REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5769 OF 2022

Mansarovar Commercial Pvt. Ltd. …Appellant

Versus

Commissioner of Income Tax, Delhi …Respondent

WITH

CIVIL APPEAL NO. 5773 OF 2022

CIVIL APPEAL NO. 5772 OF 2022

CIVIL APPEAL NO. 5771 OF 2022

CIVIL APPEAL NO. 5770 OF 2022

J U D G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 22.02.2016 passed by the High Court of Delhi at New Delhi in Income

Tax Appeal Nos. 162/2002, 164/2002, 165/2002, 167/2002 & 168/2002, by which the High Court has allowed the said appeals preferred by the Revenue and has quashed and set aside the common order dated 08th January, 2002 passed by the Income Tax Appellate Tribunal, New Delhi (for short, 'ITAT') for Assessment Years 1987-88, 1988-89 and 1989-90 and restored the orders passed by the Assessing Officer, upheld by the Commissioner of Income Tax (Appeals) (for short, 'CIT(A)), the respective assessees have preferred the present appeals.

Facts:

2. The facts leading to the present appeals in nutshell are as under:

The respective assessees, namely, Mansarovar Commercial Private Limited, Sovereign Commercial Private Limited, Swastik Commercial Private Limited, Trishul Commercial Private Limited and Pasupati Nath Commercial Private Limited were incorporated under the Registration of Companies (Sikkim) Act, 1961. Each of the assessee companies claim to be carrying on the

business of commercial agents in cardamon and other agricultural products.

2.1 Sikkim became part of India in April, 1975. The Constitution (Thirty Sixth Amendment) Act, 1975 inserted Article 371-F into the Constitution of India, in terms of which not all the laws of India were extended to the new State of Sikkim. Under Article 371-F (k) all laws in force immediately before the appointed day, i.e., 26th April, 1975, in the territories comprising the State of Sikkim or any part thereof were to continue to be in force therein until amended or repealed by a competent legislature or other competent authority. The Income Tax Act, 1961 (hereinafter referred to as the 'Act') was not made straightway applicable to the State of Sikkim. Till such extension of the Act to Sikkim by a notification issued under Article 371-F(n), income tax was to be charged and collected under the Sikkim State Income-tax Manual, 1948 (for short, 'Sikkim Manual, 1948'). The recovery of tax was under the scheme of the Sikkim (Collection of Taxes and Prevention of Evasion of Payment of Taxes) Act, 1987.

2.2 By a notification No. S.O. 1028E dated 7th November, 1988 issued under Article 371-F(n) of the Constitution, the Act, the Wealth Tax Act, 1957 and the

Gift Tax Act, 1958 were extended to the State of Sikkim. In terms of para 2 of the said notification, the Central Government appointed, by Notification S.O. 148E dated 23rd February, 1989, the 1st of April, 1989 as the date on which the Act would come into force in the State of Sikkim in relation to the previous year relevant to the Assessment Year commencing on the 1st day of April, 1989. However subsequently, by virtue of Section 26 of the Finance Act, 1989 the Act was made applicable to the State of Sikkim from the previous year relevant to the Assessment Year commencing from 1st April, 1990, thereby extending the date of applicability of the Act by one year from the date specified in the notification dated 23rd February, 1989.

2.3 The case of the assessees was that each of them was a resident of Sikkim, carrying on business in Sikkim and not elsewhere and that till 31st March, 1990, each of them were governed by the Sikkim Manual, 1948 and not the Act. Therefore, the stand of the assessees was that the income earned by them till that date was income earned in Sikkim from the business conducted/done in Sikkim. On the other hand, the case of the Revenue was that the control and management of each of the assessee companies was wholly with their auditor, M/s Rattan Gupta & Co., Chartered Accountants, who had their

offices in Karol Bagh, New Delhi and therefore, were companies' resident in India in terms of Section 6(3) of the Act.

2.4 A search was conducted on 15th March, 1990 at the premises of M/s Rattan Gupta & Co., Chartered Accountant at Daryaganj, New Delhi and during the course of the search, books of account, cheque books, signed blank cheques, vouchers and other income documents of the assessees were found. The statements of the partners, former and current, of M/s Rattan Gupta & Co., CA were recorded.

2.5 On 10th July, 1990, following the search conducted on 15th March, 1990 at the premises of M/s Rattan Gupta & Co., CA at Daryaganj, New Delhi, notices were issued by the Assistant Commissioner of Income Tax (for short, 'ACIT') (Investigation), Circle 7(1), New Delhi to each of the assessees under Section 148 of the Act, in respect of Assessment Years 1987-88, 1988-89 and 1989-90 (Assessment Years under consideration). An order was passed on 12th July, 1990 by ACIT (Investigation), Circle 13(1), New Delhi in respect of M/s Rattan Gupta & Co. under section 132(5) of the Act. It appears that the said Rattan Gupta informed the assessees about notices under section 148 of the Act issued to each of them at the

address of M/s Rattan Gupta & Co. at Daryaganj, New Delhi and affixed at the said premises of M/s Rattan Gupta & Co.

2.6 Meanwhile, each of the assessees filed return of income in terms of the Sikkim Manual, 1948 for the Assessment Years in question on 27th April, 1990. A demand notice was issued to each of them in respect thereof on 23rd July, 1990.

2.7 The respective assessees filed writ petitions in the High Court of Sikkim, challenging the notices issued under section 148 of the Act. The Sikkim High Court initially passed an interim order staying further proceedings. The said interim order was modified in terms of which the Department was permitted to continue with its enquiry and seek facts and information from the Directors of the assessee companies. The assessee companies were required to furnish the necessary information and also to file returns and produce the books of accounts before the Assessing Officer, New Delhi in compliance of the notices under section 148 of the Act. Thereafter, the Sikkim High Court dismissed the writ petitions holding that it had no jurisdiction to entertain the said writ petitions since no part of the cause of action had arisen in the State of Sikkim. It was observed that as the

notices were issued by the ACIT (Investigation), Circle 7(1), New Delhi and served on the assessees in New Delhi, it had no jurisdiction over the actions of that authority. It appears that the Sikkim High Court also observed that "mere fact that the companies have registered offices in Sikkim does not confer jurisdiction on this Court."

2.8 It appears that in the meanwhile, on the basis of the returns filed by the assessees in Sikkim, the Income and Sales Tax Department of Government of Sikkim raised a revised demand on 30th November, 1990, cancelling the earlier demand raised on 30th July, 1990.

2.9 After the dismissal of the writ petitions by the Sikkim High Court on 20th July, 1993, the assessees filed writ petitions before the Delhi High Court being Writ Petition Nos. 5565 to 5569 of 1993. Initially, the Delhi High Court passed an interim order staying the proceedings. However thereafter on 13th August, 1998, an order was passed by the Delhi High Court directing the AO to frame the assessment subject to outcome of the writ petitions.

2.10 That thereafter on 24th August, 1998, notices were issued to the assessee companies under section 148 of the ACT by ACIT, Company Circle 2, New Delhi.

2.11 That on 09th October, 1998, separate assessment orders were passed by the ACIT, Company Circle 2(2), New Delhi for each of the Assessment Years in question. The Assessing Officer concluded that each of the assessees were "intentionally trying to take advantage of the prevailing laws at Sikkim by routing money through Sikkim and ploughing back in India." The Assessing Officer also rejected the objections raised by the assessees as to the jurisdiction. The Assessing Officer made additions to the income of the assessees for the aforesaid three Assessment Years in question under different heads of income, namely, (i) income from commission (ii) unsecured loan from Dengzong Charitable Trust (iii) interest accrued/paid on the unsecured loans and (iv) provision for income tax (which was disallowed). Separate penalty proceedings were initiated under sections 271(1)(a). 271(1)(c), 273/274 and 271-B of the Act.

2.12 The assessees then preferred appeals before the CIT(A). Subsequently on 08th December, 2000, the writ petitions filed by the assessees came to be dismissed by the High Court as the respective assessees moved the Appellate Authority prescribed under the statute. The appeals preferred by the assessees before the CIT(A)

came to be dismissed *vide* order(s) dated 30th March, 2001.

2.13 Feeling aggrieved by the order(s) passed by the CIT(A) dismissing the appeals, the respective assessees preferred appeals before the ITAT. The ITAT observed and held that notices under Section 148 of the Act could not have been served on Mr. Rattan Gupta as the said Mr. Rattan Gupta cannot be said to be a "Principal Officer" of the assessees within the meaning of section 2(35)(a) of the Act and the AO did not serve any notices of his intention of treating Mr. Rattan Gupta as the "Principal Officer" for the purposes of section 2(35)(b) of the Act. On the refusal of Mr. Rattan Gupta to receive notices, ITAT observed and opined that if Mr. Rattan Gupta refused to receive such notices, he was justified in doing so and his refusal did not authorise the AO to resort to substituted service within the meaning of Rule 20 of Order V of CPC. The order(s) passed by the ITAT allowing the appeals preferred by the assessees was/were the subject matter of appeals before the High Court at the instance of the Revenue.

