A), (B) and (C) against the appellants.

81. We now analyse the rival submissions to answer the Substantial Question of Law (D) as framed by this Court. For this purpose, we recapitulate certain facts which have transpired during the course of the Appellate proceedings before the CIT (Appeals) and before the ITAT in the previous round of litigation, which have relevance to the decision on this question.

82. In the first round, the challenge to the order of the Assessment Officer dated 28.02.2014 before the CIT (Appeals), all individual assessees had raised specific ground that the assessment order in terms of Section 153C read with Section 143(3) of the Act was without jurisdiction, since the material relied upon by the AO as being "incriminating material" was already available to the AO in previous proceedings, having been fully disclosed to the AO; this material specifically being the shareholding pattern of the various companies in which the three assessee brothers held 33% share each. During the course of the hearing of these appeals, the question as to the AO's

jurisdiction to proceed in terms of Section 153C based on the appellants' contention that there was no new incriminating material, was argued and considered in order dated 28.01.2015, wherein a specific finding was given that the proceedings under Section 153(C) of the Act were validly initiated by the AO. This finding was given based upon the factual conclusion arrived at by the CIT (Appeals) that the new material forming the basis for initiating these proceedings was on the basis of coalition of the statements recorded and the material collected during the search of the premises of the companies.

83. Against the order dated 28.01.2015 of the CIT (Appeals), the Revenue preferred an appeal before the ITAT to challenge the deletion of the additions made under Section 2(22)(e) of the Act as deemed dividend. The appellants filed cross-objections to the Appeal only to the extent of challenging the finding of the CIT appeals that the proceedings under Section 153C were valid. The ITAT allowed the appeals of the Revenue only to the extent of the challenge to the part of the order of the CIT (Appeals) rejecting the AO's order of making additions by the income on the basis of treating the loans/advances from companies as deemed dividend under Section 2(22)(e) of the

Act. The ITAT, by its order of 13.08.2015, remanded the case to the CIT (Appeals) for re-adjudication on the limited issue with regard to addition of deemed dividends under Section 2(22)(e) of the Act. The para 8 of the order of remand of the ITAT, the following words recorded :

> *"8. At the outset, it was submitted by the learned A. R. (Assessees Representative) that in the cross objections for the AYs 2007-08, 2009-10 to 1011-12, the assessees have raised in ground no.2 of the cross objections, a challenge against the validity of the proceedings and the order passed under Section 153C of the Act. It was the submission that he did not wish to press the said ground. Consequently, ground no.2 in the cross objections filed by the assessees for the AYs 2007-08, 2009-10 to 1011-12 stands dismissed as not pressed."*

84. We further note that Ground II (2) raised in the cross objections dated 24.07.2015 filed by the assessee, has been raised in the following terms :

> *"II. Validity of proceedings and order passed under Section 153C of the Income Tax Act, 1961;*
>
> The learned CIT (A) has erred in not holding the notice under Section 153C and the assessment under Section 153C read with Section 143(3) making additions not based on seized material as bad in

law and thereby not holding that the proceedings under Section 153C were initiated without jurisdiction."

Thus, we see that the ground raised was one based upon the factual aspect as to whether making additions on the basis of the materials seized during the raids could be considered as the incriminating material to proceed in terms of Section 153C of the Act. It was precisely this ground, which required a reversal of the finding of fact that was given up and not pressed for in the appeal. The remand was thus limited to the question raised by the Revenue in its appeal which are purely based on the provisions of Section 2(22)(e) of the Act.

85. The remand being limited only to the question of the applicability of Section 2(22)(e) of the Act, the appellants initially filed written submissions dated 13.01.2016 limiting its argument to applying the concepts of the Wealth Tax written to their case and to the argument that the provisions of Section 187C of the Companies Act, 1956 were in operative after amendment to the Companies Act w.e.f. 13.12.2000.

