

IN THE INCOME-TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER

&

SMT. RENU JAUHRI, ACCOUNTANT MEMBER

ITA No. 693/Mum/2024

(A.Y. 2016-17)

Shinhan Bank 701/702, Peninsula Tower 1, Peninsula Corporate Park, Lower Parel, Mumbai-400013	Vs.	CIT(A)-58, Mumbai Room No. 515, 5 th Floor, Earnest House, NCPA Road, Narimal Point, Mumbai-400012
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACC2144A		
Appellant	..	Respondent

Appellant by :	Shri Madhur Agarwal
Respondent by :	Shri Anil Sant

Date of Hearing	13.06.2024
Date of Pronouncement	28.06.2024

आदेश / O R D E R

PER RENU JAUHRI [A.M.] :-

This appeal is filed by the appellant against the order of the Learned Commissioner of Income-tax (Appeals), Mumbai-58 [hereinafter referred to as "CIT(A)"] dated 20.12.2023 passed u/s. 250 of the Income-tax Act, 1961 [hereinafter referred to as "Act"] for the relevant Assessment Year [A.Y.] 2016-17.

2. The assessee raised following grounds of appeal:

Ground 1 :- *On the facts and circumstances of the case, the learned CIT(A), erred in upholding the order dated 14 December 2018, issued under section 143(3) read with section 144C(13) of*

the Act by the Assistant Commissioner of Income-tax (International tax Circle) -4(2)(1) (hereinafter referred to as the 'learned AO'].

Ground 2 :- *The learned CIT(A) has on the facts and circumstances of the case in law, and based on the order passed by learned AO, erred in rejecting the claim of Appellant for the benefit of the non - discrimination clause of the India - Korea Double Taxation Avoidance Agreement (hereinafter referred to as 'DTAA') and taxing the income of Appellant at the rate 40 per cent instead of the rate applicable to a resident taxpayer. The Appellant, therefore, prays that the benefit of the Article 25 of the DTAA be granted and that its income be taxed @ 30% instead of 40% (plus surcharge and education cess)*

3. At the outset, the Ld. AR fairly conceded that the issue stands covered against the assessee by the decisions of the co-ordinate bench in its own case for AYs 2007-08 and 2012-13 to 2015-16.
4. The Ld. DR has also filed written submissions, reiterating stand of the department and relying on the decisions of the co-ordinate benches in assessee's own case for earlier years. In the order for AY 2007-08 reported as **Shinhan Bank v/s DDIT (2022) 139 taxmann.com 563 (Mum.)**, this issue has been discussed in detail and decided as under:

4. The assessee before us is a banking company incorporated in, and fiscally domiciled in, Korea. It is carrying on business, through its permanent establishment, in India as well. In the income tax return filed by the assessee, it was pointed out that in view of Article 25(1) of the India Korea Double Taxation Avoidance Agreement [(1987) 165 ITR Stat 191; the then Indo

Korea tax treaty, in short), which provides that "nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected" [the corresponding provision in the present Indo Korean treaty are in Article 24(1)], and as, in terms of Article 3(1)(g) resident includes, amongst others, "any legal person, partnership or association deriving its status as such from the laws in force in a Contracting State", [the corresponding provision in the present Indo Korean treaty are in Article 3(1)(1)(ii)] the assessee company is also required to be treated as a national of Korea and levy of tax at the same rate as applicable for the Indian companies. It was also pointed out that in terms of the provisions of Article 25(2) of the then India Korea tax treaty, "the taxation on a permanent establishment which an enterprise of a contracting state has in the other contracting state, shall not be less favorably levied in that other contracting state than the taxation levied on the enterprise of that other contracting state carrying on the same activities". It was pointed out that the levy of tax, on the profits of the assessee's permanent establishment in India, at a rate higher than the rate at which tax is levied on the Indian entities carrying out the same activities, amounted to impermissible discrimination. It was thus pointed out that on the touchstone of the principles set out in article 25(1) as also 25(2), the rate of taxation of income of the assessee company cannot be more than the rate applicable for the domestic companies engaged in the same or similar activities. The Assessing Officer was thus urged that instead of levy of tax @ 40% plus surcharge etc, the assessee company should be levied tax @ 30% plus surcharge