2.14 The High Court framed the following questions of law:

> "1. Whether the Tribunal was right in holding that the ACIT exceeded his jurisdiction in issuing notices under section 148

of the Act and the notices were not served in accordance with law?

2. Whether the order made by the ITAT is perverse based on conjectures and surmises and ignorance of evidence and material and has relied upon incorrect facts?

3. Whether the income of the assessee is taxable in India?"

At the instance of the Assessees, an additional question was also framed as under by the same order:

4. Whether the ITAT was right in law in holding that the assessee is not a resident of India within the meaning of Section 6(3)(ii) of the Income Tax Act, 1961 and whether the said finding of the ITAT is not also vitiated and perverse as it ignores relevant admissible evidence and materials and relies upon incorrect facts and has not given due consideration to several important materials and evidence relevant for determination of residence of the assessee."

2.15 By the impugned common judgment and order, the High Court has answered all the questions in favour of the Revenue and against the assessees and consequently has allowed the appeals preferred by the Revenue. The High Court in the impugned judgment and order has dealt with and considered the following main issues and both the parties were heard on the said issues.

1. Objection to the jurisdiction by the ACIT, Circle 7(1), New Delhi who issued notices to the assessees under Section 148 of the Act;

2. Control and management in New Delhi;

3. No income accrued or was earned in Sikkim;

4. Service of notice;

5. Limitation for issuance of notice under section 147 of the Act;

6. Merits of the reopening of the assessments; and

7. Interest

By the impugned common judgment and order, the High Court has summarised the conclusion in paragraph 91 as under:

(i) The Assessees, incorporated under the company law of Sikkim, are resident Indian companies. If any income accrued to them or was earned by them in India prior to 1st April 1990, then such income is taxable under the Act.

(ii) The Revenue is justified in contending that the Assessees not having raised such objection at the first available opportunity should not be permitted to urge the ground of lack of jurisdiction of the Delhi officers to issue notices to them under Sections 147/148 of the Act.

(iii) Mr. Rattan Gupta was not only doing the audit work of the five Assessee companies, but determining who should be the directors of the said companies. This coupled with the fact that the blank signed cheque books of all the five companies together with rubber seals, the letter heads, the blank signed cheques and other records were also found in the office of Rattan Gupta & Co., the factual determination by the AO that the management and the control of the five companies was actually wholly situated in Delhi gets fortified. The exhaustive evidence gathered by the Revenue, without being countered by the Assessees despite opportunity being afforded, serves to substantiate the case of the Revenue that the management and the control of the five Assessee companies was in fact located in Delhi.

(iv) The findings of the AO that the Assessees failed to prove that the commission payments were earned by them exclusively in Sikkim has not been dislodged by the Assessees by producing any tangible material.

(v) There was an implied authority of Mr. Rattan Gupta to receive such notices even in terms of Section 252(2) of the Act, read with Order V Rule 20 CPC. Consequently, the Court is unable sustain the finding of the ITAT that notice was not properly served on the Assessees through Rattan Gupta & Co. There was no need for the Department to have gone in for substituted service and the refusal by Rattan Gupta & Co. to receive the notice was sufficient to consider it as a deemed service of notice.

(vi) The plea of the Assessees that the proceedings under Section 148 of the Act gets vitiated in the absence of a specific order vesting the ACIT with the powers under Section 127 of the Act to issue notice under Section 148 of the Act is rejected.

(vii) The plea of the Assessees that the notices under Section 142(1) and 143(2) of the Act were issued for the first time in 1998 and were time barred is rejected.

(viii) On merits there were sufficient grounds for exercising the power under Section 148 of the Act.

(ix) The ITAT's conclusion that the interest under Sections 234 A and 234 B of the Act could not be charged since a specific notice in that behalf was not issued by the AO is unsustainable in law and is overruled."

Concluding as above, the High Court has accordingly answered the questions framed in favour of the Revenue and against the assessees. The impugned

common judgment and order passed by the High Court is the subject matter of present appeals.

Submissions:

3. Shri Arvind P Datar and Shri G. Umapathy, learned senior counsel have appeared on behalf of the respective assessee companies and Shri N. Venkataraman, learned Additional Solicitor General of India has appeared on behalf of the Revenue.

3.1 Shri Arvind P Datar, learned senior counsel appearing on behalf of the assessee companies has submitted that the issue involved in the present appeals is, as to whether the provisions of Income Tax Act, 1961 shall be applicable to the assessee companies which are registered under the Sikkim Companies Act and amenable to Sikkim Tax Manual, 1948 in respect of three Assessment Years, i.e., 1987-88, 1988-89 and 1989-90 when Income Tax Act, 1961 was not extended to the State of Sikkim. It is submitted that the further issue is, whether jurisdiction on the authorities in Delhi can be conferred solely based on the alleged effective place of control and management of the assessee companies for the purpose of applicability of Income Tax Act, 1961.

3.2 Challenging the impugned judgment and order passed by the High Court, Shri Arvind P Datar, learned senior counsel appearing on behalf of the assessee companies has vehemently submitted that the impugned judgment is based on an erroneous assumption that the effective control of the companies vested with one Mr. Rattan Gupta, a resident of Delhi, who was rendering accounting and auditing services.

3.3 It is submitted that the impugned judgment has erroneously allowed the Department to levy interest on the assessee companies without framing the issue as a specific question of law as mandated by Section 260A of the Act.

3.4 In support of his submission that the Income Tax Act, 1961 shall not be applicable for the period during the relevant assessment years, it is vehemently submitted by Shri Datar, learned senior counsel appearing on behalf of the assessee companies that the Income Tax Act, 1961 came to be extended to the State of Sikkim only on and after 1st April, 1990. That therefore, the AO exceeded his jurisdiction.

3.5 It is contended that the assessee companies having been assessed to tax under the Sikkim Manual, 1948 and having paid and discharged income tax under the said law

cannot be subjected to tax once over again by applying the “head and brain” rule in the absence of an express provision under the Income Tax Act, 1961, more so in view of the well settled law that “a taxing statute should not be interpreted in such a manner that its effect will be to cast a burden twice over for the payment of tax on the taxpayers unless the language of the statute is so compelling that the Court has no alternative than to accept it.” That in a case of reasonable doubt, the construction most beneficial to the taxpayer is to be adopted.

3.6 It is further contended that as such the present case is squarely covered by the decision of this Court in the case of ***Mahaveer Kumar Jain v. CIT, Jaipur, reported in (2018) 6 SCC 527***, wherein this Court considered a question whether the appellant, who was a resident of Rajasthan and had won a lottery from Sikkim during the Assessment Year 1986-87 was liable to be taxed in India where Income Tax Act, 1961 was in force, notwithstanding that the said income had accrued or arisen to him at a place where Income Tax Act, 1961 was not in force, i.e., Sikkim, more particularly when the said income had already been taxed in the State of Sikkim under the Sikkim Manual, 1948. Reliance is placed on certain

observations made in paragraphs 13 to 15 of the said decision.

3.7 It is next submitted that the assessee companies filed income tax returns before the appropriate authority as per Sikkim Manual, 1948 and a demand was raised by the said authority, which was paid. That the fact that the appropriate Income Tax Authority under the Sikkim Manual, 1948 accepted the income tax returns filed by the assessee companies and raised demand based on such returns establish the bona fides of the assessee companies beyond reproach. Therefore, the allegation that the assessee companies have no real business in Sikkim is absolutely baseless, unfounded and untenable.

3.8 Making above submissions, it is urged that the Income Tax Act, 1961 shall not be made applicable so far as the assessee companies are concerned for the relevant assessment years.

3.9 It is further submitted that as such the ACIT, Delhi had no territorial jurisdiction to assess the assessee companies and therefore clearly exceeded in his jurisdiction in issuing notices under section 148 of the Act on the assumption that the assessee companies were carrying on business in India, on the basis of availability of books of accounts of the assessee companies at the

premises of the Chartered Accountant of the assessee companies, i.e., M/s Rattan Gupta & Co. It is submitted that such an approach is wholly untenable in law, besides being perverse.

3.10 It is further submitted that as observed and held by this Court in the cases of ***Ajay Kumar v. State of Uttarakhand, 2021 SCC OnLine SC 48*** and ***Kiran Singh v. Chaman Paswan, AIR 1954 SC 340***, an order passed by the authority without jurisdiction is a nullity.