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Thereafter, it appears that further written submissions were filed consisting of 98 paragraphs which are found on the record of the appeals at Exh-A-17 from pages 339 to 380. These written submissions consist mainly of submissions from paragraphs 1 to 74 thereof on the applicability of Section 2(22) to the case (which was the subject of remand), which covers substantial questions of law (A) to (C) herein. Paras 53 to 76 of the written submissions discuss the shareholding of the three brothers in this company. Submissions on substantial questions of law (E) and (F) are found in terms of the submissions at paras 14 to 52 of the written synopsis. Surprisingly, from para 77 to para 98, the very same factual ground raised on the powers of the Assessment Officer to proceed under Section 153A of the Act, which were given up before the ITAT, have been re-agitated in the written submissions before the CIT (Appeals), though this question was never subject matter of remand.

86. Though CIT (Appeals) was not called upon to decide this question, nevertheless, a finding on this question was given by the Appellate Authority, upholding the jurisdiction of the AO to proceed in terms of the provisions of Section 153C of the Act. Taking

advantage of this finding, which our opinion was redundant as the order of remand was clearly restricted to the applicability of Section 2(22) of the Act, the appellants have raised this as a ground of appeal, claiming that the AO lacked the jurisdiction in terms of Section 143(3) read with Section 153C of the Act, that question has been concurrently answered on facts by the CIT (Appeals) and the ITAT in the first round between the parties.

Here again, the ITAT has answered this question for a second time at para 59.3 of its judgment after considering the various transactions which came to light in the search conducted by the Revenue, which were earlier considered on the first round, after which that ground was specifically given up and not pressed for by the appellants.

In these circumstances, we are of the opinion that substantial question of law (D) does not arise for our determination as the same was never the subject matter of remand and decision before the CIT (Appeals) or before the ITAT.

87. The appellants have contended that notwithstanding the fact that the remand of the matter to the CIT (Appeals), was limited to the sole question as to whether the transactions between company *inter se* could be considered as deemed dividend under the provisions of Section of 2(22)(e), the appellants could not be estopped from raising and re-agitating the grounds raised of the jurisdiction of the AO to proceed under Section 153C of the Act, even though this ground stood specifically withdrawn by the appellants before the ITAT in the first round of litigation.

In this regard, it is further the appellants' contention that the issue raised in the substantial question of law (D) goes to the root of the matter, in that the issue is purely one of the jurisdiction of the AO to proceed under Section 153C, notwithstanding the fact that there was no new an incriminating material found during the course of search. It was contended that the observation of the Tribunal that incriminating material is the knowledge obtained by the Revenue of the shareholding in the group companies for making additions under Section 2(22)(e) of the Act is unsustainable since, as a matter of record, the assessee gave the shareholding pattern in the course of assessment

proceedings, and many events, the shareholding pattern is available in the public domain on the website of the Registrar of companies, and cannot be stated to be discovered during the course of the search conducted. Reliance was placed on the following judgments to canvas the argument that the incriminating material should be discovered during the course of the search to give jurisdiction to the AO to proceed:

a) *Principal Commissioner of Income Tax ..V/s.. Abhisar Buildwell P. Ltd., Civil Appeal No.6580 of 2021;*

b) *CIT ..V/s.. Murli Agro Products Ltd., reported in [2014] 49 Taxmann.com 172;*

c) *CIT ..V/s.. Kabul Chawla, reported in [2016] 380 ITR 573 (Delhi);*

d) *CIT ..V/s.. Continental Warehousing Corporation (Nhava Sheva) Ltd., reported in [2015] 58 Taxmann.com 78 (Bombay);*

e) *Mani Square Ltd. ..V/s.. ACIT, reported in [2020] 83 ITR (T) 241 (Kolkata Tribunal).*

88. To support the argument that the appellants are entitled to raise this ground even though it was specifically given up, on the

plea that this ground goes to the root of the jurisdiction of the AO to proceed in terms of Section 153C read with Section 143(2) of the Act, the following judgments have been cited before us :

a) *PCIT ..V/s.. Jignesh P. Shah, reported in [2018] 99 Taxmann.com 111 (Bombay);*

b) *Underwater Services Company Ltd. ..V/s.. ACIT, reported in [2022] 448 ITR 691 (Bombay),*