etc, as is applicable on the domestic companies. This plea, however, was rejected by the Assessing Officer on the ground that in the light of Explanation I to Section 90, the provisions of a double tax avoidance agreement, the tax rate on a foreign company being higher than the tax rate on a domestic company cannot be considered to a less favourable charge or levy of tax in respect of such foreign company, and as such the provisions of Article 25(1) Article 25(2) of the then Indo Korean tax treaty do not come into play. The Assessing Officer proceeded to frame a draft assessment order accordingly. Aggrieved by the draft assessment order, the assessee raised the objections before the Dispute Resolution Panel, but without any success. The stand of the Assessing Officer was approved and reiterated. The Assessing Officer thus proceeded to levy the tax at the rate prescribed for a foreign company, i.e. a company which is not a domestic company. The assessee is not satisfied and is in appeal before us.

5. Learned counsel for the assessee invites our attention to the judgment dated 7 August 2019 passed by Hon'ble Calcutta High Court, in the case of Bank of Tokyo Mitsubishi Ltd Vs CIT ((2019) 108 taxmann.com 242 (Cal)) and submits that the issue is covered, in favour of the assessee, by the aforesaid decision of Hon'ble Calcutta High Court. However, when learned counsel's attention was invited to Explanation 1 to Section 90 and he was asked to address us on the implications of this amendment, he simply pointed out that the aforesaid judgment was delivered on 7th August 2019- i.e. after the retrospective amendment was brought to the statute, and yet the issue has been decided in favour of the assessee. He left the matter at that and submitted that he has nothing further to add to what has been held by Hon'ble Calcutta High Court in the case of Bank of Tokyo Mitsubishi (supra). Learned Departmental

Representative, on the other hand, submits that there is no discussion at all in the said decision about the Explanation 1 to Section 90, which is in effect with effect from 1st April 1962, though inserted by the Finance Act 2001, and a decision which has been rendered without dealing with this foundational aspect of the matter, cannot be binding on us. Learned Departmental Representative submits that in any case, it is a non-jurisdictional High Court and there is no dispute about the scope of Explanation to Section 90, and the learned counsel for the assessee has not even advanced any arguments on merits. It is pointed out that the learned counsel has simply cited a judicial precedent and left it at that, and, therefore, we should treat this ground as not pressed in effect. We are thus urged to confirm the stand of the authorities below and decline to interfere in the matter.

6. We have heard the rival contentions, perused the material on record and duly considered the facts of the case in the light of the applicable legal position. Considering that this issue raised in the appeal it may affect several non-resident companies, we consider it appropriate to deal with this issue in some detail.

7. We find that, by Finance Act 2001, an Explanation (now known as Explanation 1) was inserted below Section 90, and it was with retrospective effect i.e. effective 1st April 1962. This Explanation states that "For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company, where such foreign company has not made the prescribed arrangement for declaration and payment within India, of the dividends (including dividends on preference shares) payable out of its income in India". It is important to bear in mind that it is by

virtue of Section 90(2), which specifically provides that "Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee", that the provisions of the related double taxation avoidance agreement override the provisions of the Income Tax Act, 1961. As a corollary to this legal framework, it is only elementary that once a rider to this override is placed in the statute itself, to that extent the provisions of the Income Tax Act, 1961 will hold the field notwithstanding the more beneficial provisions in the tax treaties. In this light, when we look at the expression "less favorably levied" or "more burdensome...taxation and connected requirement", appearing in Articales 25(2) and 25(1) respectively, in the then applicable tax treat, we find that unless such a foreign company makes prescribed arrangement for declaration and payment withing I India, of the dividend payable out of its income in India, the levy of tax at a higher rate cannot be considered dividend payable out of if tax or more burdensome taxation vis-à-vis the domestic companies. Once this principle is implicit in the very scheme of legislation which provides for the treaty provisions overriding the domestic law provisions, it cannot be open to contend that the provisions of law prescribing the higher rate of taxation for the foreign companies will have to be read down by the treaty provisions. The law is clear and unambiguous. To this extent, therefore treaty provisions do not override the provisions of the Income Tax Act, 1961. While the amendment was made by the Finance Act 2001, it was retrospective in effect inasmuch as it was