3.11 It is contended that the exercise of territorial jurisdiction by CIT, Delhi is also wholly untenable in law in view of section 6(3) of the Act as it was at the relevant point of time. That Mr. Rattan Gupta was a practising Chartered Accountant and providing accounting and auditing services to several corporates and individuals and could have never been the “head and brain” behind the assessee companies.

3.12 It is further contended that even otherwise the re-assessment was impermissible in law in the absence of any original orders passed under section 143(3) of the Act. Reliance is placed on the decision of this Court in the case of ***trustees of H.E.H, the Nizam’s Supplemental Family Trust v. CIT, reported in (2000) 3 SCC 501 (paragraphs 10 & 11)***. It is submitted that the said

decision was subsequently followed and affirmed by this Court in the case of ***Standard Chartered Finance Limited v. CIT, Bangalore, (2016) 14 SCC 634 (Civil Appeal No. 1101 of 2016 dated 9.2.2016).***

3.13 It is further submitted by Shri Datar, learned senior counsel appearing on behalf of the assessee companies that as such there was no material to substantiate that the assessee companies' control and management was situated wholly in India. That the High Court has proceeded on an erroneous presumption that the assessee companies were controlled by one Rattan Gupta, who was rendering accounting and auditing services, simply because books of accounts had been found in his office. It is submitted that no evidence was produced to the effect that he ever appointed any person as the Director of the assessee companies or dictated the manner in which such Directors were to discharge duties towards assessee companies. That the finding of the High Court that the control over management vested with Rattan Gupta and therefore the assessee companies were situated in India, is therefore wholly untenable and consequently to draw such presumption is legally unsustainable.

3.14 It is further submitted that there was no cogent material at the time of issuance of notices under section 148 of the Act to form a belief that income was chargeable under the Income Tax Act, 1961 and that the burden to prove that the control and management of assessee companies was situated wholly in India lie with the Department. That the law is well settled that the onus was on the Revenue, which has not been discharged. That on the contrary the High Court has erred in shifting the onus on the assessee companies to prove that they had legitimate business interest and income arising from the State of Sikkim.

3.15 It is contended that the impugned order is based solely on an erroneous supposition that Mr. Rattan Gupta was in control of the management of the assessee companies. That as such until the Assessment Years 1988-89, the audit and accounts of the assessee companies were being handled by one Ravinder Singh & Co. That the High Court has committed an error in treating the said Ravinder Singh to be the partner of M/s Rattan Gupta & Co. It is submitted that therefore, the impugned order is based on a flawed presumption of a critical fact and therefore the impugned judgment deserves to be set aside by this Court.

3.16. Shri Datar further submitted that in the absence of framing of any substantial question of law under Section 260A of the Act on levy of interest, the liability of interest could not have been fastened upon the assessee companies. That section 260A of the Income Tax Act is analogous to Section 100 CPC which mandates framing of question of law before exercising its jurisdiction on the said issue. It is submitted that as such no issue of levy of interest was framed by the High Court. That therefore the High Court has committed a jurisdictional error in recording a finding that ITAT's conclusion that interest under section 234 A & B of the Act could not be charged since a specific notice in that behalf was not issued by the Assessing Officer, is unsustainable in law.

3.17 In addition, it is submitted on the aspect on territorial jurisdiction of the authorities at Delhi that the assessee companies were having their registered offices in Sikkim. Therefore, the issuance of notices under Section 148 of the Act is beyond jurisdiction. That on the issue of territorial jurisdiction, the ITAT found that since the business premises of the assessees were in Sikkim, the territorial jurisdiction to assess vested with the ACIT, Gangtok. Therefore, the ITAT rightly held that the ACIT Delhi who issued notices under section 148 of the Act had

no territorial jurisdiction. That the proper course for the Department was to have the matter entrusted to ACIT, Gangtok after complying with the mandate of section 127 of the Act for transferring jurisdiction of ACIT, Gangtok to New Delhi. It is submitted that though the Revenue in its appearance before the High Court raised a question of law on the finding recorded by the ITAT on territorial jurisdiction of the authorities at Delhi, while framing question(s) of law, the High Court did not frame an issue with regard to territorial jurisdiction. Thus, the finding with regard to lack of territorial jurisdiction by ITAT had attained finality.

3.18 Insofar as the levy of interest is concerned, it is submitted that the ITAT specifically observed that no direction was made by the AO for levy of interest. Therefore relying upon the decision of this Court in the case of ***CIT v. Ranchi Club Limited, (2001) 247 ITR 209*** taking the view that levy of interest was under Section 234A, B & C of the Act, without a direction by the AO in the assessment order is not legally sustainable. It is further submitted that the High Court, while upsetting the finding recorded by the ITAT on levy of interest, has erred in relying upon the decisions of this Court in the cases of ***Commissioner of Income Tax, Mumbai v. Anjum M.H.***

Ghaswala, (2002) 1 SCC 633 and ***Commissioner of Income Tax, Delhi v. Bhagat Construction Company Private Limited, (2016) 15 SCC 738***.

3.19 Shri Datar, learned senior counsel appearing on behalf of the assessee companies contended that as such there was no notice served upon the proper person and the notice served upon Rattan Gupta cannot be said to be a valid service of notice. That under section 2(35)(b) of the Act, the Assessing Officer is required to serve a notice only on persons who are connected with the management or administration of the assessee company to treat them as Principal Officer. That Rattan Gupta was never connected with the management or administration of the assessee companies so as to treat him as a Principal Officer. That Rattan Gupta was not the Secretary, Treasurer, Manager or Agent of the assessee companies under section 2(35)(a) of the Act. Therefore, the AO ought to have served a notice on Rattan Gupta informing him of his intention to treat him as the Principal Officer of the assessee companies on the ground that he was a person connected with the management or administration of the assessee companies under section 2(35)(b) of the Act. However, in the present case, the AO never served a notice on Rattan Gupta under section 2(35)(b) of the Act

expressing his intention to treat him as the Principal Officer of the assessee companies. Therefore, this failure vitiates the entire proceedings.

3.20 It is submitted that there is adequate evidence on record to establish that:

(a)the business was managed from Gangtok in Sikkim where the business was carried on by one Mr. Ajay Kumar Agarwal, Local Director and Mr. H.L. Verma,

(b)the income was earned and assessed to income tax in Sikkim as per the Sikkim Manual, 1948, and

(c)income tax was paid in Sikkim under Sikkim Manual, 1948.

3.21 That further, seized vouchers and records clearly establish that commission payments were received into the bank accounts of these companies from identified traders of large cardamom and that department had no material in its possession to disbelieve that these traders had made the commission payments only on sale of cardamom.

3.22 It is submitted that books of accounts, ledgers etc. which were found at the office premises of Mr. Rattan Gupta's office at Daryaganj, Delhi were handed over to Mr. Rattan Gupta for providing professional accounting services as he was a practising Chartered Accountant.

He had clearly stated that the books of accounts, ledgers etc. were handed over to him for providing professional services and that the business operations were carried out from Gangtok in Sikkim by Mr. Ajay Kumar Agarwal, Local Director and Mr. H.L. Verma and that he had nothing to do with the business operations of the assessee companies. A mere allegation that he is in charge of the conduct of the company is not sufficient to hold that he is the Principal Officer. There should be credible material to how his active involvement in the conduct and management of the business.

3.23 It is next submitted that assumption of jurisdiction based on the seizure of books of accounts from the office premises of the practising Chartered Accountant Mr. Rattan Gupta at New Delhi and treating him as the Principal Officer or "head and brain" of the companies incorporated under the Sikkim Companies Registration Act, 1961 when the said Chartered Accountant had categorically stated on oath that he was rendering professional accounting and reconciliation services to the companies in question, is without jurisdiction, perverse and deserves to be set aside. The failure of same would set a very bad precedent and have far reaching

consequences on the rights of Chartered Accountants to carry on their profession.

3.24 Making above submissions and relying upon the aforesaid decisions, it is prayed that the present appeals be allowed.

4. The present appeals are vehemently opposed by Shri N. Venkataraman, learned Additional Solicitor General of India appearing on behalf of the Revenue. He has taken us through the findings recorded by the Assessing Officer in the Assessment Order, findings of the CIT(A) *vide* order dated 30th March, 2001, findings recorded by the ITAT *vide* order dated 8th January, 2002 and the findings recorded by the High Court including the findings recorded regarding the issue pertaining to service of notice and levy of interest.