89. In *Principal Commissioner of Income Tax ..V/s.. Abhisar Buildwell P. Ltd* (supra), the Hon'ble Supreme Court was concerned with the conflict of decisions rendered by various High Courts on the scope of Section 153A of the Act and whether, whilst re-assessing, the AO may consider only the incriminating material found during the search and is precluded from considering any other material derived from any other source. Whilst deciding this question, the Hon'ble Supreme Court recorded its agreement with a view taken by Delhi High Court in *Kabul Chawla* (supra) and by the Gujrat High Court in *Somya Construction* (supra) that no addition can be made in respect of a completed assessment in the absence of incriminating material. The conclusions in this judgment are the following :

> ***"14.*** *In view of the above and for the reasons stated above, it is concluded as under:*
>
> > ***i)*** *that in case of search under Section 132 or requisition under Section 132A, the AO assumes the jurisdiction for block assessment under Section 153A;*
> >
> > ***ii)*** *all pending assessments/reassessments shall stand abated;*
> >
> > ***iii)*** *in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and*
> >
> > ***iv)*** *in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfillment of the conditions as envisaged/mentioned under Sections 147/148 of the Act and those powers are saved."*

Thus, we see that all that *Abhisar Buildwell* (supra) lays down is that in case incriminating material is unearthed during a search conducted under Section 132, the AO can assume jurisdiction to re-

assess the total income taking into consideration the incriminating material, while if no incriminating material is unearthed, no additions can be made by the AO to the income. The judgment, in our view does not lay down what material, could be considered to be incriminating, which is the precise submission made in the present case, that gaining knowledge during the search, of the shareholding pattern of the assesses in various companies, could not constitute incriminating material for the purpose of assuming jurisdiction under Section 153A of the Act.

90. In ***CIT ..V/s.. Murli Agro Products Ltd., reported in [2014] 49 Taxmann.com 172,*** the Bombay High Court was considering a case where the ITAT, on facts had concluded that there was no material unearthed during the search or during Section 153A proceedings which would justify passing of a fresh assessment order. The relevant paragraphs are quoted below :

> ***"12.*** *Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed under Section 80 HHC of the Income Tax Act as well as the loss computed under the assessment dated 29.12.2000 would attain finality. In such a case, the A.O. while passing the independent assessment order under Section 153A read with Section 143(3) of the IT Act could not have disturbed the*

> *assessment/reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income Tax Act establish that the reliefs granted under the finalized assessment/reassessment were contrary to the facts unearthed during the course of 153A proceedings.*
>
> ***13.*** *In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings which would show that the relief under Section 80HHC was erroneous. In such a case, the A.O. while passing the assessment order under Section 153A read with Section 143(3) could not have disturbed the assessment order finalised on 29.12.2000 relating to Section 80HHC deduction and consequently the C.I.T. could not have invoked jurisdiction under Section 263 of the Act."*

Thus, *Murli Agro Products Ltd* (supra), was based upon the finding of the ITAT that no material at all has been unearthed by the AO to justify proceeding in terms of Section 153A of the Act. This judgment, too, apart from holding that there has to be some material gathered in the course of proceeding under Section 153A to establish that the reliefs granted were contrary to the facts unearthed, does not decide the nature of the material that would amount to be incriminating for the purpose of proceeding under Section 153A of the Act.

