आयकर अपीलीय अधीकरण, न्यायपीठ – “C” कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA

(समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य **एवं** डॉ. अर्जुन लाल सैनी, लेखा सदस्य)

[Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

S.A. No.103/Kol/2019
In I.T.A. No. 1314/Kol/2019
Assessment Year: 2014-15
&
ITA No.1314/Kol/2019
Assessment Year: 2014-15

Bodhisattva Chattopadhyay Plot No. X 1-7, Block EP/G, Sector-V, BCS Building, Salt Lake, Kolkata-700 091. (PAN: AHLPC7400N)	Vs.	Commissioner of Income-tax (IT & TP), Kolkata
Appellant		Respondent

&

S.A. No.99/Kol/2019
In I.T.A. No. 1304/Kol/2019
Assessment Year: 2014-15
&
ITA No.1304/Kol/2019
Assessment Year: 2014-15

Himadri Mallick 114/3, Rajani Mukherjee Lane, Kolkata-700 038. (PAN: ASMPM1867B)	Vs.	Commissioner of Income-tax (IT & TP), Kolkata
Appellant		Respondent

&

S.A. No.100/Kol/2019
In I.T.A. No. 1306/Kol/2019
Assessment Year: 2014-15
&
ITA No.1306/Kol/2019
Assessment Year: 2014-15

Nayan Mukherjee CF 04 IC, UTSA, New Town, Kolkata-700 156. (PAN: AQCPM0647B)	Vs.	Commissioner of Income-tax (IT & TP), Kolkata
Appellant		Respondent

&

S.A. No.101/Kol/2019
In I.T.A. No. 1308/Kol/2019
Assessment Year: 2014-15
&
ITA No.1308/Kol/2019
Assessment Year: 2014-15

Ravi Kiran Sinha AT Bankali Road, PO-Gobindpur, Dhanbad, Jharkhand-828109. (PAN: CAUPS5234E)	Vs.	Commissioner of Income-tax (IT & TP), Kolkata
Appellant		Respondent

&

S.A. No.102/Kol/2019
In I.T.A. No. 1311/Kol/2019
Assessment Year: 2014-15
&
ITA No.1311/Kol/2019
Assessment Year: 2014-15

Malay Ghosh C/o Mr. Kanai Lal Ghosh, Village-Dal Dali, Midnapore, West Bengal-721127 (PAN: AIDPG0136A)	Vs.	Commissioner of Income-tax (IT & TP), Kolkata
Appellant		Respondent

&

S.A. No.104/Kol/2019
In I.T.A. No. 1315/Kol/2019
Assessment Year: 2014-15
&
ITA No.1315/Kol/2019
Assessment Year: 2014-15

Debanjan Dasgupta 12 D/4, Naktala Lane, DPP Road, Naktala, Kolkata-700 047. (PAN: ATKPD5968J)	Vs.	Commissioner of Income-tax (IT & TP), Kolkata
Appellant		Respondent

Date of Hearing	27.09.2019
Date of Pronouncement	.11.2019
For the Appellant	Ms. Sherry Goyal, Advocate
For the Respondent	Shri Jayanta Khanna, JCIT

ORDER

Per Shri A.T.Varkey, JM

All these appeals and stay applications preferred by the different assessees are against orders of the Ld. CIT(IT & TP), Kolkata passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") all dated 29.03.2019for AY 2014-15.

2. At the outset itself, it was brought to our notice that the issue involved is, no longer res integra and, therefore, after hearing both the parties, we are inclined to dismiss all the stay applications filed by the assessee and dispose of all the appeals in ITA Nos. 1304, 1306, 1308. 1311, 1314 & 1315/Kol/2019.The common facts permeating in all the appeals, are that all the assessee's are the employees of IBM India Pvt. Ltd. (hereinafter referred to as "IBM") who have been sent to Switzerland on company's foreign assignment. The undisputed facts are that the residential status of all the assessee's for the relevant year is "non-resident" in terms of Section 6 of the Act and that they actually rendered services outside India during the period under consideration. The employer viz., IBM deducted tax at source u/s 192 on the entire gross salary earned by the assessee's. The assessee's however claimed in their respective returns of income that the foreign assignment allowance component inter alia included in the gross salary was received by them outside India and that too for the services rendered outside India and therefore fell outside the ambit of total income u/s. 5(2) of the Act. In the assessments completed u/s 143(3), the AO accepted the assessee's claim for exclusion of such foreign assignment allowance from the ambit of total income. This action of the AO has been interfered with by the Ld. CIT u/s. 263 of the Act on the ground that AO's action is erroneous as well as prejudicial to the Revenue. The legal issue raised by all the assessee's in the present appeals, is against the action of the ld. CIT to usurp the revisional jurisdiction u/s. 263 of the Act. Since the facts and questions of law involved in all these cases are identical, we take the appeal of Shri Bodhisattva Chattopadhyay in ITA No.1314/Kol/2019as the lead case, the result of which will be applied mutatis mutandis in all other cases.

3. Briefly stated the facts of the lead case is that the assessee (Shri Bodhisattva Chattopadhyay) was sent by his employer IBM on short term assignment to Switzerland

for which he was stationed there for 349 days during the relevant financial year 2013-14. Since his stay outside India for the purpose of employment exceeded 182 days during the relevant year, his residential status for the year under consideration was “Non-Resident”. During the year, the assessee had received the following emoluments from IBM.

a) Gross salary received in India - Rs.18,65,767/-, and

b) Foreign allowances on account of the international assignment, received in Switzerland - Rs.42,97,092/-

4. It is noted that IBM had deducted tax at source (TDS) of Rs.16,94,180/- on the entire emoluments paid to the assessee including the foreign assignment allowance u/s. 192(1) of the Act. The assessee filed his return of income for the Asst. Year 2014-15 declaring taxable income of Rs.17,52,360/- (comprising only of the salary of Rs.18,65,767/- received in India) after claiming the deduction of Rs.1,01,405/- under chapter VIA of the Act. After claiming the credit of taxes deducted at source by the employer u/s 192, the assessee claimed a refund of Rs.13,27,800/- in his return of income. According to the assessee, the foreign assignment allowance of Rs.42,97,092/- had been received outside India in connection with the services he rendered outside India and therefore he did not offer it to tax in the return of income filed in India since it did not form part of his total income chargeable u/s. 5(2) of the Act.

5. We note from the documents on record that the case of the assessee was selected for complete scrutiny under CASS wherein one of the parameters for selection was that the income declared under the head ‘Salary’ in the return of income was lower than the ‘salary’ reported in Form 26AS. In the course of assessment the AO called for several details in his notice issued u/s 142(1) dated 11.11.2016 along with write-ups on the issues for which the assessee’s case was selected under CASS. Before the AO the assessee explained the modalities of receipt of foreign assignment allowance through his TCC issued by Axis Bank which showed that the foreign assignment allowance was received outside India. The assessee also furnished a certificate from his employer that such allowance was paid for the services rendered outside India. Additionally, the assessee furnished the Switzerland tax documents for 2013 & 2014 evidencing that the foreign assignment allowance had been

taxed in Switzerland. Taking note of the replies furnished by the assessee, the AO in his assessment order dated 23.12.2016 had accepted the Return of Income ('ROI') filed by the assessee claiming the assignment allowance received by the assessee at Switzerland, as not taxable in India in terms of Section 5(2) of the Act. The AO accordingly assessed the total income of the assessee at Rs.17,61,110/-. Subsequent to passing of the order u/s 143(3)of the Act, the ld. CIT issued show cause notice dt. 13-03-2019 to the assessee stating that the taxability of the foreign assignment allowance required reconsideration in view of the provisions of Section 5(2)(b) of the Act which was held erroneously to be non-taxable by the AO in the assessment order passed u/s 143(3) of the Act.