4.1 Insofar as the submission on behalf of the appellants on control and management of affairs of the companies is concerned, it is submitted that section 6 of the Act defines residence in India. That the relevant provision is section 6(3) of the Act. That this principle of control and management of its affairs is not something which had originated for the first time in the Income Tax Act, 1961. This expression had existed even under the Income Tax Act, 1922. It is submitted that under the

erstwhile Income Tax Act, 1922, Section 4A defined residence in taxable territories. Section 6 of the Act deals with residence in India and the relevant provision would be Section 6(3) pre-amendment in 2017 and post-amendment 2017 w.e.f. 01.04.2017. He has taken us through the relevant provisions under the Income Tax Act, 1922 (Section 4A), Section 6(3) of the Act (existed prior to 01.04.2017) and Section 6(3) of the Act substituted by Finance Act w.e.f. 01.04.2017.

4.2 On the interpretation on the control and management of affairs, Shri N. Venkataraman, learned ASG has relied upon the following English, Supreme Court and High Court judgments both under the Act, 1922 and Act, 1961:

i) ***San Paulo v. Carter (1896) AC 31 Lord Halsbury;***

ii) ***V.V.R.N.M. Subbayya Chettiar v. CIT***, ***Madras, AIR 1951 SC 101;***

iii) ***Erin Estate v. CIT, 1959 SCR 573;***

iv) ***Narottan and Pereira Ltd. v. CIT, Bombay City, 1953 23 ITR 454 (paragraphs 3 & 4) (Bombay High Court Judgment);***

v) ***Estate of A. Mohammed Rowther v. CIT, Madras, 1963 49 ITR 39, (Madras High Court Judgment);***

vi) ***CIT v. Chitra Palayakat Co., 1985 156 ITR 730 (Madras High Court Judgment);***

vii) ***Commissioner of Income Tax v. Nandlal Gandalal, 1960 40 ITR 1 (SC);***

viii) ***A.M.M. Firm v. Reserve Bank of India, 1982 SCC OnLine Mad. 187 (Madras High Court Judgment);***

ix) ***Commissioner of Income Tax v. Bank of China, 1985 SCC OnLine Cal. 24 (Calcutta High Court Judgment);*** and

x) ***Universal Cargo Carriers Inc. v. Commissioner of Income Tax, 1990 SCC OnLine Cal. 385 (Calcutta High Court Judgment)***

4.3 Relying upon the aforesaid decisions, it is submitted as under:

a) Holding lands, receipt of payments and carrying on trade is of no consequence as long as the control of the commercial venture and directions governing the commercial venture are given from elsewhere.

b) Domicile or registration of the company is not relevant. The making, maintaining, managing and working is insufficient.

c) Directors authorised to manage the work and employees rendering service again are insufficient.

d) The determinative test is where the sole right to manage and control every department of its affairs lies. Managers and directors whose services are merely remunerated is not a relevant criterion. The profits although received by the employees as remuneration, do not belong to them and are not in their disposal. Incurring of debts or payment to agents are of no consequence.

e) The test is, where the head and seat and directing power of the affairs of the company is, which works with some degree of permanence while the expression 'wholly' would seem to recognize the possibility of the seat of such power being divided between two distinct and separate places.

f) The question to be asked is from where the person or group of persons control or direct the business.

g) Mere activity by the company does not create residence.

h) In case of dual residence, it is necessary to show that the company performs some of the vital organic functions incidental to its existence in both the places so that there are in fact two centres of management.

i) Control and management which must be shown is not merely theoretical control and power, or *de jure* control and power but the *de facto* control and power actually exercised in the course of the conduct and management of the affairs of the firm. Mere presence of directors or vesting of power in them is insufficient unless otherwise they had exercised the power elsewhere in the territory under question.

j) Even acting under a power of attorney is not sufficient as the same can be cancelled at any moment and as a power of attorney holder they must submit to the principal an explanation of what they have been doing and the principal has the right of keeping a vigilant eye over their work from the board room and the power exercised by the power of attorney holder is only *de jure* control and not *de facto* control and management.

k) The intrinsic test is where the central control and management actually abides. Mere presence of even

the managing partner or mere delegation of power is insufficient.

l) The expression control and management of its affairs is much wider than the expression used in some treatises 'Control and Management of the business.'

4.4 It is further submitted that in light of the principles laid down in the aforesaid decisions, it is well settled that a question, as to where the control and management lies is to be decided in light of the actual or the factual exercise of control, inasmuch as the Courts consistently have taken the view that mere presence of a partner firm in India even when he happens to be the managing partner, is not conclusive of the issue.

4.5 It is further submitted that to cull out the meaning of management and control under the old Section 6(3) pre-amendment 2017, which shall be applicable in the present case, section 6(3) post 1st April, 2017 is also required to be considered. That the test under the new law post 1st April, 2017 is "Key management and commercial decisions necessary for the conduct of the business as a whole or in substance." It is submitted that the place of effective management (POEM) is the new standard

prescribed by the Parliament, w.e.f. 1st April, 2017, in alignment with the global needs and business practices.

4.6 Taking us to the findings recorded by the AO, CIT(A) and the High Court which are on appreciation of evidence/material on record, it is vehemently submitted by Shri N. Venkataraman, learned ASG that it was rightly concluded that the control and management of the companies was in Delhi and that it was a clear design on the part of the respective assessees to treat the income as arising from Sikkim to avoid the payment of tax under the Act, 1961. It is submitted that the control and management of the companies was being done by Rattan Gupta from his Delhi office. Therefore, the assessees can be said to be residence in India and therefore liable to pay tax under the Income Tax Act, 1961.

4.7 Insofar as the submission on behalf of the appellants that in the absence of any original assessment, there shall not be any re-assessment under sections 147/148 of the Act, Shri N. Venkataraman, learned ASG has heavily relied upon the decision of this Court in the case of ***Commissioner of Income Tax v. Sun Engineering Works P. Ltd. (1992) 4 SCC 363*** *(paragraph 14)*. It is submitted that in the said decision, it is observed and held by this Court that under section 147,

the AO has been vested with the power to 'assess or reassess' the escaped income of an assessee. That the term 'escaped assessment' includes both "non-assessment" as well as "under assessment."

4.8 Insofar as the submission on behalf of the appellants on service of notice is concerned, it is submitted that the principal place of business is the seat of control and therefore notice sent to Delhi is sufficient. On the service of notice at Delhi, Shri N. Venkataraman, learned ASG has heavily relied upon the observations/findings recorded by the High Court in the impugned judgment and order in paragraphs 78 to 83. Thereafter, relying upon the decision of the Calcutta High Court in the case of ***India Glycols Ltd. v. Commissioner of Income Tax, 2004 SCC OnLine Cal. 736***, it is submitted that notices sent/served at Delhi can be said to be valid notice/service.

4.9 As regards levy of interest under Section 234A of the Act is concerned, it is urged by Shri N. Venkataraman, learned ASG that interest levied under Section 234A is mandatory and there is no discretion with the AO and therefore there is no question of non-compliance of principles of natural justice. It is submitted that so far as the penalty leviable under section 271 of the Act is

concerned, the same is discretionary, however the interest is not discretionary. Therefore, for imposing penalty, principles of natural justice are required to be complied with, however in case of interest, the same being mandatory in nature and automatic there is no requirement of following principles of natural justice and/or even if in the assessment order there is no specific order to levy the interest but the interest charged is indicated in the ITNS 150 accompanying the assessment order and the same would be sufficient compliance for demanding interest. Heavy reliance is placed on the Constitution Bench decision of this Court in the case of ***Anjum M.H. Ghaswala (supra)*** as well as subsequent decision in the case of ***Karanvir Singh Gossal v. Commissioner of Income Tax, (2012) 13 SCC 802*** and the decision of this Court in the case of ***Bhagat Construction Company Private Limited (supra)***.

4.10 It is submitted that the ITAT has relied upon the decision of this Court in the case of ***Ranchi Club Ltd. (supra)***. However, the said decision has been subsequently overruled and/or held not to be good law in view of the subsequent decisions in the cases of ***Anjum M.H. Ghaswala (supra)*** and ***Bhagat Construction Company Private Limited (supra).***

4.11 Insofar as the submission regarding non-framing of the substantial question of law on levy of interest is concerned, heavy reliance is placed on the decision of this Court in the case of ***State Bank of India v. S.N. Goyal, (2008) 8 SCC 92 (paragraph 13)***. It is submitted that as observed and held by this Court in the aforesaid decision, when a question of law arises incidentally or collaterally, having no bearing on the final outcome, it will not be a substantial question of law. It is submitted that in the present case, the Constitution Bench in ***Anjum M.H. Ghaswala (supra)*** has held that the interest is both mandatory and automatic and the decision of this Court and various High Courts had concluded that it does not require a separate notice, hearing and an independent order. It is submitted that this Court in the case of ***Bhagat Construction Company Private Limited (supra)*** had in no uncertain terms made the legal position clear by holding that should the assessing authority enclose an ITNS 150 form computing the interest liability and annexed the same with the assessment order, the same would constitute adequate compliance for sustaining the interest and upholding it. That the aforesaid judgment makes it evidently clear that when an issue is incidental or collateral then it does not give rise to a substantial

question of law. Once the tax liability is upheld, interest become automatic, mandatory and collateral.