91. *Murli Agro Products Ltd (supra)* was considered thereafter by another Bench of this Court in ***CIT ..V/s.. Continental***

Warehousing Corporation (Nhava Sheva) Ltd., reported in [2015] 58 Taxmann.com 78 (Bombay), wherein the question raised was whether a Special Bench of the ITAT had correctly decided additions made to an assessees' income, which were not based on incriminating material found during the search, in terms of Section 153A of the Act. Expressing their agreement with a view taken in *Murli Agro Products Ltd* (supra), the judgment rendered in *Continental Warehousing* (supra) holds thus :

> *"30. Even otherwise, we agree with the Division Bench when it observes as above with regard to the ambit and scope of the powers conferred under Section 153A of the Act. Since we are not required to trace out the history and we can do nothing better than to reproduce the observations and conclusions as above that we are not repeating the same. Even if the exercise of power under Section 153A is permissible still the provision cannot be read in the manner suggested by Mr. Pinto. Not only the finalised assessment cannot be touched by resorting to those provisions, but even while exercising the power can be exercised where a search is initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132A after 31st March, 2003. There is a mandate to issue notices under Section 153(1)(a) and assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made. Thus, the crucial words "search" and "requisition" appear in the substantive provision and the provisos. That would throw light on the issue of applicability of the provision. It being enacted to a search or requisition that its construction would have to be accordingly. That is the conclusion reached by the Division Bench in Murli Agro*

> *(supra) with which we respectfully agree. These are the conclusions which can be reached and upon reading of the legal provisions in question."*

A reading of this judgment leaves no doubt that the only question decided therein was that the assessment under Section 153A of the Act could only be on the basis of incriminating material found during the search; however, the judgment does not deal with the question of what constitutes "incriminating material".

92. The appellants have cited before us a judgment of the ITAT, Kolkata, in ***Mani Square Ltd. ..V/s.. ACIT, reported in [2020] 83 ITR (T) 241 (Kolkata Tribunal)***, which in turn has referred *Kabul Chawla* (supra) and, as claimed by the appellants, has decided the issue before us. A reading of the judgment would reveal that the real question before the Tribunal was quoted at paras 12 and 13 thereof which read as under :

> ***"12.*** *After giving thoughtful consideration to the facts of the present case and the grounds raised in appeal by both parties and taking their consent, we frame the following issues/questions for our adjudication.*
>
> > ***(A)*** *Whether in absence of any incriminating material found in the course of search at the premises of the appellant, the additions/disallowances made in the assessments of the appellant and M/s IQCIPL which*

were unabated [since assessment of AY 2013-14 was non-pending] on the date of search, could be held to be sustainable on facts and in law?

(B) *Whether the Ld. CIT(A) was justified in confirming the addition made on account of alleged on-monies of Rs.4,81,38,000/- received upon the sale of flat and car park(s) to M/s Satyam Bubna (HUF) in the Shiromani Project ? If yes, whether based on this singular instance, the AO was justified in extrapolating and making addition by way of unaccounted sales in respect of all units and car parks sold in the Shiromani Project ?*

(C) *Whether the Ld. CIT(A) was justified in confirming the AO's order making addition on account of unsecured loans and interest paid thereon u/s 68 & 69C of the Act?*

(D) *Whether the Ld. CIT(A) was justified in deleting the addition of Rs.15,07,993/- made by the AO by way of unaccounted transactions conducted by the appellant ?*

(E) *Whether the AO could be held to have validly assumed jurisdiction by issuing notices u/s 153A and 143(2) in the name of non-existent entity (M/s IQCIPL) and consequent thereto frame separate assessment order dated 31.12.2018 and whether such action of the AO was tenable in the eyes of law or not ?*

13. *We first proceed to answer the question (A) which is again repeated for the sake of ready reference (A) Whether in absence of any incriminating material found in the course of search at the premises of the appellant, the additions/disallowances made in the assessments of the appellant and M/s IQCIPL which were unabated [since assessment of AY 2013-14 was non-pending] on the date of search, could be held to be sustainable on facts and in law?"*

93. Question (A) before the Kolkata Tribunal was one, where there was total absence of incriminating material found in the course of search. The entire judgment proceeds on that base and is therefore quite distinguishable on the facts before us, where the appellant claims that disclosure of the shareholding pattern during the search could not be considered to be incriminating material for the assumption of jurisdiction under Section 153A.