6. In reply, the assessee furnished his objections to the SCN. The ld. CIT however did not agree with the contentions put forth by the assessee. According to the CIT the contract of employment of the assessee was with IBM which was located in India and therefore any and all rights arising from the contract inter alia including the 'right to receive' salary arose only in India. Referring to the term 'receive' or 'deemed to receive' as used in Section 5(2)(b)of the Act, the Ld. CIT observed that the situs of 'income received' would be the place of delivery of cash/cheque. According to Ld. CIT, the 'point of receipt' is the 'point of payment'. He observed that the income was received by the assessee in India when the employer transferred his foreign assignment allowance from their bank account held in Bangalore to Axis Bank's Nostro Account for top-up to the Travel Currency Card ('TCC') which was earlier made available to the assessee in India. He thus held that in real terms the income was received in India. To support his case, the Ld. CIT further referred to the salary statement of the assessee wherein the allowance was denominated in Indian currency. The Ld. CIT also emphasized that the assessee had not offered the foreign assignment allowance in Switzerland nor claimed the benefit of the DTAA and therefore the assessee had allegedly not paid taxes on the foreign assignment allowance either in India or in Switzerland. Relying on the decision of this Tribunal in the case of Tapas Kr Bandopadhyay Vs DDIT (159 ITD 309), the ld. CIT observed that the income paid/loaded in TCC was actually received in India and hence taxable in terms of Section 5(2)(a) of the Act. The Ld CIT in his order u/s. 263 of the Act dated 29.03.2019 thus concluded the order passed by the AO u/s. 143(3) of the Act dated 23.12.2016 for AY 2014-15 is erroneous and prejudicial to

the interest of revenue since in his opinion the assessment order was passed without examining the legal issues involved and interpretation, examination of material on record etc. and accepting the assessee's claim that the income of Rs.42,97,092/- had not been received in India. Invoking Explanation (2) of Section 263of the Act, the ld. CIT set aside the assessment order of the AO directing him to pass a fresh assessment order after making necessary enquiries on all the issues, including the points on which the assessee has not furnished as discussed supra, after examining the various case laws and correct interpretation of the law in the facts of the case to examine and decide the issue of exemption from taxation on salary amounting to Rs.42,97,092/-. Being aggrieved by the order of the ld. CIT, the assessee is in appeal before us.

7. In the grounds taken in the appeal, the assessee has challenged the legal validity of usurpation of revisional jurisdiction by the ld. CIT u/s 263 of the Act. According to assessee the ld. CIT has wrongly exercised the revisional jurisdiction u/s 263of the Act since the AO's order on this issue cannot be held to be erroneous as well as prejudicial to the interest of the revenue. It is the assessee's case that the AO passed the assessment order after considering the issue of taxability of foreign allowance and it was only after the AO examined the facts and the relevant documents that the AO took a plausible view on this issue, which is in consonance with this Tribunal's view laid on this precise issue in the case of DCIT Vs SudipMaity & Others in ITA Nos. 428, 416 & 425/Kol/2017. According to the assessee therefore, on the facts of the case, the AO's action of accepting the assessee's claim for exclusion of foreign allowance from the computation of total income cannot be said to an unsustainable view in law and, hence the assessment order cannot be held to be erroneous as well as prejudicial to the interest of revenue, which is a condition precedent to usurp/invoke the revisional jurisdiction u/s 263 of the Act, by the ld. CIT. In the circumstances since the conditions precedent to usurp the revisionary jurisdiction u/s 263of the Act is claimed to be absent in the present case, the assessee has contended that the impugned order is wholly without jurisdiction and is, therefore, bad in law.

8. Having heard both the parties, and on a careful consideration of the facts and circumstances of the case, we find that the ld. CIT invoked the revisionary jurisdiction on

the broad allegation that the AO had failed to conduct enquiries which the facts of the case required the AO to conduct. According to ld. CIT before passing of the assessment order, there was lack of application mind to the facts and incorrect application of applicable legal provisions in the facts of the case. As a result the AO passed an order which in the opinion of ld. CIT was unsustainable in law and therefore liable for revision u/s 263 of the Act. Before adjudicating the issues arising from the impugned order of the ld. CIT, we have to remind ourselves as to the scope of revisional jurisdiction u/s. 263 of the Act. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordship have held that twin conditions should be satisfied before jurisdiction u/s 263 of the Act is exercised by the ld. CIT. The twin conditions which need to be satisfied are that (i) the order of the Assessing Officer must be erroneous and(ii) as a consequence of passing an erroneous order, prejudice is caused to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous i.e. (i) if the Assessing Officer's order was passed on assumption of incorrect facts; or assumption of incorrect law; (ii) Assessing Officer's order is in violation of the principles of natural justice; (iii) if the AO's order is passed by the without application of mind; or (iv) if the AO has not investigated the issue before him. In the circumstances enumerated above only the order passed by the Assessing Officer can be termed as erroneous for the purpose of S.263 of the Act. Coming next to the second limb, the AO's erroneous order can be revised by the Ld. CIT only when it is shown that the said order is prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (supra) held that this phrase i.e. "prejudicial to the interest of the revenue" has to be read in conjunction with an "erroneous" order passed by the Assessing Officer. The Hon’ble Supreme Court, held that for invoking powers conferred by S.263; the CIT should not only show that the AO's order is erroneous as a result of any of the situations enumerated above but CIT must also further show that as a result of an erroneous order, some loss is caused to the interest of the revenue. Their Lordship in the said judgment held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. It was further observed that when the Assessing Officer adopts one of the course permissible in

law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the Ld. CIT does not agree, it cannot be treated as an order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is **unsustainable in law**.

9. In the given facts of the present case, we find that the primary fault found by the ld. CIT to interfere with the order of AO was the alleged non-examination of the relevant facts concerning taxability of the foreign assignment paid through TCC. We are aware of the fact that the Assessing Officer's role while framing an assessment is not only as that of an adjudicator but he is also an investigator. The AO has a dual role to perform i.e. he is an investigator as well as an adjudicator and therefore, if he fails in any one of the two roles as afore-stated, his order can be termed as erroneous. From the order of the Ld. CIT, we note that he firstly found fault with the AO's role of an investigator because in his subjective opinion the AO did not properly conduct the investigation of the relevant facts and legal aspects concerning taxability of foreign assignment allowance. We however note that the assessee's case was selected for scrutiny assessment on the CASS parameter of *"salary income shown in ITR is less than the salary income as per Form 26AS"*. We find that the assessee's employer, IBM had deducted on the gross salary inter alia including foreign assignment allowance and the TDS was reported in statement 26AS in the assessee's name. In the return furnished, the assessee however did not include the said allowance in his total income on the plea that it was not income earned or accrued in India and therefore not forming part of the total income in terms of Section 5(2) read with Section 9(1)(ii) of the Act. Consequently therefore there appeared difference between the salary income reported in Form 26AS with the salary income declared in the return of income. As a result the assessee's case was selected for scrutiny assessment for making enquiries about such differential amount. We note that in the notice u/s 142(1) of the Act dated 11.11.2016, the AO raised specific query requiring the assessment to explain the said difference and furnish his explanation along with supporting documents. In response, the ld. AR of the assessee furnished detailed replies through letters dated 30.11.2016, 05.12.2016&15.12.2016. In his letter dated 30.11.2016, available at Pages 54 to 55 of paper book, the AR explained during the relevant year the assessee was physically present outside India for more than 182 days

and therefore he was a 'non-resident' under Section 6 of the Act. Drawing attention to Section 5(2) of the Act, he submitted that the assessee being a non-resident, the income would be taxable in India only if the income was received or deemed to be received or accrued or deemed to accrue in India. The assessee submitted that since foreign assignment allowance of Rs.42,97,092/- was received outside India for rendering services in Switzerland, the same did not form part of his total income. The AR of the assessee also furnished copies of the Swiss tax document for 2013 & 2014 to substantiate that the allowance received outside India from the employer had suffered tax in the country where the services were rendered. Vide letter dated 05.12.2016 [Pages 52 to 53 of paper book], the AR of the assessee filed copies of his bank statements in India to show that foreign assignment allowance was not received by the assessee in India. The AR also furnished copy of certificate by the employer certifying that the foreign assignment allowance was paid for rendering of services in Switzerland. In the letter dated 16.12.2016 [Pages 52 to 53 of paper book], the A/R of the assessee explained the modality of payment of Foreign Assignment Allowance by IBM as under:

> *"We would like to submit before your goodself that the foreign assignment allowance paid by IBM India Private Limited employer of the captioned assessee, to the International Travel Card outside India. The said card is denominated in foreign currencyonly and can be used only outside India. Once an employee is sent on foreign assignment, a travel currency card is issued to the employee by Axis Bank Limited.*
>
> *Upon instructions from IBM, Axis Bank pays the amount of foreign assignment allowance to the international travel card of the employee outside India through its Nostro account situated outside India. A Nostro Account is a bank account held in a foreign country by a domestic bank, denominated in the currency of that country. Nostro Accounts are used to facilitate settlement of foreign exchange and trade transactions. A Nostro Account is always maintained outside India and denominated in Foreign Currency.*
>
> *In view of the same, since the foreign assignment allowances are paid from Nostro Account situated outside India to the international travel card outside India, the same is not taxable under section 5(2) of the Act in case of Non-residents. In this regard,we have also enclosed a letter issued by Axis bank confirming that the amount is credited to the International Travel Card of the employees outside India through the Nostro Account maintained outside India as Annexure 1*
>
> *In connection with the same, we would like 10 refer to the letter from Axis Bankissued in case of an employee of IBM India Private Limited (,IBM), MrSudiptaMaity (copy enclosed as Annexure 2) wherein Axis Bank has clarified the methodology of transfer of funds to the Axis Travel Card of employees of IBM from its Nostro Account with ZurcherKantonal Bank (ZKB) outside India. The letter states that the funds are transferred to the international travel card of the employee outside India upon instruction of IBMfrom the Nostro Account maintained*

outside India. The modality of payment as confirmed by Axis Bank Ltd for SudiptaMaity is same for the captioned assessee……."

10. From the foregoing discussion it is abundantly clear that prior to completion of the assessment u/s 143(3)of the Act, the AO had required the assessee to furnish his explanations with regard to his claim for exclusion of foreign assignment allowance from the ambit of his taxable total income in India. In response the ld. AR of the assessee had furnished before the AO the relevant documentary evidences and also substantiated his explanations in support of his contentions by placing reliance on the relevant applicable legal provisions of the Act. The ld. AR of the assessee had also furnished before the AO requisite documentary evidences which proved the foreign assignment allowance which was excluded from the ambit of total income taxable in India, had suffered applicable tax in Switzerland being the country where the services were actually rendered. Having considered these evidences, explanations and applicable legal provisions, the AO recorded the specific finding that *"the assessee was in India only for 16 days and the rest of the period he was in assignment to Switzerland and had received foreign assignment allowance*". All these facts and documents considered harmoniously go on to show that the AO had indeed called for information and documents and after due application of mind passed the assessment order u/s 143(3) of the Act in which he accepted the assessee's plea for exclusion of foreign assignment allowance was not chargeable to tax in India. In such a scenario, the finding recorded by the ld. CIT that the action of the AO in allowing the amount of Rs.42,97,092/- as exempt from taxation (i.e. the foreign assignment allowance) is in violation of the provision of sec. 5(2)(a) of the Act without any enquiry, is factually erroneous.

11. In order to understand the difference between "lack of inquiry" and "inadequate inquiry" and when it can be termed as erroneous, let us look at the judgment of the Hon'ble Calcutta High Court in the case of CIT Vs J.L. Morrison (I) Ltd (366 ITR 593), wherein on similar facts & circumstances, their Lordships explained the difference between the two as follows:-

"14. The case of the CIT in his notice dated 26th November, 2009 under Section 263 of the Act reads as follows :--

"1. During the said A.Y., you have received a sum of Rs.18.00 Crore from M/s. Beierdorf AG., Germany (BDF) as one-time settlement for termination of contracts of producing and selling of the products of the latter company in India as well as issuing a NOC for setting up a 100% subsidiary by them in India. The said receipt should have been considered as income in the ambit of either Sec.28 or Sec.56, if the same is considered as voluntary payment on a goodwill gesture as pointed out by you. But, the said receipt has been allowed to be transferred directly to Capital Reserve Account while passing the assessment order for the A.Y. 2006-07."

....

76. He drew our attention to the notice under Section 142(1) of the Act and in particular to the annexure thereto from which it would appear that the assessing officer wanted the assessee to "furnish in writing and verified in the prescribed manner information called for as per annexures and on the points or matters specified therein before me at my office at 18, RabindraSarani, Poddar Court, 5th Floor, on 04.02.2008 at 11.30 AM.". The annexure to the notice under Section 142(1) of the Act reads as follows:--

'Requisition u/s 142(1) of the IT Act '61.

M/s. J. L. Morison (India) Ltd. - AY 06-07.

(1) A write-up on receipt of Rs.18 crore from foreign co.

(2) ……

77. Mr. Poddar also drew our attention to the reply dated 19th March 2008 given by the assessee to the notice, dated 21st January 2008, under Section 142(1) of the Act. He contended that all the requisite particulars were furnished together with documents.

Thereafter, the matter was heard from time to time by the assessing officer as would appear from the List of Dates submitted by Mr. Nizamuddin, learned advocate for the appellant. From the list of dates it appears that on 21st January, 2008 notice under Section 142(1) was issued. On 4th February, 2008 the Assessee appeared and filed details and particulars. On 18th February, 2008, 4th March, 2008, 19th March, 2008 and 26th March, 2008 the matter was heard. The Assessing Officer has recorded in the order sheet that the case was discussed and the official documents and particulars were filed by the Assessee.

78. Mr. Poddar contended that the fact that the Assessing Officer had issued the notice under Section 142(1) of the Act requiring the assessee to give particulars and to furnish documents in respect of seventeen items indicates that the Assessing Officer had in fact applied his mind. Without application of mind, according to him, the aforesaid notice itself could not have been issued. The fact that all the requisite papers required by the Assessing Officer were duly furnished and the matter was discussed from time to time on the various days indicated above, appearing from the assessment records produced by Mr. Nizamuddin, leave no scope for any doubt as regards the fact that the Assessing Officer after satisfying himself passed the order dated 28th March, 2008.

79. Mr. Poddar also drew our attention to the impugned judgment of the learned Tribunal which reads as follows:--

"Therefore, on combined reading of the assessment order for the assessment year under consideration along with the order sheet entries, it can be said that the A.O. had carried out such enquiry as the circumstances warranted and permitted before accepting the claim of the assessee and passing assessment order accordingly. It was an entirely different matter that the Commissioner did not agree with the conclusion derived by the A.O. from the enquiries made. Failure to carry out an enquiry is one thing and in such cases the commissioner would be justified in saying that the mere failure to make any enquiry was erroneous and prejudicial to the interests of the Revenue. But it would not be open to him to hold that the assessment order was erroneous and prejudicial to the interests of the revenue merely because he is of the opinion that some more enquiries are required to be made and he could not agree with the conclusion arrived at by the A.O. from the enquiries made. It was after verifying the books of account and various materials gathered from the assessee during assessment proceeding and after considering the explanation offered by the assessee that the A.O. had exercised a judicial discretion in the matter while completing the assessment u/s 143(3) of the Act. In such circumstances, the view taken by the A.O. cannot be said to be prejudicial to the Revenue nor can it be said to be erroneous simply because in his order the A.O. did not make any elaborate discussions in that regard."

80. Mr. Poddar contended that neither before the Tribunal nor in the present appeal has any question has been suggested that the assessment order was bad because the same did not disclose any reasons. The contention raised and the judgments cited by Mr. Nizamuddin, as regards exercise of power u/s. 263 of the Act, are misconceived, and also out of the context.

81. Mr. Poddar contended that the finding of the learned Tribunal that the order dated 28th March, 2008 was not passed without application of mind has not been challenged before this Court. No attempt far less any serious attempt was made on behalf of the revenue to demonstrate that the order passed on 28th March, 2008 by the Assessing Officer was wrong either on facts or law. The appellant has also not been able, nor in fact has made any attempt to establish that the finding of the learned Tribunal that the order dated 28th March, 2008 was not passed without the application of mind is based otherwise than on evidence. On the contrary, the records of assessment, the list of dates produced by Mr. Nizamuddin go to establish that the assessment order was passed after due application of mind.