4.12 It is next submitted that the final outcome of the tax liability or the final outcome of the substantial questions raised and decided by the High Court, had been decided without any sense of dependence on the issue of interest. That the final legal outcome of the substantial questions raised and decided is not dependent or contingent upon a decision on interest. On the contrary, the moment the tax liability gets upheld, if the AO had imposed interest at the first instance, (which in this case is not under dispute) then interest would get added to the tax liability as it does not require an independent and stand alone consideration as to whether the same is leviable.

4.13 As regards the reliance placed upon the decision of this Court in the case of ***Shiv Raj Gupta v. CIT, Delhi, AIR 2020 SC 3556,*** by the learned senior counsel appearing on behalf of the appellants on non-framing of substantial question of law in terms of Section 260A of the Act so far as the interest liability is concerned, it is submitted that the said decision shall not be applicable to the facts of the case at hand and more particularly in case of an interest which is automatic and mandatory. It is submitted that in the said case, the dispute was with

respect to capital gains which by its very nature is a separate head of income and the issue relates to the very taxability. That therefore, failure to raise a question of taxability of capital gains in a particular case may tantamount to a failure in raising a substantial question of law in terms of Section 260A of the Act. However, the same may not apply on interest as the interest is automatic and mandatory.

4.14 Making above submissions and relying upon the aforesaid decisions, it is prayed that the present appeals be dismissed.

Consideration:

5. We have heard learned counsel for the respective parties at length.

We have also gone through the orders passed by the Assessing Officer, CIT(A), ITAT and the impugned judgment and order passed by the High Court in great detail.

At the outset, it is required to be noted that the AO held against the respective assessees on all points including Rattan Gupta being the main person in management and control of the respective companies

situated in Delhi as well as the jurisdiction of the AO in Delhi. The findings shall be referred to hereinbelow. The findings recorded by the AO have been upheld by the CIT(A), which are also against the respective assessees. However, the ITAT reversed the order passed by the CIT(A), which order has been reversed by the High Court by holding that the decision of the ITAT is perverse both, on facts and in law.

6. While appreciating the correctness of the impugned judgment and order passed by the High Court and while appreciating the submissions made by the learned counsel appearing for the respective parties, the findings recorded by the AO, CIT(A), ITAT and the High Court in the impugned judgment and order are required to be referred to, which are as under:

Findings record by the AO while passing the Assessment Order:

i) The directors are all from outside Sikkim and had never been to Sikkim, and the lone director Mr. Ajay Agarwal was projected as a resident of Gangtok, Sikkim, which could not be sustained as no proof or identity was shown;

ii) The entire books of accounts were found and seized at New Delhi at the address of Mr. Rattan Gupta, Chartered Accountant, 4556/4, Ansari Road, Darya Ganj, New Delhi. Returns were filed without audit reports and auditors have not signed balance sheets and the auditors were also based out of Delhi. Though bank accounts were available both in Delhi and Sikkim, the authorized signatories, to operate both the accounts were located only in Delhi;

iii) The statutory books, registers and the shareholders were all located in Delhi;

iv) No evidence was ever produced for having conducted board meetings in Sikkim;

v) When it came to earning of commission from various agents, the genuineness of the addresses given at Sikkim could not be proved. When notices were issued under Section 131 of the Act, no response was forthcoming and, from the memorandum and articles of association it was clear that the agents were kith and kin of the directors;

vi) Shockingly, the total commission alleged to have been earned was more than the sale of

cardamom and what could have been produced by the State of Sikkim in a year. These facts have been corroborated by the intelligence wing of the department;

vii) There were no employees and no expenses incurred at Sikkim;

viii) At the time of search and seizure on 15.03.1990 at the premises of Mr. Rattan Gupta & Co., the following things were seized:

1) Books of accounts
2) Funds
3) Memorandum and Articles of Association
4) Blank cheque books of the bank accounts held both in New Delhi, Gangtok and Sikkim
5) Pass books of all the 5 companies both Delhi and Gangtok
6) Blank printed letter pads and rubber stamps

ix) Mr. Rattan Gupta in his statement dated 15th March, 1990, confirmed that as part of reconciliation, the persons contacted were Dalmia Resorts International Private Limited and Gujarat Heavy Chemicals Limited and other entities. He further confirmed that Mr. Rajiv Jain became a director in 3 companies on his

instructions and he had also made directors in all the 5 Sikkim companies and named a few of them. It was conceded clearly that though these persons became directors at his behest no work was performed by these persons except signing papers;

x) Mr. Rajiv Jain in his statement dated 15th March, 1990 confirmed that cheque books and pass books were found at the office of Mr. Rattan Gupta and so is the case with rubber stamps and blank printed letter heads;

xi) Mr. Ravinder Singh in his statement confirmed that he had been looking after the day-to-day affairs of these companies from Delhi till March, 1998, after which Rattan Gupta took over the position as the only director and the other directors were his nominees, and Rattan Gupta functioned and operated only from Delhi and no office expenses have been incurred in Sikkim;

xii) The AO also entered a finding that there has been a fund transfer from Delhi into the bank accounts at Sikkim to claim exemption and these have been round tripping of money going from

Delhi to Sikkim and getting remitted back into Delhi and claiming exemption in Sikkim; and

xiii) This was done till 31st March, 1989 and the moment Income Tax Act was extended in 1990 the whole apparatus erased and no commission was shown by any of the companies.

Findings recorded by the CIT(A):

1) That the appellate authority upheld the findings of the AO, more specifically regarding commission alleged to have been received by reiterating that the summons sent to different persons who had allegedly paid amounts as commission had not responded to him and that the assessees had also not produced any worthwhile evidence to prove the genuineness of commission received.
2) That even U.P. Karma was examined on 8th October, 1998 and he confirmed that he had joined in 1998 and had no idea of earlier annual general body meetings and could not produce any minutes. He also confirmed that he did not have any idea about the business in which all the 5 companies were involved earlier. That he is a working director

claiming that he had never visited Gangtok, which shows that Sikkim has been merely used without actual rendition of any affairs.

3) As regards the charging of interest, the CIT(A) gave a finding that the interest was charged as per the workings mentioned in ITNS 150 which was forming part of the assessment order, which is sufficient and good enough to uphold interest in terms of the decision of this Court.

Findings recorded by the ITAT:

1) After confirming the fact that the notices were dispatched only in the name of the respective companies in c/o Rattan Gupta, Chartered Accountant, it was observed that Rattan Gupta would not qualify as a principal officer within the meaning of section 2(35)(a) of the Act. At this stage, it is required to be noted that the High Court has observed that in any event the authorised representative of the assessee appeared before the AO and accepted that the notices has been issued. In that view of the matter, thereafter it is

not open for the assessees to make a grievance with respect to non-service of the notice;

2) On the aspect relating to the control and management of the affairs, the ITAT recorded the findings as under:

   i) It is important to highlight that the ITAT had neither reserved nor found the findings of the AO as upheld by the CIT(A), as not maintainable or factually erroneous or perverse.

   ii) The findings of fact rendered by the AO as upheld by the CIT(A) remain undisturbed and unquestioned.

   iii) The entire discussion by the ITAT has only been an analysis of various case law on this point without questioning the underlying findings.

   iv) The ITAT finally came to a conclusion that since all the 5 companies had been registered in Sikkim, Sikkim will get the jurisdiction to tax.

Thereafter, the ITAT concluded that the revenue could not discharge its burden and, therefore, control and

management was only in Sikkim and the income had accrued only in Sikkim.

6.1 While reversing the finding of the AO on whether the commission was not earned in Gangtok, though the AO found that the notices were sent to those who had allegedly paid the commission to the assessees and the summons under Section 131 had not been complied with, the ITAT gave a finding that the AO did not proceed further and thus, since no adverse material has been brought on record, the AO could not have proceeded to draw adverse inference as the burden was heavily on the revenue.

6.2 On the levy of interest, the ITAT concluded that the interest could not have been levied since the AO had not applied his mind before levying interest following the decision of the Patna High court in the case of ***Ranchi Club Limited (supra)***.