94. ***CIT ..V/s.. Kabul Chawla, reported in [2016] 380 ITR 573 (Delhi)*** was a judgment of the Delhi High Court to decide whether the additions made under Section 2(22)(e) of the Act were not sustainable because no incriminating material concerning such additions were found during the course of a search. In that case the ITAT concluded that the additions made were not based on any incriminating material found during the search operations and directed deletion of the same referring to the judgment of this Court in *Continental Warehousing* (supra), the Delhi High Court has summarized the legal position thus :

> *"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the*

aforementioned decisions, the legal position that emerges is as under:

i. *Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*

ii. *Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*

iii. *The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*

iv. *Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*

v. *In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*

> ***vi.*** *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*
>
> ***vii.*** *Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.*
>
> *Conclusion*
>
> ***38.*** *The present appeals concern AYs, 2002-03, 2005-06 and 2006-07.On the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."*

Thus, *Kabul Chawla* (supra), says no more than what has been held by this Court in *Continental Warehousing* (supra) and *Murli Agro* (supra), this view being approved by the Supreme Court in *Abhisar Buildwell* (supra). All that is required is that the assessment under Section 153A has to have some relevance to the incriminating material.

95. We then consider the submission of Shri Jain for the appellants, notwithstanding the fact that the appellants had given up the cross objections raised before the ITAT on the first round on the question of the AO assuming jurisdiction under Section 153A or that the discovery of the shareholding pattern during search could not constitute the incriminating material for that purpose, the appellants were not estopped at law to raise this question in the present appeal since the same was a jurisdictional issue. In support of the submissions, the appellants have cited a judgment of this Court in ***PCIT ..V/s.. Jignesh P. Shah, reported in [2018] 99 Taxmann.com 111 (Bombay);*** whilst dismissing the appeals at the threshold holding no substantial questions of law arose, this Court has observed thus :

> *"6. The aggrieved assessee approached the Tribunal. After considering the rival submissions, the Tribunal answered the legal issue in favour of the assessee. While answering it, in para 8, the scheme of the law was discussed. Then, the principle which was enunciated by the judgment of this Court rendered in the case of CIT v. Murli Agro Products Ltd. [2014] 49 taxmann.com 172 was applied. That judgment held that, once the assessment has attained finality before the date of search and no material is found in the course of proceedings under Section 132(1), then, no addition can be made in the proceedings under Section 153A.*
>
> *7. After setting out this principle in great details, the Members of the Tribunal rendered their opinion that factually there was no incriminating material found during*

> *the course of search relating to the addition made on account of deemed dividend. The very fact that Section 132 was resorted requiring the Assessing Officer to record the necessary satisfaction, was lacking in this case. The assessment, which had gained finality, in the absence of any material termed as incriminating having thus been subjected to assessment/re-assessment, the Tribunal held in favour of the assessee. We do not think that the Tribunal's understanding of the legal provisions in the backdrop of these peculiar facts suffers from such legal infirmity or perversity necessitating our interference in further Appellate jurisdiction."*

The judgment proceeded on the finding of the Tribunal that, factually, there was incriminating material found during the search; thus, the AO could not assume jurisdiction to re-assess and take proceedings under Section 153A. In our opinion, this judgment does not lay down any law and, on facts, is quite different from the case before us; in this case, the CIT (Appeals) on the first round had turned down the argument of the appellants that there was no incriminating material, by holding that the shareholding pattern that came to the notice of the authorities during search could constitute incriminating material. This finding of fact was assailed before in the first round before the ITAT and specifically given up, thus bringing finality to the factual finding arrived at by the CIT (Appeals). The remand was

limited only to the other question raised as to the applicability of Section 2(22)(e) of the Act.

96. *Underwater Services Company Ltd. ..V/s.. ACIT, reported in [2022] 448 ITR 691 (Bombay)*, cited by the appellants was a judgment of this Court in which notice issued under Section 153A was under challenge in a writ petition, on the ground that the Assessing Officer was not in possession of any incriminating material on the basis of which the notice was issued. Since there was no reference made to any material found to be incriminating in the notice under Section 153A, the notice was quashed with a direction that the Assessment Officer could issue a fresh notice under Section 153A to word it suitably to include the details of the incriminating material. We quote below the relevant paragraphs of this judgment : 4, 5 and 6.