specifically inserted with effect from 1" April 1962, i.e. the point of time when the Income Tax Act 1961 itself came into existence. On the first principles, the reason for the classificatory amendment appears to be that while income earned by the domestic companies is first taxed as corporate profits, and then with respect to taxation of dividends in the hands of the shareholder or at the point of time of distribution, the foreign companies normally (i.e. unless they make arrangements for declaration and payment within India, of the dividend payable out of its income in India gets taxed only once. As a matter of fact, the terminology used, so far as the tax rate for companies is concerned, in the finance Acts is 'domestic company' and 'a company other than a domestic company. Under section 2(22A), a domestic company is defined as "an Indian company or any other company, which in respect of its income liable to tax in India makes prescribed arrangements for declaration and payment of dividends within India", and Section 2(23A), a foreign company is defined as a company "which is not a domestic company" i.e. which has not made prescribed arrangements for declaration and payment of dividends in India. The basis of different tax rates being applied is thus not the situs of fiscal domicile or incorporation but simply the arrangement for making arrangements for the declaration of payment of dividends within India. Quite clearly, therefore, the claim of the assessee proceeds on an erroneous assumption about the reason for charging different tax rates. In sharp contrast, under section 6(3) of the Income-tax Act, 1961, a company is said to be resident in India if either it is an Indian company or if control and management of its affairs is situated wholly in India. Thus, a non-resident company if it distributes dividends in India will be treated as a domestic company and will then be subjected to the same rate of tax as a resident

company declaring and distributing dividends in India. If a non-resident company can make arrangements for the declaration and payment of dividends, out of income earned in India, in India, that non-resident company will be subjected to the same rate of tax which is levied on the Indian companies. The taxation of the foreign companies at a higher rate therefore at a higher rate vis-à-vis the domestic companies is thus not considered to be discriminatory vis-à-vis the foreign companies. The sharp contrast in the definition of a foreign company under section 2(23A) vis-à-vis the definition of a non-resident company under section 6(3) makes it clear that so far as the charge of tax is concerned, the critical factor is the situs of the control and management of a company. but so far as the rate of tax is concerned, the critical factor is the arrangements for the declaration of dividends out of income earned in India. Clearly, thus, the mere fact that a company which has not made "arrangements for the declaration of dividends out of income earned in India" is charged at a higher rate of tax in India vis-à-vis domestic company, cannot be treated as discrimination on account of the fact that the enterprise belonged to the other Contracting State, Le. Korea. That is what the clarificatory and retrospective insertion of Explanation 1 to Section 90 reflects. The plea of the assessee, therefore, must be rejected. In our considered view, given the specific provisions of law- as discussed above, there is no occasion for reading down the rate of tax, as applicable for a foreign company, just because the domestic companies are being taxed at a lower rate of taxation.

8. As we hold so, however, we may add that we are alive to the fact that in Bank of Tokyo Mitsubishi (supra), Hon'ble Calcutta High Court has, though without the benefit of discussions on the fact of or scope of this retrospective insertion of Explanation

to Section 90, proceeded to decide the matter in favour of the assessee by observing, inter alia, as follows

5. By virtue of Section 90(2) of the Act, since there is a double taxation avoidance agreement between India and Japan, the provisions of the Act shall apply to a permanent establishment of a Japanese entity in India 'to the extent they are more beneficial to that assessee. Also, in terms of the mandate of clause 24(2) of the agreement, 'the taxation on a permanent establishment...in the other Contracting State shall not be less favourably levied...than the taxation levied on enterprises...carrying on the same activities. By virtue of Clause 24(2) of the said agreement and the statutory recognition thereof in Section 90(2) of the Act, the permanent establishment of a Japanese entity in India could not have been charged tax at a rate higher than comparable Indian assessee carrying on the same activities.