Findings recorded by the High Court:

1. That a company, though incorporated in Sikkim, if it had earned any income outside Sikkim and within India, Income Tax Act, 1961 would apply to such income and the jurisdiction of the income tax authorities would not get excluded as long as what

is sought to be brought to take is the income of the company incorporated in Sikkim, which income accrued to it and was earned in India.

2. While referring to the various statements made by the directors who are all stationed in Delhi, the High Court has given the following findings:

   i) Rattan Gupta had not acted merely as an auditor giving professional advice to the 5 entities;

   ii) His own employees are appointed as directors;

   iii) The explanation offered for signed cheque books, rubber seals and letter heads being available in his office is not convincing;

   iv) Rattan Gupta had tried to shift the entire responsibility of handling of cheques to Mr. Verma; Mr. Verma was never produced by the assessee;

   v) The burden of proof could not be discharged in the instant case and therefore, the High Court upheld the findings of the AO that the precise role of Mr. Rattan Gupta as being in *de facto* control of the 5 entities appears to be correct;

vi) That two persons who had been identified to have handled the business and supervised it, namely, H.L. Verma and Uma Shankar Sitani were produced by the assessees for their statements to be recorded. The High Court found that Mr. R.K. Goswami, Mr. Vedant Mehta and Mr. Rajiv Jain had all become directors on the request of Mr. Rattan Gupta, a fact which was not disproved or found to be incorrect.

6.3 Thereafter, the High Court concluded that the control and management of affairs was wholly in India for the following reasons:

a) Rattan Gupta was not only doing audit work but determining who should be the directors of the said companies.

b) The rubber seals, letter heads, blank signed cheques and other records were all found in the office of Rattan Gupta. The factual determination by the AO remains undisputed and this fortifies that the control and management was in Delhi.

c) The statement of Rattan Gupta suggesting that H.L. Verma or Uma Shankar Sitani were actually handling

the affairs of the 5 entities could not be made good by offering either of them for examination.

d) Once documents were seized and statements were recorded from various persons, the burden gets shifted to the assessees to produce some evidence to counter the picture and, the court found that its extremely unusual that the seals and the signed blank cheques would be lying with the Chartered Accountant.

e) The High Court in paragraph 70 held that the revenue is right as there can be no presumption in law that control and management is at the registered office.

f) In paragraph 71, the High Court held that “it appears to the Court that the ITAT has not upset the factual finding of the AO, which was confirmed by the CIT(A). The above exhaustive evidence gathered by the revenue, without being countered by the assessee despite opportunity being afforded, serves to substantiate the case of the revenue that the management and control of the 5 assessee companies was in fact located in Delhi. The finding by the ITAT in this regard is plainly perverse and unsustainable in law.”

g) On commission and accrual of income, the High Court concluded as under:

i) The findings by the AO that the assessee had failed to prove that the commission payments earned by them is exclusively in Sikkim had not been dislodged by the assessee by producing any tangible material;

ii) The evidence produced by the assesses are only copies of bills and vouchers and receipt of money from such agents at Sikkim in its bank accounts and assessments have been made under the Sikkim Manual, 1948;

iii) The High Court in para 76 held that "none of the 5 entities named by the assessees as having paid the commission to them appeared in the course of assessment proceedings to confirm the payments having been made to the assessees." The High Court also recorded that the rate of commission paid was unrealistic and beyond human probabilities, non-existence of any employees in Sikkim, non-incurring of any expenditure in Sikkim as found in the P&L account and finally the balance sheet showing that notwithstanding that the income was from commission the assets were in the form of investments in Dalmia Group would stare at the face of the assessees and remains unrebutted. The High

Court concluded that the findings by the ITAT in this regard is contrary to the record and is based on surmises and unsustainable in law.

6.4 In light of the above findings, the submissions made by the learned counsel for the respective parties on service of notice upon Rattan Gupta being in the control and management of the respective assessees; the control and management of the affairs of the assessee companies; the applicability of the Income Tax Act, 1961; jurisdiction of the AO and levy of interest are required to be considered.

7. On appreciation of the entire evidence on record, the AO, CIT(A) and the High Court have specifically held against the assessees that in fact Rattan Gupta did not merely render professional services but had a vital say in the control and management of the assessee companies and in fact he was in control and management of the affairs of the respective assessee companies.

7.1 On control and management of business, few decisions on interpretation of Section 4A of the erstwhile Income Tax Act, 1922 and interpretation of Section 6(3) of the Income Tax Act, 1961 are required to be referred to, which are as under:

i) In the case of ***V.V.R.N.M. Subbayya Chettiar (supra)***, it is observed in paragraph 10 as under:

> **"10.** The principles which are now well established in England and which will be found to have been very clearly enunciated in *Swedish Central RailwayCo. Ltd.* v. *Thompson (Inspector of Taxes)* [*Swedish Central Railway Co. Ltd.* v. *Thompson (Inspector of Taxes)*, 1925 AC 495 : 9 TC 373 (HL)] , which is one of the leading cases on the subject, are:
>
> (1) That the conception of residence in the case of a fictitious "person", such as a company, is as artificial as the company itself, and the locality of the residence can only be determined by analogy, by asking where is the head and seat and directing power of the affairs of the company. What these words mean have been explained by M. Patanjali Sastri, J. with very great clarity in the following passage where he deals with the meaning of Section 4-A(*b*) of the Income Tax Act:
>
> "**4-A. (*b*)** 'Control and management' signifies, in the present context, the controlling and directive power, 'the head and brain' as it is sometimes called, and 'situated' implies the functioning of such power at a particular place with some degree of permanence, while 'wholly' would seem to recognise the possibility of the seat of such power being divided between two distinct and separated places."
>
> As a general rule, the control and management of a business remains in the hand of a person or a group of persons, and the question to be asked is wherefrom the person or group of persons controls or directs the business.
>
> (2) Mere activity by the company in a place does not create residence, with the result that a company may be "residing" in one place and doing a great deal of business in another.
>
> (3) The central management and control of a company may be divided, and it may keep house and do business in more than one place, and, if so, it may have more than one residence.
>
> (4) In case of dual residence, it is necessary to show that the company performs some of the vital organic functions incidental to its existence as such in both the places, so that in fact there are two centres of management."

ii) Thereafter, in the case of ***Erin Estate (supra)***, it is observed in paragraphs 6 & 9 as under:

> "6**.** There is no doubt that the question raised for our decision is a question of law. Whether or not the appellant is a resident firm under Section 4-A(*b*) would depend upon the legal effect of the facts proved in the case. The status of the appellant which has to be determined by reference to the relevant section of the Act is a mixed question of fact and law and in determining this question the principles of law deducible from the provisions of the said section will have to be applied. This position has not been disputed before us in the present proceedings. Section 4-A(*b*) provides inter alia that "for the purpose of the Act, a firm is resident in the taxable territories unless the control and management of its affairs is situated wholly without the taxable territories". This provision shows that, where the partners of a firm are residents of this country, the normal presumption would be that the firm is resident in the taxable territories. This presumption is rebuttable and it can be effectively rebutted by the assessee showing that the control and management of the affairs of the firm is situated wholly without the taxable territories. The onus to rebut the initial presumption is on the assessee. The control and management contemplated by the section evidently refers to the controlling and directing power. Often enough, this power has been described in judicial decisions as the "head and brain"; the affairs of the firm which are subject to the said control and management refer to the affairs which are relevant for the purpose of taxation and so they must have some relation to the income of the firm. When the section refers to the control and management being situated wholly without the taxable territories it implies that the control and management can be situated in more places than one. Where the control and management are situated wholly outside India the initial presumption arising under the section is effectively rebutted. It is true that the control and management which must be shown to, be situated at least partially in India is not the merely theoretical control and power, not a de jure control and power but the de facto control and power actually exercised in the course of the conduct and management of the affairs of the firm. Theoretically, if the partners reside in India they would

naturally have the legal right to control the affairs of the firm which carries on its operations outside India. The presence of this theoretical de jure right to control and manage the affairs of the firm which inevitably vests in all the partners would not by itself show that the requisite control and management is situated in India. It must be shown by evidence that control and management in the affairs of the firm is exercised, may be to a small extent, in India before it can be held that the control and management is not situated wholly without the taxable territories. (Vide *B.R. Naik* v. *CIT* [(1945) 13 ITR 124 : (1946) 14 ITR 334]). The effect and scope of the provisions of Section 4-A(*b*) has been considered by this Court in *V.V.R.N.M. Subbayya Chettiar* v. *CIT* [1950 SCC 971 : (1950) SCR 961, 965] . After examining the relevant decisions on this point, Fazi Ali, J., who delivered the judgment of the Court, has observed "(*1*) that the conception of residence in the case of a fictitious 'person' such as a company, is as artificial as the company itself and the locality of the residence can only be determined by analogy, by asking where is the head and seat and directing power of the affairs of the company. …(*2*) Mere activity by the company in a place does not create residence, with the result that the company may be residing in one place and doing a great deal of business in another. (*3*) The central management and control of a company may be divided and it may keep house and do business in more than one place, and, if so, it may have more than one residence. (*4*) In case of dual residence, it is necessary to show that the company performs some of the vital organic functions incidental to its existence as such in both the places so that in fact there are two centres of management". It is in the light of these principles that Section 4-A(*b*) has to be construed. Thus, the only question which remains to be considered is whether the High Court of Madras was right in holding that the appellant was resident in India under Section 4-A(*b*).