82. Mr. Poddar contended that there is no provision in the Income Tax Act which requires the Assessing Officer while accepting the claim of the assessee to pass a reasoned order. The reasons, according to him, are required only when an issue is decided against the assessee. He also drew our attention to the judgment in the case of S.S Gadgil v. Lal & Co. [1964] 53 ITR 231, wherein the Apex Court held as follows :--

"A proceeding for assessment is not a suit for adjudication of a civil dispute. That an income tax proceeding is in the nature of a judicial proceeding between contesting parties, is a matter which is not capable of even a plausible argument. The Income Tax authorities who have power to assess and recover tax are not acting as judges deciding a litigation between the citizen and the State: they are administrative authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the taxpayer and to assess him to tax on the basis of that estimate. Tax legislation necessitates the setting up of machinery to ascertain the taxable income, and to assess tax on the income, but that does not impress the proceeding with the character of an action between the citizen and the State."

83. He also drew our attention to the judgment in the case of CIT v. Gabriel India Ltd. [1993] 203 ITR 108 /71 Taxman 585 (Bom.) 'The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee.

Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order, he did not make an elaborate discussion in that regard.'

84. The aforesaid views expressed by the Bombay High Court was quoted in the case of CIT v. Sunbeam Auto Ltd. [2011] 332 ITR 167/[2010] 189 Taxman 436 (Delhi).

85. He also drew our attention to a judgment of the Punjab & Haryana High Court in the case of Hari Iron Trading Co. v. CIT [2003] 263 ITR 437/131 Taxman 535, wherein the following views were expressed:--

"The expression "record" has also been defined in clause (b) of the Explanation so as to include all records relating to any proceedings available at the time of examination by the Commissioner. Thus, it is not only the assessment order but the entire record which has to be examined before arriving at a conclusion as to whether the Assessing Officer had examined any issue or not. The assessee has no control over the way an assessment order is drafted. The assessee on its part had produced enough material on record to show that the matter had been discussed in detail by the Assessing Officer. The least that the Tribunal could have done was to refer to the assessment record to verify the contentions of the assessee. Instead of doing that, the Tribunal has merely been swayed by the fact that the Assessing Officer has not mentioned anything in the assessment order. During the course of assessment proceedings, the Assessing Officer examines numerous issues. Generally, the issues which are accepted do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations are rejected and additions/disallowances are made. As already observed, we have examined the records of the case and find that the Assessing Officer had made full inquiries before accepting the claim of the assessee qua the amount of Rs.10 lakhs on account of discrepancy in stock. Not only this, he has even gone a step further and appended an office note with the assessment order to explain why the addition for alleged discrepancy in stock was not being made. In the absence of any suggestion by the Commissioner as to how the inquiry was not proper, we are unable to uphold the action taken by him under section 263 of the Act."

86. Whether the assessment order dated 28th March, 2008 was passed without application of mind is basically a question of fact. The learned Tribunal has held that the assessment order was not passed without application of mind. The records of the assessment including the order sheets go to show that appropriate enquiry was made and the assessee was heard from time to time. In deciding the question Court has to bear in mind the presumption in law laid down in Section 114 Clause - e of the Evidence Act:--

"that judicial and official acts have been regularly performed;"

87. Therefore, the Court has to start with the presumption that the assessment order dated 28th March 2008 was regularly passed. There is evidence to show that the assessing officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is

difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under Section 142 (1) of the Act could not have been formulated.

88. The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return, filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied. On the top of that the Assessing Officer by his order dated 28th March, 2008 did not adversely affect any right of the assessee nor was any civil right of the assessee prejudiced. He was as such under no obligation in law to give reasons.

89. The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered both by the Tribunal as also by us to be a possible view, strengthens the presumption under Clause (e) of Section 114 of the Evidence Act. A prima facie evidence, on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact the order was passed by the assessing officer after due application of mind.

90. The judgments cited by Mr. Nizamuddin do not really support his contention. The judgment in the case of Meerut Roller Flour Mills (P.) Ltd. (supra) does not apply because the High court in that case was satisfied that the assessment order was passed without enquiry.

91. The judgment of Cochin Bench of Income Tax Appellate Tribunal in ITA No. 116 /Coch/ 2012 relied upon by Mr. Nizamuddin is evidently based on an erroneous impression that "the proceedings before the Assessing Officer are judicial proceedings". This impression, which is patently contrary to the views expressed by Apex Court in the case of S.S. Gadgill (supra), was responsible for the views taken by the Tribunal. When the premise is wrong, the conclusion is bound to be wrong.

92. The judgment in the case of Infosys Technologies Ltd. (supra) is distinguishable on facts. The step taken by the CIT under Section 263 in that case was justified because the Income Tax records produced before him did not show that the assessing officer had considered the double taxation avoidance agreement on the basis whereof the claims were made by the assessee. Therefore, that was a clear case to show that the assessment order was passed without considering the relevant pieces of evidence.

93. The judgment in the case of Anusayaban. A. Doshi (supra) does not apply because the High Court in that case was dealing with the need on the part of the learned Tribunal to give reasons in support of its order.

94. The judgment in the case of Hindusthan Tin Works Ltd. (supra) also does not apply because there the Delhi High Court was dealing with the duty of the learned Tribunal to disclose reasons in support of its appellate order.

95. The judgment in the case of S.N. Mukherjee (supra) is clearly distinguishable. The point for consideration in that case was whether it was incumbent for the Chief of Army Staff while confirming the findings and the sentence of the General Court Martial, and for the Central Govt. while rejecting the post confirmation petition of the appellant, to record reasons for the orders passed by them.

96. The function of an Assessing Officer is to estimate the income of the assessee and to recover tax on the basis of such estimate as laid down by the Apex Court in the case of S.S Gadgil (supra). Their Lordships opined that the income tax proceedings do not partake the character of a judicial proceeding between the State and the citizen. Therefore, the principles applicable to a proceeding before a judicial or a quasi-judicial authority where there are two contesting parties cannot be made applicable to the proceedings before an Assessing Officer.

97. Mr. Nizamuddin contended the judgments cited by Mr. Poddar indicate that the Assessing Officer is not required to write an elaborate judgment. He contended that the assessing officer may not have any such obligation but it cannot be said, according to him, that the Assessing Officer is under no obligation to record anything in his assessment order. It is not in the first place a fact that he has not recorded anything. From the assessment order, the following facts and circumstances appear:--

"Return was filed on 29/11/06 showing total income of Rs.3,80,66,940/-. In response to notices u/s. 143(2) and 142(1) of the I. T. Act, 1961, Sri P. R. Kothari, A/r appeared from time to time and explained the return. Necessary details and particulars were filed. The business of the assessee is manufacturing and trading of cosmetics and dental care products as in earlier years. In view of above total income is computed is under:"

98. Unless the aforesaid recital is factually incorrect or the computation is legally wrong, it is not possible to hold that the assessment order was passed without application of mind. On the top of that when the Assessing Officer accepted the contention of the assessee there was no occasion for him to make any discussion in his order.

99. If the assessing officer cannot be shown to have violated any form prescribed for writing an assessment order, it would not be correct to hold that he acted illegally or without applying his mind. The third question is, for the reasons discussed above, answered in the negative."

12. We note that the sheet anchor on which the ld. CIT has found fault with the AO's order in the present case is the lack of enquiry on the part of the AO in not enquiring into the nature of foreign assignment allowance and its taxability in terms of Section 5(2) of the Act. In this context we find that there is a clear distinction between "lack of enquiry" and "inadequate enquiry". If there is an enquiry, even if inadequate, that would not by itself give occasion to the ld. CIT to interdict and interfere by exercising his revisional jurisdiction merely because he is of the opinion that some more enquiries should have been conducted in the matter. In a case where the ld. CIT finds that the enquiry conducted by the AO is not in accordance with his subjective standards, then the ld. CIT should himself conduct the investigation and thereafter record a clear finding in his order u/s. 263 that the view followed or acted upon by the AO in his order was unsustainable in law and therefore the

order of the AO was erroneous. In addition, the ld. CIT should also prima facie show that the erroneous order caused prejudice to the Revenue and thereby twin conditions prescribed by Section 263 are satisfied. If even one condition is not satisfied, then it is open for the ld. CIT to usurp the revisionary jurisdiction u/s 263 of the Act.