> *"4. We have no quarrel with the proposition submitted by Mr. Chhotaray. Section 153A is couched in mandatory language once there is a search, the assessing officer has no option but to call upon the assessee to file the returns of the income for the earlier six assessment years. Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the assessing officer which can be related to the evidence found, it does not mean that the assessment can be arbitrary or made without any relevance or nexus with the seized material.*

Obviously an assessment has to be made under this Section 153A only on the basis of seized material.

5. *Issuance of a show cause notice is the preliminary step which is required to be undertaken. The purpose of show cause notice is to enable a party to effectively deal with the case made out by respondent Om Shri Jigar Association v. Union of India [1995] 80 Taxman 514/[1994] 209 ITR 608 (Guj.)/1994 SCC Online Guj.77.*

6. *Because Section 153A provides that an assessment has to be made under the said Section only on the basis of seized material, the notice dated 29th November 2018, which is impugned in this petition, should have mentioned whether the seized material was under Section 132 or books of account, other documents or any assets are requisitioned under Section 132A. The notice is absolutely silent as could be seen from above. The notice says "you are required to prepare true and correct return of income" and "setting forth such other particulars". Petitioner had filed their returns for the Assessment Year in question, which they thought was true and correct return of income and that it contained all other particulars as prescribed. If respondent felt that was not enough and petitioner should file a fresh true and correct return of income because of the search, then respondent should certainly indicate in its notice what were the seized material under Section 132 or books of account or other documents or any assets requisitioned under Section 132A. Otherwise an assessee would file a copy of what it had filed earlier, which respondent anyways had in its file. Petitioner has also been seeking from respondent to make available copy of the alleged incriminating material found/seized during the search based on which the notice has been issued. Mr Chhotaray states that such material has been given later. We are not going into that aspect at this stage because what we find is that the notice issued under Section 153A is bereft of any material. Nothing prevented respondent from mentioning in the notice the basis for issuing the notice under Section 153A so that petitioner could comply with the same as prescribed."*

Thus, *Underwater Services Company* (supra), was decided purely on the fact that there was no reference to the material seized in the notice, resulting in the notice be quashed and afresh notice being issued by the AO. In our view, this judgment would not advance the argument of the appellants in any manner.

97. We are, therefore, of the considered view that the CIT (Appeals), in its order dated 20.01.2015 passed in the first round of litigation, had come to a categorical finding of fact on page 73 of its order that it was for the first time during the search in the seizure that intragroup transactions and the fact that individual assessees were the beneficiaries of such transactions came to the knowledge of the year and had no opportunity to examine these transactions during regular assessment since these were not made known prior to the search operations. The CIT (Appeals) has also noted in this order that it was during the course of the search that the facts were collated and statements were recorded, thus coming to a factual finding that the shareholding pattern of the individual assessees of this company was for the first time discovered during the search. Thus, the CIT

(Appeals) had clearly arrived at a factual finding in the first order itself that the discovery of the shareholding pattern during the search found the incriminating material for assuming jurisdiction for issuance of notice under Section 153A of the Act.

This factual finding was challenged before the ITAT in the first round of litigation, and such ground of challenge to a factual finding was specifically given up. The finding of fact as to what constituted the incriminating material to proceed had become final and could not be re-agitated in subsequent appeals filed by the appellants. In our opinion, therefore, the substantial question of law (D) could not have arisen at all in view of our findings above. We hold accordingly.

98. Regarding questions (E) and (F), firstly, upon evaluation of the material on record, we believe these are questions of fact and not substantial questions of law. The records show that the Assessing Authorities have granted a limited benefit to the assessee after analysing the transactions in question and determining whether the transactions were in a nature of bona fide commercial transactions. In

some cases, the Assessing Authorities accepted that the trade advances were commercial transactions, but not to the extent claimed by the assessee. Secondly, in evaluating the various transactions and recording the findings of fact, it is not as if the Assessing Authorities have acted perversely. The evaluation and the findings of fact are based on the material on record, and this is not a case of no evidence or the finding being contrary to the weight of the evidence on record. Accordingly, no case is made out to interfere with the findings on the individual transactions and answer questions (E) and (F) favouring the assessee or against the Revenue.