xxx xxx xxx

9. Mr Kolah then raised a further point which had not been urged before the High Court. He contended that the control and management mentioned in Section 4-A(*b*) must be control

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> and management valid and effective in law. Under Section 12 of the Partnership Act, it is only the majority of partners who could have given effective directions to the superintendent and since there is no evidence that the alleged control and management has been exercised by the majority of partners acting in concert it would not be possible to hold that any control and management of the firm's affairs resided in India. We do not think there is any substance in this argument. Under Section 12(*a*), every partner has a right to take part in the conduct of the business and it is only where difference arises as to ordinary matters connected with the business of the firm that the same has to be decided by majority of partners under sub-section (*c*) of the said section. It has not been suggested or shown that there was any difference between the partners in regard to the matters covered by the individual partner's letters of instruction to the superintendent. Indeed the course of conduct evidenced by these letters shows that Andiappa Pillai who holds the maximum number of individual shares has purported to act for the partnership and usually gave instructions in regard to the conduct and management of the firm's affairs. On the record we see no trace of any protest against, or disagreement with, this conduct of Andiappa Pillai. Besides, it was never suggested during the course of the enquiry before the Income Tax Officers that the directions given by Andiappa Pillai were not valid or effective and had not been agreed upon by the remaining partners. That is why we think this technical point raised by Mr Kolah must fail."

iii) That thereafter the Bombay High Court in the case of ***Narottam and Pareira Ltd. (supra)*** through Justice M.C. Chagla, as His Lordship then was, observed and held in paragraphs 3 and 4 as under:

> "3. It is also necessary that the control and management of the affairs of the company should be situated wholly in the taxable territories. Therefore, if any part of the control and management is outside the taxable territories then the company would not be

resident. In this connection it is perhaps necessary to look at the converse definition for a Hindu undivided family, firm or other association of persons. In their case they are resident unless the control and management of its affairs is situated wholly without the taxable territories. Therefore; whereas in the case of a Hindu undivided family or firm or association of persons any measure of control and management within the taxable territories would make them resident, in the case of a company any measure of control and management of its affairs outside the taxable territories would make it non-resident. In construing the expression "control and management" it is necessary to bear in mind the distinction between doing of business and the control and management of business. Business and the whole of it may be done outside India and yet the control and management of that business may be wholly within India. In this particular case considerable emphasis is placed upon the fact that the whole of the business of the company is done in Ceylon and the whole of the income which is liable to tax has been earned in Ceylon. But that is not a factor which the Legislature has emphasised, It is entirely irrelevant where the business is done and where the income has been earned. What is relevant and material is from which place has that business been controlled and managed. "Control and management" referred to in Section 4A(c) is, as we shall presently point out on the authorities, central control and management. The control and management contemplated by this sub-section is not the carrying on of day to day business by servants,

employees or agents. The real test to be applied is, where is the controlling and directing power, or rather, where does the controlling and directing power function or to put it in a different language there is always a seat of power or the head and brain, and what has got to be ascertained is, where is this seat of power, or the head and brain. A company or for the matter of that a firm or an undivided Hindu family has got to work through servants and agents, but it is not the servants and agents that constitute the seat of power or the controlling and directing power. It is that authority to which the servants, employees and agents are subject, it is that authority which controls and manages them, which is the central authority, and it is at the place where the central authority functions that the company resides. It' may be in some cases that like an individual a company may have residence in more than one place. It may exercise control and management not only from one fixed abode, but it may have different places. That would again be a question dependent upon the circumstances of each case. But the contention which Mr. Kolah has most strongly pressed before us is entirely unacceptable that a company controls or manages at a particular place because its affairs are carried on at a particular place and they are carried on by people living there appointed by the company with large powers of management. A company may have a dozen local branches at different places outside India, it may send out agents fully armed with authority to deal with and carry on business at these branches, and yet it may retain the central management and control in Bombay

and manage and control all the affairs of these branches from Bombay and at Bombay. It would be impossible to contend that because there are authorised agents doing the business of the company at six different places outside India, therefore the company is resident not only in Bombay but at all these six different places.

4. ....It is perfectly true that these two managers do all the business of the company in Ceylon and in doing that business naturally a large amount of discretion is given to them and a considerable amount of authority. But the mere doing of business does not constitute these managers the controlling and directing power. Their power-of-attorney can be cancelled at any moment, they must carry out any orders given to them from Bombay, they must submit to Bombay an explanation of what they have been doing, and throughout the time that they are working in Ceylon a vigilant eye is kept over their work from the directors' board room in Bombay. The correspondence which has also been relied upon between the company here and its office in Colombo also goes to show and emphasises the same state of affairs. Mr. Kolah is right again when he puts emphasis upon the fact that what we have to consider in this case is not the power or the capacity to manage and control, but the actual control and management, or, in other words, not the dejure control and management but thede facto control and management, and in order to hold that the company is resident during the years of account it must be established that the company de facto controlled and managed its affairs in Bombay. Mr.

> Kolah says that the two powers-of-attorney go to show that whatever legal or juridical control and management the company might have had, in fact the actual management was exercised by the two managers in Ceylon. In our opinion this is not a case where the company did nothing with regard to the actual management and control of its affairs and left it to some other agency. As we said before, the two managers were the employees of the company acting throughout the relevant period under the control and management of the company, and therefore in the case we are considering there was not only a dejure control and management, but also a de facto control and management."

That thereafter, Justice Kania, as His Lordship then was, after referring to the decision in the case of ***B.R. Naik v. Commissioner of Income Tax, Bombay, (1945) 13 ITR 124*** has observed and held that the expression "control and management" means where the central control and management actually abides.

iv) The Calcutta High Court in the case of ***Bank of China (supra)*** has specifically held that a company may be simultaneously resident in more than one place, but the control and management is where the head and

brain is situated. While holding so, in paragraphs 7 to 9, it is observed and held as under:

> "7. Under s. 6(3), a non-Indian company is said to be resident in India in any previous year if during that year the control and management of its affairs is situated wholly in India. The determination as to at what place or places the control and management of a particular company is situated is essentially a question of fact to be determined on the facts and circumstances of the particular case. A company can be simultaneously resident in more than one place but the question is whether the control and management is situated wholly in India during the relevant previous year. The expression "control and management" signifies the controlling and directive power, "the head and brain", as it is sometimes called, and "situated" implies the functioning of such power at a particular place with some degree of permanence. The word "wholly" as used in s. 6(3) would indicate that the seat of such power may be divided between two distinct and separate places. The expression "control and management" means de facto control and management and not merely the right or power to control and manage. In order to hold that a non-Indian company is resident in India during any previous year, it must be established that such company de facto controls and manages its affairs in India. The principles are by now well settled.
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> **8.** Lord Loreburn L.C. in *De Beers Consolidated Mines Ltd.* v. *Howe*, [1906] 5 TC 198 (HL) at page 212, observed as follows:
>
> > "Mr. Cohen propounded a test which had the merits of simplicity and certitude. He maintained that a company resides where it is registered, and nowhere else…… I cannot adopt Mr. Cohen's contention. In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see whether it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise, it might have its chief seat of

> management and its centre of trading in England, under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Chief Baron Kelly and Baron Huddleston in *Calcutta Jute Mills Co. Ltd.* v. *Henry Nicholson*, [1876] 1 TC 83 : [1876] 1 Ex D 428 and *Cesena Sulphur Co. Ltd.* v. *Henry Nicholson*, [1876] 1 TC 83 : [1876] 1 Ex D 428, now thirty years ago, involved the principle that a company resides for purposes of income-tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule; and the real business is carried on *where the central management and control actually abides.*"
>
> **9.** Since that judgment, the words underlined have been taken as the test, although central management and control has sometimes been stated in the form "head, seat and directing power". The question depends on the fact of the management and not on the physical situation of the thing that is managed. A company is managed by the board of directors and if the meetings of the board of directors are held within India, it may be said that the central control and management is situated here. The direction, management and control "the head and seat and directing power" of a company's affairs is, therefore, situate at the place where the directors' meetings are held and, consequently, a non-Indian company would be a resident in this country if the meetings of the directors who manage and control the business are held here. The word "affairs" means affairs which are relevant for the purpose of the I.T. Act and which have some relation to the income sought to be assessed. It is not the bare possession of powers by the directors, but their taking part in or controlling the affairs relating to the trading, that is of importance in determining the question of the place where the control is exercised. They must exercise their power of control in relation to business or activity wherefrom the profit is derived. (See *Egyptian Hotels Ltd.* v. *Mitchell*, [1915] 6 TC 542 (HL))."

v) In the case of ***Nandlal Gandalal (supra)***, this Court has held that the expression "control and management" in Section 4A(b) of the Income Tax Act, 1922, means *de*

facto control and management and not merely the right or power to control and manage.