13. In the given facts of the present case, as noted earlier, the AO had made due enquiries into the nature and mode of receipt of foreign assignment allowance as also about its taxability in India. The AO had also obtained declaration from the employer to the effect that the allowance in question was paid in relation to services rendered in Switzerland. The AO had also obtained requisite documentary evidence in support of fact that the applicable taxes on such allowance was paid in Switzerland. After examining the specific details furnished by the assessee, the AO did not find any fault with the claim of the assessee that the foreign assignment allowance was not taxable in India. On these facts, we are therefore of the firm view that not only did the AO enquire into the issue of taxability of foreign assignment allowance but had consciously applied his mind to the facts made available before him and adopted the view permissible in law. For these reasons, we are of the considered view that the assessment order did not suffer from the error of non-enquiry or non-application of mind or assumption of wrong facts.

14. In the impugned order the ld. CIT placed emphasis on the fact that the allowance in question was received by the assessee from an entity established in India. He further emphasized on the fact that the assessee’s employment contract was with Indian company and the contract of the employment which gave rise to the payment in question was executed in India. Accordingly the assessee’s right to receive remuneration inter alia including foreign assignment allowance had accrued in India and consequently therefore the assessee was liable to pay tax on such allowance in India. The ld. CIT further observed that the allowance in question was computed in INR denomination which clearly showed that the payment was intended to be made in India. The ld. CIT also found that the payment of the allowance was made from the employer’s Deustche Bank Account which was located in India. In his opinion, the ‘point of payment’ was the ‘point of receipt’ and consequently therefore the income was deemed to be received at the place where the payment originated. According to the ld. CIT the payment of allowance from Deustche Bank, Bangalore to Axis

Bank's Nostro A/c outside India and thereafter to TCC of the assessee happened on the express direction of the assessee and therefore the payment was actually effected in India. For the foregoing reasons therefore the ld. CIT concluded that the foreign assignment allowance was taxable in India and in passing the assessment order the AO had not considered these material facts.

15. After due consideration of the facts and material on record as also applicable legal provisions, we however do not find substance in the reasons adduced by the ld. CIT in his order justifying his interference under Section 263 of the Act. It may be true that the allowance in question was received by the assessee pursuant to his employment contract with a company which was tax resident in India. It may also be true that the contract of employment was executed in India. However for such fact alone it cannot be held that assessee's right to receive the entire remuneration accrued or deemed to accrue in India. Admittedly the assessee would not have been entitled to receive the allowance in question if the services were rendered or performed by the assessee in India. The essential pre-requisite for receiving the foreign assignment allowance was that the assessee was required to render his services in a foreign country viz., Switzerland in this case. In other words, it was only in the event that the assessee left the place where his employment contract was signed and he migrated to a foreign country for rendering services that such foreign assignment allowance was receivable by him. It is not in dispute that the amount in question was received by the assessee in connection with the services which the assessee actually rendered to his employer outside India. In the circumstances therefore before the said foreign assignment allowance was brought within the taxing net, it was necessary for the authorities below to demonstrate that the income chargeable under the salary accrued or deemed to accrue in India, as defined in Section 9(1)(ii) of the Act, which read as follows:

"9. (1) The following incomes shall be deemed to accrue or arise in India :—

(ii) income which falls under the head "Salaries", if it is earned in India.

Explanation.—For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—

(a) service rendered in India; and

(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment,

shall be regarded as income earned in India

16. From the foregoing provision it is quite evident that the income under the head 'Salaries' is deemed to be earned in India only if such income is paid for services rendered in India. In other words, rendering of services to the employer in India is sine qua non for invoking deeming provisions of Section 9(1)(ii) of the Act. In the present case it is not denied by the ld. CIT that for the relevant assessment year the status of the assessee was non-resident because his physical stay in India was less than 182 days. He also did not deny the fact that the services were rendered by the assessee in Switzerland and for which the impugned allowance was received. Once these are the admitted facts, then the same clearly takes the assessee's case outside the ambit of Section 9(1)(ii) of the Act and thereby the said allowance was not includible in the total income of the assessee for the purposes of tax in India.

17. We also do not see any merit in the ld. CIT's finding that the assessee had received the impugned sum in India. According to ld. CIT the 'point of payment' was the 'point of receipt' as well and therefore since the payment originated from the employer's bank account in India with Deutsche Bank, the income was received by the assessee in India and therefore liable for tax in India under Section 5(2)(b) of the Act. We have no hesitation in holding that this interpretation of the facts and legal position by the ld. CIT is patently wrong. Going by the ld. CIT's conclusion in case of every international transaction where the payment made to non-resident originates from a bank situated in India, the income of the non-resident shall be deemed to be received in India, and therefore liable to tax in India in terms of Section 5(2) of the Act. Accordingly, even where the assessee's make payments for import of goods and for which the payment is made by the Indian importer from his Indian bank account, the foreign supplier of the goods shall be liable to be taxed in India since the 'point of payment' as well as 'receipt' is in India and therefore the income is received in India. Such proposition is devoid of any merit.

18. It is also noted that the ld. CIT was factually incorrect in concluding that the payment of foreign assignment allowance was first received by the assessee in India and thereafter remitted to his TCC at his express directions. We note that there no material or evidence

was brought on record by the ld. CIT to support this conclusion. As noted in the earlier Para, the modus operandi for receiving the said allowance through TCC was as follows:

a) When an employee of IBM India Private Limited is sent on international assignment, Axis Bank upon instruction from IBM, issues a Travel Currency Card (TCC) to an employee who is sent to a foreign assignment.

b) IBM maintains an Exchange Earners Foreign Currency (EEFC) Account with Deutsche Bank, Bangalore.

c) From the EEFC Account of Deutsche Bank, funds are transferred to the Nostro Account of Axis Bank maintained outside India.

d) Upon instruction from IBM, the funds are then transferred from the Nostro Account of Axis Bank maintained outside India to the Axis TCC of the respective employee.

19. From the foregoing, it is evident that the funds were transferred outside India to the foreign currency denominated account of the employer at the express direction of the employer and even the payment towards TCC was made on the instructions of the employer. We therefore do not find any merit in the ld. CIT's finding that the impugned allowance was first received by the assessee in India and thereafter at his instance the amounts were remitted outside India in the form of TCC.

20. Another issue which weighed on the ld. CIT's mind was that the impugned allowance did not suffer any tax in the country of residence i.e. Switzerland and therefore it was a case of double non-taxation which could not be permitted in law. In the first instance we do not find much force in this plank of the ld. CIT's reasoning. The question for determination by the ld. CIT was whether in law the amount received by the assessee for rendering services outside India was legally chargeable to tax in India. For deciding this question, it was wholly immaterial whether or not, such income suffered tax in the country of residence i.e. Switzerland. Double taxation of income is not alien phenomenon in cross border transactions. In the circumstances in deciding the issue of taxability of the particular

receipt in India, it was wholly irrelevant whether or not such receipt suffered tax in the other jurisdiction. We therefore hold that this ground on which the ld. CIT considered the AO's order to be erroneous is legally not tenable. Even on facts, we find that before the AO the assessee had sufficiently demonstrated that the foreign assignment allowance had suffered appropriate tax in Switzerland. The assessee had furnished before the AO, the copies of the Switzerland tax documents for the year 2013 and 2014 as Annexure 6 & 7 to his letter dated 30.11.2016, which is found placed at pages 79 to 80 of the paper book. The Annexure 6 & 7 referred in this letter by assessee to AO reveals that assessee had been subjected to tax deduction from 01.01.2013 to 31.12.2013 and for 01.01.2014 to 02.05.2014 @ 16.58% and 12.68% respectively. In light of these documentary evidences therefore the ld. CIT's finding that the foreign assignment allowance in question did not suffer any tax in Switzerland and therefore the case of assessee is distinguishable with that of Shri SudiptaMaity decided by this Tribunal reported in (2018) 172 ITD 94 (Kol), since the assessee has not shown his foreign assignment allowance was subjected to tax in Switzerland is therefore per se wrong.