99. Nevertheless, we have examined the various transactions and recorded our observations on the same.

The first transaction concerns Kamat Inn Pvt. Ltd. (KIPL), advancing amounts to Kamat Construction Pvt. Ltd. (KCPL). As noted earlier, the individual assessees (the three Kamat brothers) are common shareholders in these companies, holding 30-33% of shares.

The Assessing Authorities, including the Tribunal, have evaluated the arrangement between the KIPL and KCPL in the context

of managing Kamat Holiday Homes, for which the KIPL was required to pay 15% of the sales to KCPL based on the audited figures of the sales. Therefore, to the extent of advances corresponding to 15% of the sales, the Assessing Authorities have accepted the transaction as a bona fide business or commercial transaction. However, in the absence of any proper explanation about the advances over and above the consideration of 15% of the sales to be paid by the KIPL to KCPL, the Assessing Authorities have considered such additional financial advances for computing deemed dividend under Section 2(22)(e), read with Section 2(32) of the IT Act. Accordingly, this factual assessment is not vitiated because of perversity or unreasonableness.

100. We have also taken note of the fact that the principles of the CBDT Circular no. 19/2017, dated 12th June 2017, have neither been ignored nor breached, though such a circular may not have existed when the ITAT heard the matter. The Assessing Authorities, including the Tribunal, have also considered such principles. Therefore, no case is made to interfere with the findings, which are primarily factual and based on the material on record. Accordingly, no purpose would be served in remanding the matter based upon the

CBDT Circular dated 12th June 2017 since the principles in the said circular have been followed and applied by the Assessing Authorities qua the transaction in question.

101. The second transaction is between KCPL and Kamat Construction and Resorts Pvt. Ltd. (KCRPL). Again, a partial relief is granted to the assessee upon evaluating the material on record. The assessee had contended that the advances were towards acquiring a premises from KCRPL, which was in the construction business. The material on record, however, does not support this defence.

Another defence about enabling KCRPL to meet its interest/repayment liability on the credit facilities obtained was sought to be introduced. However, apart from putting forth this theory ex post facto, no contemporaneous material was produced to back this claim. In such circumstances, we find no error in finding facts recorded by the Assessing Authorities in financial transactions between the KCPL and KCRPL. In appeals under Section 260A, this Court does not ordinarily interfere with pure findings of facts unless a case of perversity is made out.

102. The third transaction concerns Kamat Inns Pvt. Ltd. and Kamat Construction and Resorts Pvt. Ltd. (KCRPL). Here, again, the assessee's contention about the financial transaction being a genuine commercial transaction was not accepted by the Assessing Authorities primarily on the ground that no material was produced to back the claim that advance was to enable the acquisition of KCRPL's shares since they were in the process of setting up a Five-star Hotel in Panaji. The Assessing Authorities considered but rejected the explanation about the transaction between closely held group companies; therefore, no documents were executed. Again, these are pure findings of fact which suffer from no perversity, warranting interference in an appeal under Section 260A of the IT Act.

103. The last transaction was between AVC Investments and Trading Company Pvt. Ltd. (AVCTPL) and KCPL for Assessment Year 2010-11. The ex post facto explanation was that Kamat Industries and Trading (KIT) supplied the group companies with various items for construction projects. It was further contended that AVCTPL purchased the construction material from KIT, and a sum of ₹2.11 crore

was payable by AVCTPL to KIT for the material supply. Still, KCPL made direct payment to KIT for the material supplied. Again, if genuine, the transaction of this nature would have certainly been backed by some paper trail or other documents. The Assessing Authorities have correctly held that this ex post facto defence was unacceptable. Again, this is a pure question of fact, and since no perversity is shown, no substantial question of law arises in this regard.