8. The sum and substance of the above decisions of this Court as well as various High Courts would be that where the head and seat and directing power of the affairs of the company and the control and management is must be shown is not merely theoretical control and power, i.e., not *de jure* control and power, but *de facto* control and power actually exercised in the course of the conduct and management of the affairs of the firm; that the domicile or the registration of the company is not at all relevant and the determinate test is where the sole right to manage and control of the company lies.

9. Applying the above principles of law to the facts of the case at hand, and the findings recorded by the AO, confirmed by the CIT(A), it is rightly concluded that the control and management of the affairs of the respective assessees were with Rattan Gupta, Chartered Accountant in Delhi. The findings of fact recorded by the AO, confirmed by the CIT(A) that the control and management of the affairs of the assessee companies was with Rattan Gupta are based on the entire material on record. In light of the aforesaid findings, the High Court has not

committed any error in reversing the contrary findings recorded by the ITAT and it is rightly observed and held that service of notice upon Rattan Gupta treating him as the principal officer and/or as a principal officer for and on behalf of the assessee companies were valid notices and the High Court has rightly held that the AO at New Delhi was having the jurisdiction to issue notice under the Income Tax Act, 1961.

10. Insofar as the case on behalf of the respective assessees that the entire income was earned in Sikkim by way of commission on sale of cardamom and therefore such income shall not be liable to be taxed under the Income Tax Act, 1961 is concerned, at the outset, it is required to be noted that there are concurrent findings recorded by the AO and the CIT(A), as approved by the High Court, that no income by way of commission, as claimed by the assessees, has been established and proved by the assessees. In fact, the AO issued notices/summons to different persons who had allegedly paid amounts as commission, however, those persons had not responded. Therefore, the AO as such has rightly drawn an adverse inference. At this stage, it is required to be noted that as such the assessees did not produce any worthwhile evidence to prove the genuineness of the

commission received. Despite the above, the ITAT reversed the findings of fact recorded by the AO and the CIT(A) by observing that the AO did not proceed further (after issuing the summons/notices) and that since no adverse material has been brought on record the AO could not have proceeded to draw an adverse inference as the burden was heavy on the revenue. Once, the AO issued summons to those who had allegedly paid the commission to the assessees and the summons were issued under Section 131 which were not complied with and it was the assertion on behalf of the respective assessees that they earned the income of commission within Sikkim, the burden to prove the same was upon the assessees. Under the circumstances, the ITAT wrongly and erroneously shifted the burden upon the AO to prove the contrary. Therefore, in absence of any material on record that the commission was earned only in Gangtok, the assessees cannot be permitted to say that they were liable to pay the tax under the Sikkim Manual, 1948 and not under the Income Tax Act, 1961. It appears that the assessees with *mala fide* intention and to evade the payment of tax under the Income Tax Act, 1961 came out with a case that they earned the income within Sikkim, which has not been established and proved. It was a

clear attempt on the part of the respective assessees to wriggle out of the clutches of the Income Tax Act, 1961.

11. As regards the submission on behalf of the respective assessees that as there was no original assessment under the Income Tax Act, 1961, there could not have been the re-assessment under sections 147/148 of the Act, 1961 is concerned, the same has no substance in view of the binding decision of this Court in the case of ***Sun Engineering Works P. Ltd. (supra)***. In paragraph 14 of the said decision, it is observed and held as under:

> "14…..Thus, under Section 147, the assessing officer has been vested with the power to 'assess or reassess' the *escaped income* of an assessee. The use of the expression "assess or reassess *such* income or recompute the loss or depreciation allowance" in Section 147 after the conditions for reassessment are satisfied, is only relatable to the preceding expression in clauses (*a*) and (*b*) viz., "escaped assessment". The term "escaped assessment" includes both "non-assessment" as well as "under assessment". Income is said to have "escaped assessment" within the meaning of this section when it has not been charged in the hands of an assessee in the relevant year of assessment. The expression "assess" refers to a situation where the assessment of the assessee for a particular year is, for the first time, made by resorting to the provisions of Section 147 because the assessment had not been made in the regular manner under the Act. The expression "reassess" refers to a situation where an assessment has already been made but the Income Tax Officer has, on the basis of information in his possession, reason to believe that there has been under assessment on account of the existence of any of the grounds contemplated by the provisions of Section 147(*b*) read with the Explanation (1) thereto."

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12. Insofar as the submission on behalf of the respective assessees regarding levy of interest and the submission on behalf of the assessees that in absence of any specific order passed in the assessment order to levy interest, the interest could not have been levied, is concerned, the said issue as such is concluded against the assessees in view of the Constitution Bench decision of this Court in the case of ***Anjum M.H. Ghaswala (supra)*** as well as the subsequent decision in the case of ***Karanvir Singh Gossal (supra)***. The ITAT relied upon the decision of the Patna High Court in the case of ***Ranchi Club Ltd. (supra)***, however, the decision of the Patna High Court in the case of ***Ranchi Club Ltd. (supra)*** is held to be not good law, in view of the Constitution Bench decision of this Court in the case of ***Anjum M.H. Ghaswala (supra)***.

12.1 In the case of ***Anjum M.H. Ghaswala (supra)***, while dealing with the interest under the provisions of Sections 234A, 234B and 234C of the Income Tax Act, 1961, it is observed and held that the interest contemplated under the said provisions is mandatory in nature and the power of waiver or reduction has not been expressly conferred on the Commission. The same indicates that insofar as

the payment of statutory interest is concerned, the same is outside the purview of the settlement contemplated in Chapter XIX-A of the Act. In the present case also, the levy of interest under Section 234A for default in furnishing the return of income is mandatory and automatic. Section 234A of the Act provides that where the return of income for any assessment year is furnished after the due date or is not furnished, the assessee shall be liable to pay simple interest. Thus, interest under section 234A is statutory interest leviable and payable and therefore the decision of this Court in the case of ***Anjum M.H. Ghaswala (supra)*** shall be applicable with full force. Therefore, when the interest is levied as per the workings mentioned in ITNS 150 which is forming part of the assessment order, it is rightly held to be sufficient and good enough to charging interest. (See decision of this Court in the case of ***Bhagat Construction Company Private Limited (supra)***).

13. As regards the submission on behalf of the assessees that no substantial question of law was framed on levy of interest, at the outset, it is required to be noted that both the parties made submissions on levy of interest elaborately which have been dealt with and considered by the High Court in light of the Constitution Bench decision

of this Court in the case of ***Anjum M.H. Ghaswala (supra)***. Even otherwise, the said issue can be said to be incidental or collateral. Even otherwise, in view of the decision of this Court in the case of ***Anjum M.H. Ghaswala (supra)*** holding that the levy of interest under Section 234A is statutory interest and mandatory and automatic, thereafter the said issue cannot be said to be a question of law.

Conclusion:

14. In view of the above and for the reasons stated above and the findings recorded by the AO, CIT(A), confirmed by the High Court, it cannot be said that the High Court has committed any error in upsetting the findings recorded by the ITAT. We are in complete agreement with the view taken by the AO, CIT(A) and the High Court on all issues including the issue of control and management of the affairs of the assessee companies by Rattan Gupta from Delhi; jurisdiction of the AO at New Delhi; applicability of the Income Tax Act, 1961; that the assessees did not prove that the income was earned by way of commission in Sikkim and therefore the tax was not liable to be paid under the Income Tax Act, 1961 and

was liable to be paid under the Sikkim Manual, 1948. We are also in agreement with the view taken by the High Court on levy of interest in view of the binding decision of the Constitution Bench in the case of ***Anjum M.H. Ghaswala (supra)***, which has been subsequently followed in the case of ***Karanvir Singh Gossal (supra)***.

15. In view of the above and for the reasons stated above, the present appeals fail and the same deserve to be dismissed and are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

……J.
[M.R. SHAH]

NEW DELHI;
APRIL 10, 2023.

……J.
[B.V. NAGARATHNA]