21. In the impugned order the ld. CIT relying on the decision of the coordinate Bench of this Tribunal in the case of Tapas Kumar Bandyopadhyay (supra) held that the amount received by the assessee from his Indian employer which he had received in India was chargeable to tax in terms of Section 5(2) of the Act. According to ld. CIT, the judgment of the Hon'ble Calcutta High Court reported in 397 ITR 406, overturning the decision of the Tribunal in that case was of no help to the assessee because the Hon'ble High Court had reversed the decision of the Tribunal keeping in view the concession granted by the Board to the specific class of assessee's being sea-farers. Since the assessee in the present case was not a 'seafarer', it was the ld. CIT's stand that the benefit of the CBDT Circular No.13 of 2017 as well as the judgment of the Hon'ble Calcutta High Court was of no help to the assessee. After due consideration of the facts and material on record, we are unable to agree with the ld. CIT's such contention. In the first instance we find that the facts of the case are materially different from the facts involved in the case of Tapas Kumar Bandyopadhyay (supra). In that case the assessee a marine engineer was rendering his services in international waters and his salary from the employer was admittedly deposited in his bank account maintained in India. Further such salary did not suffer any tax in any other country. On these facts, the Tribunal held that the income was chargeable to tax in India since the

salary was deposited in bank account maintained in India. In the present case however, as noted in the preceding paragraphs, no money was found deposited in assessee's account maintained in India and the foreign assignment allowance received for services rendered in Switzerland, the due taxes were paid in that country. Moreover, Section 9(1)(ii) makes it abundantly clear that income chargeable under the head 'Salary' constitutes income deemed to accrue in India only if the services are rendered in India. Since in the present case, admittedly no services were rendered in India for which the foreign assignment allowance was received by the assessee, the same was not chargeable to tax in India even in terms of the deeming provisions of Section 9(1)(ii) of the Act.

22. We note that in the impugned order the ld. CIT has not made any discussion with regard to application of Section 9(1)(ii) which was the most appropriate legal provision in deciding whether the foreign assignment allowance received for rendering of services outside India, was taxable in India or not. We note that the ld. CIT discussed several reasons for holding the amount to be taxable in India but surprisingly his order is conspicuously silent about the applicability of Section 9(1)(ii) of the Act according to which the income could be made liable to tax if and only if the income was received for services rendered in India. We note that this specific issue was adjudicated by the coordinate Bench of this Tribunal in the case of Shri SudiptaMaity (supra) which involved identical facts. In the decided case, the Tribunal has noted the following facts:

> *"4. The brief facts of this issue are that the assessee was an employee in IBM India Private Limited and during the financial year 2012-13 was sent on short term assignment to Switzerland. He had stationed in Switzerland for 331 days during the year under consideration. Accordingly, his residential status for the year under consideration would be Non-Resident. During the year under consideration, the assessee had received the following emoluments from IBM :-*
>
> *a) Gross Salary received in India – Rs 6,77,128/- and*
>
> *b) Foreign allowances on account of the international assignment received in Switzerland – Rs 51,84,489/-*
>
> *IBM had effected TDS of Rs 16,04,063/- on the entire emoluments paid to the assessee including the foreign allowances paid to the assessee u/s 192(1) of the Act. The assessee filed his return of income for the Asst Year 2013-14 declaring taxable income of Rs 5,73,320/- (being the salary received in India alone) after claiming deduction of RS 1,01,405/- under Chapter VIA of the Act and claimed a refund of Rs 15,58,060/- in his return of income.*
>
> *4.1. During the financial year 2012-13, the assessee had received Rs 51,84,489/- outside India for services rendered outside India . The assessee pleaded that the entire foreign allowance of*

Rs 51,84,489/- was not offered to tax in India as the same was received by the assessee outside India for the services rendered outside India which does not form part of the total income u/s 5(2) of the Act. The assessee however offered the entire salary received in India of Rs 6,77,128/- to tax in India. In the course of assessment proceedings, the assessee submitted a letter dated 24.9.2015 with regard to exemption claimed by him towards foreign assignment allowance, which was paid by crediting the assessee's Travel Currency Card (TCC) . The assessee also furnished a certificate from IBM India Private Limited stating that the assessee had received Rs 51,84,489/- outside India for rendering services in Switzerland. In the said certificate, it was also mentioned by IBM that taxes to the tune of Rs 16,04,063/- was deducted at source including on the portion of foreign assignment allowance because the residential status as well as the tax residency of the assessee was not known."

23. With reference to the foregoing facts, the issue for adjudication before the Tribunal was whether the Ld. CIT(A) was justified in deleting the addition made of Rs.51,84,489/- which was brought to tax by the AO by applying the provisions of section 5(2) of the Act. So, we note that this issue, on similar facts and applicable provisions of law, was adjudicated in respect of an assessee who was working with the same company IBM as that of the assessee in this case; and the AO had taxed the foreign assignment allowance by invoking provisions of Section 5(2) of the Act, which was deleted by the Ld. CIT(A). This action of the Ld. CIT(A) was challenged by the Revenue before the Tribunal and the Tribunal upholding the action of the ld. CIT(A) held as under:

"7. We have heard the rival submissions. We have gone through the following documents enclosed in the paper book of the assessee:-

a) Copy of passport for the relevant period – enclosed in pages 124 to 128 of paper book.

b) Certificate issued by IBM India Private Limited explaining the entire facts of payments to assessee including the details of deduction of tax at source thereon together with its purpose – enclosed in page 129 of paper book.

c) Statement of Account of Axis Bank TCC for the period 30.11.1999 to 14.12.2015 – enclosed in apges 130 to 145 of paper book.

d) List of various Nostro Accounts held by Axis Bank in various countries , out of this list, the relevant Nostro Account from where payments were made to assessee herein is ZurcherKantonal Bank (ZKB) from Account Number 0700-00037.370 – enclosed in Page 146 of paper book.

e) Sample instructions given by IBM India Private Limited authorizing the Axis Bank, Bangalore to load currencies to the TCC of assessee - enclosed in pages 147 to 148 of paper book.

7.1. From the facts narrated above and on hearing the learned counsels of assessee as well as for the revenue, we find that:-

a) The assessee is a non-resident individual and had rendered services outside India for which he has received foreign assignment allowance.

b) IBM maintains money in foreign currency in its EEFC account maintained with Deutsche Bank, Bangalore.

c) IBM instructs Axis Bank to issue Travel Currency Card to its employees who are sent on foreign assignment, which is loosely called Axis TCC.

d) Axis Bank has maintained a Nostro Account with its Correspondent Banker (ZuercherKantonal Bank, Zurich).

e) IBM transfers funds from its EEFC Account from Deutsche Bank to the Nostro Account of Axis Bank (i.eZuercherKantonal Bank) for the purpose of loading / reloading the Axis TCC issued to the assessee who is sent on foreign assignment.

f) The employee who is sent on foreign assignment uses the said funds outside India out of monies topped up or credited in his Axis TCC. Hence it could be safely concluded that the first point of receipt for the assessee happens outside India. This money is used by him for his sustenance in Switzerland. Both the accrual and receipt of income happens outside India. Hence the same is outside the ambit of tax as per the provisions of section 5(2) of the Act. The services of the assessee are also utilized only outside India.

g) This foreign assignment allowance is duly subjected to tax in the country of Switzerland and the assessee had duly paid the said tax to the Swiss Government.

h) The assessee had paid taxes in India in respect of salary received by him in India, which is not in dispute.

7.2. We find that the ld DR had argued that the foreign assignment allowance given to the assessee is nothing but salary and that the same is first deposited in India and thereafter it gets loaded into the TCC by Axis Bank as instructed by IBM. In this regard, we find from the account statement of TCC enclosed in pages 130 to 145 of Paper Book for the period 30.11.1999 to 14.12.2015 , that the assessee is sent outside India with a TCC containing zero balance and the same is loaded/reloaded periodically as per the requirement . This loading or reloading of funds in TCC happens when the assessee was rendering services outside India and was staying outside India. Hence the funds get deposited / loaded / reloaded in TCC for the first time outside India. Thereafter the assessee withdraws the monies for his sustenance outside India . Hence the first point of receipt of these funds loaded / reloaded in TCC for the assessee is outside India. We find that this submission of the ld DR is factually incorrect and is not borne out from the facts narrated above.