104. For all the above reasons, no case is made out to answer questions (E) and (F) favouring the assessee and against the Revenue. Though such questions were framed, on closer scrutiny and evaluation of the material on the record, We find that these are questions of fact giving rise to no substantial question of law. In any case, the substantial questions of law, as framed, must be answered against the assessee and favouring the Revenue because there is no error in the findings that the transaction in question or, in any case, the transactions above particular financial limits were not made in the ordinary course of business and, therefore, did not qualify loans or advances to apply the provisions of Section 2(22)(e) of the Income Tax Act.

105. Having held substantial questions of law (A) to (F) against the appellants in 29 Tax Appeal bearing Nos.51 of 2017, 121 of 2017, 80 of 2017, 81of 2017, 63 of 2017, 69 of 2017, 123 of 2017, 89 of 2017, 60 of 2017, 53 of 2017, 79 of 2017, 67 of 2017, 59 of 2017, 86 of 2017, 82 of 2017, 84 of 2017, 88 of 2017, 120 of 2017, 54 of 2017, 56 of 2017, 87 of 2017, 122 of 2017, 66 of 2017, 78 of 2017, 77 of 2017, 64 of 2017, 55 of 2017, 85 of 2017, 65 of 2017, 58 of 2017, 70 of 2017, 76 of 2017, 83 of 2017, 68 of 2017 and 93 of 2017 and in the remaining 5 appeals, being Tax Appeal Nos.121, 122, 123, 119, and 120 of 2017, all filed at the behest of KCPL, the question of law raised in the sole appeal filed at the behest of the Revenue is Tax Appeal No.93 of 2017 (Pr. Commissioner of Income Tax Vs Dattaprasad Kamat) found in paragraph 2 of our order of admission of these appeals dated 23.08.2017 will not arise.

106. For all the reasons stated above, we uphold the impugned order dated 30.03.2017 passed by the Income Tax Appellate Tribunal, Panaji Bench, and hereby dismiss tax appeal

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bearing Nos.51 of 2017, 121 of 2017, 80 of 2017, 81of 2017, 63 of 2017, 69 of 2017, 123 of 2017, 89 of 2017, 60 of 2017, 53 of 2017, 79 of 2017, 67 of 2017, 59 of 2017, 86 of 2017, 82 of 2017, 84 of 2017, 88 of 2017, 120 of 2017, 54 of 2017, 56 of 2017, 87 of 2017, 122 of 2017, 66 of 2017, 78 of 2017, 77 of 2017, 64 of 2017, 55 of 2017, 85 of 2017, 65 of 2017, 58 of 2017, 70 of 2017, 76 of 2017, 83 of 2017, 68 of 2017, 93 of 2017, 121 of 2017, 122 of 2017, 123 of 2017, 119 of 2017, and 120 of 2017. No order as to costs.

(VALMIKI SA MENEZES, J.) (M. S. SONAK, J.)

LATER ON

Shri Jas Sanghavi, learned Counsel for the appellants, prays for continuation of the interim relief granted by this Court on 13.10.2017, for a period of eight weeks to enable the appellants to approach the Hon'ble Supreme Court. After hearing Ms Susan Linhares, learned Counsel for the respondent, we are of the view

that interim relief granted by our order dated 13.10.2017 in Civil Application Nos.136 of 2017, 156 of 2017, 157 of 2017, 158 of 2017, 161 of 2017, 167 of 2017, 168 of 2017, 169 of 2017, 173 of 2017, 174 of 2017, 175 of 2017, 178 of 2017, 179 of 2017, 182 of 2017, 184 of 2017, 185 of 2017, 189 of 2017, 190 of 2017, 192 of 2017, 194 of 2017, 197, of 2017, 198 of 2017, 199 of 2017, 201 of 2017, 202 of 2017, 203 of 2017, 204 of 2017, 206 of 2017, 207 of 2017 and 208 of 2017, shall continue for the period of eight weeks from today. All the above applications are disposed of in the above terms.

(VALMIKI SA MENEZES, J.) (M. S. SONAK, J.)