7.3. We find that the assessee's case squarely falls under the provisions of Explanation to Section 5(2) of the Act which are reproduced for the sake of convenience as under:-

Explanation 1 – Income accruing or arising outside Inia shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2 – For the removal of doubts, it is herby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

7.4. We find that the reliance placed by the ld AR on the Co-ordinate Bench decision of Jaipur Tribunal in the case of ADIT (International Taxation) vs Sri Kartik Vyas in ITA No. 375/JP/2012 dated 31.12.2014 is directly on this point which was rendered in the context of an IBM employee under similar circumstances. It was held as under:-

"5. At the outset, the learned AR for the assessee reiterated the submissions made before the ld. CIT(A) and submitted that the appellant is an employee of IBM India Pvt. Ltd., was sent on an International assignment to Netherlands during the previous year 2007-08. The appellant received foreign allowances of Rs. 17,27,360/- outside India for the services rendered in Netherlands. As the appellant, qualified as a non-resident during the relevant assessment year and foreign allowances received by the appellant is not liable to tax U/s 5(2) of the Act. The appellant had disclosed total income of Rs. 3,27,910/- excluding the foreign allowances and against this income, the tax of Rs. 48,790/- was paid by the appellant. The employer deducted TDS wrongly at Rs. 6,36,484.65 and appellant also paid self assessment tax at Rs. 4,653/- on account of his interest income from bank deposits. Therefore, the appellant had claimed refund of Rs. 5,92,305/- by filing the return. The learned Assessing Officer submitted that the amount of Rs. 17,27,360/- was received by the appellant in Netherlands from his employment on account of foreign allowances, for which he produced certificate from the employer. The employer was non-resident during the year and provisions of Section 6(1) of the Act is applicable. Therefore, foreign allowances received by him outside the India for services rendered outside India are not liable to be taxed in India U/s 5(2) of the Act. He also relied on the various case laws, which were relied upon before the learned CIT(A), therefore, he prayed to confirm the order of the learned CIT(A).

6. We have heard the rival contentions of both the parties and perused the material on record. The appellant was non-resident during the year under consideration and allowances were received by him in Netherlands. The employer wrongly deducted TDS, the appellant had claimed refund on it. The Indian income has been considered by the appellant as taxable but the allowances paid outside the India are not taxable u/s 5(2) of the Act in the case of non-resident. The case law relied upon by the learned CIT(A) are squarely applicable in the case of the assessee, therefore, we confirm the order of the learned CIT(A).

7. In the result, the appeal filed by the Revenue is dismissed."

7.5. We find that the ld DR placed reliance on the Co-ordinate Bench decision of Chennai Tribunal in the case of Sri BalamuthuKadiresan vs ITO in ITA No. 353/Mds/2016 dated 29.4.2016 in support of his contentions. We find that the said decision in para 9.1. of the order had considered the decision of Jaipur Tribunal in the case of ADIT(International Taxation) vs Sri Karthik Vyas in ITA No. 375/JP/2012 dated 31.12.2014 and observed that the Jaipur Tribunal decision is factually distinguishable with the facts before the Chennai Tribunal. Hence the reliance placed on the decision of Chennai Tribunal supra does not come to the rescue of the assessee herein.

7.6. We also find that the Hon'ble Karnataka High Court in the case of DIT (International Taxation) vs PrahladVijendra Rao reported in 198 Taxman 551 (Kar) and Hon'ble Bombay High Court in the case of CIT vs Avtar Singh Wadhwan reported in 247 ITR 260 (Bom) had held that in the case of a non-resident, when services are rendered outside India , the accrual of income thereon happens outside India and hence the same cannot be brought to tax in India as per section 5(2) of the Act. As stated above, we find that the assessee was able to get control over the funds in his TCC for the first time only in Switzerland and not in India and first point of receipt also happens only in Switzerland. Hence it could be safely concluded that both accrual and receipt of funds happens outside India thereby making the said receipt to stay outside the ambit of taxability u/s 5(2) of the Act.

7.7. We also find that identical claim of exemption of the assessee was allowed by the ld AO for the Asst Year 2014-15 u/s 143(3) of the Act dated 10.12.2016 after detailed examination of the same and by giving proper findings in the assessment order vide para 5.02 and 5.03.

7.8. In view of the aforesaid findings in the facts and circumstances of the case and by respectfully following the various judicial precedents relied upon hereinabove, we hold that the ld

CITA had rightly deleted the addition made on account of disallowance of claim of exemption in respect of foreign assignment allowance received by the assessee outside India. Hence we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed."

24. From the aforesaid decision rendered by the Coordinate Bench of this Tribunal dated 11.07.2018, we find that the issue involved before us is no longer res integra. We note that the claim of the assessee in the present case for exclusion of foreign assignment allowance, which was accepted by the AO, was in consonance with the view of Ld. CIT(A) in Shri SudiptaMaity's case (supra) which has been upheld by the Tribunal. In light of the decision of the coordinate Bench of the Tribunal with which we are in agreement, we hold that the action of the AO cannot be held to be erroneous in so far as prejudicial to the interest of the revenue as held by the Hon'ble Supreme Court in Malabar Industrial Co. ltd. (supra).

25. We note that in the impugned order, the Ld. CIT has fortified his usurpation of revisionary jurisdiction u/s 263 of the Act, by relying on the amendment to Section 263 whereby second Explanation to sub-section (1) of sec. 263 of the Act was inserted with effect from 01.06.2015. The said amendment inserted the words "*in the opinion of Principal commissioner or Commissioner*". According to ld. CIT, after this amendment was brought into statute, the order passed by the AO can be deemed to be erroneous insofar as prejudicial to the interest of the revenue if in the opinion of the Pr. CIT or CIT, the order has been passed without making enquiries or verification which should have been made. According to us, however, the insertion of the amendment which has brought in the word '*in the opinion of Principal commissioner or Commissioner"* cannot be read in isolation. And it has to be kept in mind that "Explanation" cannot over-ride the substantive provision of the law which the Explanation only tries to explain/clarify. Before we advert further, let us look at Section 263 of the Act, which is reproduced as under:-

*"**263.** (1) The Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*

[Explanation 1.]—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include—

(i) *an order of assessment made by the Assistant Commissioner or Deputy Commissioner] or the Income-tax Officer on the basis of the directions issued by the [Joint] Commissioner under section 144A;*

(ii) *an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under section 120;*

(b) *"record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner;*

(c) *where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matterof any appeal [filed on or before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]*

[Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) *the order is passed without making inquiries or verification which should have been made;*

(b) *the order is passed allowing any relief without inquiring into the claim;*

(c) *the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*

(d) *the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]*

[(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal,] the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

26. A reading of Section 263 of the Act and the Explanations as well as the amendments brought in by the Finance Act, 2015, *w.e.f. 01.06.*2015, by inserting Explanation 2, we note that Explanation -2, is a deeming provision and the well settled position of law is that while construing a deeming provision, it has to be strictly interpreted and that the legal fictions should not be stretched beyond the purpose for which they were enacted and should not extend that legitimate field (Raymond Vs. State of Chattisgarh AIR 20-07 SC 2854) and it should be kept in mind <u>that deeming provision should be in respect of facts, from which</u>

legal consequences will follow. However, a legal consequence cannot be deemed[DCM Vs. State of Rajasthan (1996) 2 SCC 449. AIR 1996 SC 2930 (3 judges of Hon'ble Supreme Court) and same view reiterated in State of Karnataka Vs. State of Tamil Nadu (2017) 3 SCC 362. So when we look at Explanation-2, we note that deeming fiction of law that the order of the Assessing Officer is deemed to be erroneous insofar as it is prejudicial to the interest of the Revenue only if in the opinion of the ld. CIT, which necessarily has to be a finding of fact in the following four events. Then legal consequence follows, if not it does not. So, the CIT has to make a finding of fact in the following:

(a) the assessment order passed by the Assessing Officer is without inquiry or verification,

(b) the Assessing Officer allowed a claim without enquiry,

(c) the Assessing Officer passed the order not in accordance with any order, directions or instructions issue by the CBDT u/s 119 of the Act,

(d) theAssessing Officer passed the order not in accordance to the decision of the Hon'ble Jurisdictional High Court or the Hon'ble Supreme Court, which is prejudicial to the assessee, which is rendered either in the assessee's case or any other person.

27. So, the amendment brought by the Finance Act, 2015, by way of insertion of Explanation-2, can come to the aid of the ld. Pr. CIT or ld. CIT only when any of the four conditions is satisfied and there is a clear finding of fact to that effect is recorded by the Ld. CIT, then only the legal consequence that AO's order is erroneous insofar as prejudicial to the revenue can be deemed or else it cannot be deemed. Then in that case only the assessment order framed by the Assessing Officer can be deemed to be erroneous insofar as prejudicial to the interest of the Revenue, not otherwise. To say it differently, the "opinion of Ld. Pr. CIT or CIT" cannot be read in isolation, and it has to be read with the four conditions stipulated under Explanation-2 as (a) to (d) and has to be read along with it. And only in the event that any one of the situation is satisfied and there is a finding of fact by the Ld. CIT to that effect in his sec. 263 order, then only the deeming provision of Explanation-2 can be pressed into service for rendering an assessment order as erroneous, insofar as

prejudicial to the Revenue, which is the jurisdictional fact & law required for the ld. Pr. CIT/CIT to invoke revisional jurisdiction u/s 263 of the Act.

28. Coming to the expression in Explanation -2 “in the opinion of the Ld. CIT”, it cannot be an arbitrary opinion bereft of facts or law by the Ld CIT. It must be the considered opinion of the CIT which is based on the correct facts and in accordance to well established principles of law. The aforesaid clause only provides for situation where inquiries or verifications should be made by reasonable and prudent officer in the context of the case. Such clause cannot be read to authorize or give unfettered powers to the Commissioner to revise each and every assessment order. The applicability of the clause is thus essentially contextual. It has to be the opinion of a prudent person instructed in law. The Hon’ble Supreme Court in Maneka Gandhi Vs. Union of India reported in 1978 AIR (SC) 597 has laid down the law that a public authority should discharge his duties in a fair, just and reasonable, manner and the principle of due process of law was recognized by the Hon’ble Supreme Court. Therefore the opinion of the Ld. CIT has to be in consonance with that of the well settled judicial principles and cannot be arbitrarily made discarding the judicial precedent on the subject. The opinion of the Ld. Pr. CIT has to be reasonable and that of a prudent person instructed in law. Moreover, it has to be kept in mind that an Explanation to substantive section should be read as to harmonize with and clear up any ambiguity in the main section and should not be so construed as to widen the ambit of the section as held by the Hon’ble Supreme Court in Bihta Cooperative Development Cane Marketing Union Ltd. Vs. Bank of Bihar, AIR 1967 SC 389 and M/s. Oblum Electrical Industries Pvt. Ltd., Hyderabad vs. Collector of Customs, Bombay - AIR 1997 SC 3467 at page 3471 and also see Justice G. P. Singh, Principal of Statutory Interpretation 234 Lexus 2016. It has to be kept in mind that while the Commissioner is exercising his revisional jurisdiction over the assessment order, he has to exercise his power in an objective manner and not arbitrarily or subjectively since he is discharging quasi-judicial powers vested in him while doing so. Thus according to us, Explanation (2) inserted by the Parliament u/s. 263 cannot override the main section i.e. sec. 263(1) of the Act. The Ld. CIT can exercise his revisional jurisdiction in the event the assessment order is erroneous as well as prejudicial to the interest of the Revenue as discussed above and not otherwise.

29. As we discussed above, the opinion of the Ld. CIT based on the deeming provision of Explanation 2 to sec. 263 of the Act should be on the bedrock of the finding of fact that AO's order falls in the infirmities/condition stipulated under the Explanation 2(a) to (d) and then only the opinion of the ld. CIT should prevail and not that of any other person. Therefore, when the issue of assumption of jurisdiction of the Ld.CIT is tested on the back-drop of the judicial precedent of the subject, we note that the AO had called for documents from the assessee vide notice issued u/s. 142(1) dated 11.11.2016 and has passed the order on 23.12.2016 after perusal of replies of assessee, as discussed. The AO had acknowledged to have received the same in the assessment order itself, by recording a specific finding in the assessment order that the assessee had received foreign assignment allowance. So, the issue of foreign assignment allowance to the tune of Rs.42,97,092/- which is the bone of contention in this case was indeed considered and examined by the AO. We also note that the assessee had also furnished before the AO requisite documentary evidences which proved the foreign assignment allowance which was excluded from the ambit of total income taxable in India, had suffered applicable tax in Switzerland being the country where the services were actually rendered. Having considered these evidences, explanations and applicable legal provisions, the AO recorded the specific finding that *"the assessee was in India only for 16 days and the rest of the period he was in assignment to Switzerland and had received foreign assignment allowance*". In such a scenario, the finding recorded by the AO, cannot be termed as a case of no-enquiry at all in respect of foreign assignment allowance of the assessee. Therefore, the ld. CIT's view that the action of the AO in allowing the amount of Rs.42,97,092/- as exempt from taxation is in violation of the provision of sec. 5(2) of the Act without any enquiry, is factually incorrect. We note that this issue was considered by the AO and after enquiry he has taken a view to allow the claim of the assessee that this foreign assignment allowance is not taxable in India. We therefore hold that the AO's view cannot be held to be erroneous for want of enquiry.

30. We further find that when confronted with the reasons set out in the SCN, the assessee had led before the ld. CIT sufficient documentary evidence which proved that the SCN had proceeded on assumption of incorrect facts and wrong interpretation of applicable

legal provisions. It was also established before the ld. CIT that before completion of assessment, the AO had indeed made enquiries into the foreign assignment allowance and after being satisfied about its non-taxability, the order u/s 143(3) of the Act was passed. On receipt of these objections, though the ld. CIT did not agree with the submissions, we find that ultimately the reasons on which the ld. CIT proceeded to pass the order did not contain any substantive legal or factual material by which he was able to prove that the said explanations suffered from any infirmity. Instead we note that the ld. CIT ultimately merely set aside the assessment order directing AO to pass the order afresh in accordance with law which in our opinion was nothing but giving the AO second innings without establishing that the AO's order was erroneous as well as prejudicial to the interests of the Revenue. Our findings in this regard find support in the following judgments:

- DIT vs Jyoti Foundation reported in 357 ITR 388 (Del)
- ITO vs DG Housing Projects Ltd reported in 343 ITR 329
- CIT vs Ashish Rajpal reported in 320 ITR 674 (Del)
- CIT vs Sunbeam Auto Ltd reported in 332 ITR 167 (Del)
- CIT vs R.K.Construction Co. reported in 313 ITR 65 (Guj)

31. In the light of the above, we are of the firm view that not only did the AO enquire into the issue of taxability of foreign assignment allowance received by the assessee but had consciously applied his mind to the facts made available before him and adopted the permissible view in law. For these reasons, we are of the considered view that the assessment order is not the result of non-enquiry or non-application of mind or assumption of wrong facts. We are also of the considered opinion that while passing the assessment order the AO had followed the permissible view in law which cannot be said to be 'unsustainable in law'. In the circumstances therefore, the jurisdictional facts for usurping the jurisdiction u/s 263 of the Act, being absent, we hold that the action of Ld. CIT was without jurisdiction and all subsequent actions are 'null' in the eyes of law. We therefore quash the order impugned before us. Since all the appeals itself has been decided, therefore, the stay applications become infructuous and stands dismissed.

32. In the result, all the six appeals of the assessee's are allowed and the Stay applications are dismissed.

Order is pronounced in the open court on 15th November, 2019.

Sd/- Sd/-

(Dr. A. L. Saini) (Aby. T. Varkey)
Accountant Member Judicial Member

Dated : 15th November, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Assessee/Applicant
2 Respondent – ACIT (IT), Circle-1(2), 1(1), Kolkata
3. CIT(IT&TP), Kolkata. (sent through e-mail)
4. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy, By order,

Assistant Registrar