6. In the instant case, it is evident from the order of the Commissioner as affirmed by the Tribunal by the impugned order of March 31, 1997 that in respect of assessment year 1991-92, the assessee herein was assessed as not being a domestic company. There is no dispute that an Indian company which was a domestic company would have been charged tax at a lower rate than the 65% imposed on the assessee by virtue of the assessee not being regarded as a domestic company. The disparity between the rates applicable to Indian and foreign companies is not in issue. However, since clause 24(2) of the agreement between the two countries provides that a permanent establishment of an entity of one country in the other country shall not be subjected to less favourable terms than an assessee carrying on

similar activities in the other country, the assessee in this case was liable to pay tax at the same rate as Indian companies carrying on the same activities were liable to for the relevant assessment year. The effect of the legal fiction envisaged in Article 24(2) of the agreement was that for the purpose of applying the appropriate rate, the permanent establishment of the Japanese entity had to be regarded as a domestic company. That is the effect of the expression 'taxation...not be less favourably levied...than the taxation levied on enterprises of that other Contracting State carrying on the same activities,' in Article 24(2) of the bilateral agreement between India and Japan.

7. The stand taken in the Tribunal's order cannot be appreciated or accepted since a similar clause in the double taxation avoidance agreement between India and the Netherlands was interpreted by the Central Board for Direct Taxes and a circular issued thereupon. The Tribunal held, in the present case, that since there was no similar circular, the benefit as available to a permanent establishment of ABN Amro Bank in India could not be extended to this assessee.

8. When there is no dispute that there is a double taxation avoidance agreement in place between India and the country of origin of the assessee in the present case and when such agreement contains a lucid clause as apparent from Article 24(2) thereof quoted above and when Section 90 of the Act itself recognises such an agreement and creates a special status for the relevant permanent establishments, there was no room for either the Commissioner to wait for any dictat from the high command of the CBDT or for the Tribunal to demonstrate

similar servile conduct in not appropriately interpreting and giving effect to the clear words of the agreement between the two countries.

9. The reference is concluded by answering the first question raised as follows:-

The Tribunal was incorrect in holding that the rate of tax applicable to the assessee was 65%. The Tribunal ought to have held that the rate applicable to the assessee was such rate as applicable to a domestic company carrying on similar activities. In the light of such answer, the two other questions need not be addressed since paragraph 8 of the order admitting the reference recognised that the answer to the first question would cover the entire matter.

9 Clearly, Hon'ble Calcutta High Court had no occasion to examine the impact of, or to even take note of the fact of, insertion of Explanation 1 to Section 90, which, even though inserted by the Finance Act 2001, was effective 1st April 1962. This critical development in the law was not brought to Their Lordships' notice. The assessment year involved in this case was 1991-92, i.e. an assessment year much before the insertion of Explanation I to Section 90, but the law, as it prevailed, in material respects, at the point of time when the matter came up for consideration before Their Lordships was exactly the same as the law at on now or for the period relevant to this appeal. Neither it was the case of the assessee that retrospectivity of the amendment was unconstitutional nor there are any observations in the judgments to read down the retrospectivity of this amendment which is specifically legislated as a retrospective amendment. It cannot, therefore, even be a reasonable justification, for any judicial forum where this judicial precedent has a binding effect, for not following the Hon'ble Calcutta High Court's judgment in the case of Bank of

Tokyo Mitsubishi (supra), on the ground that the period for consideration before Their Lordships was a pre-amendment period. Such an approach, given the amendment being admittedly retrospective in effect w.e.f. 1st April 1962, will be superfluous. Therefore, the fact that reference before Their Lordships, which was disposed of vide the judgment dated 7th August 2019 in the case of Bank of Tokyo Mitsubishi (supra), was for the assessment year 1991-92 and in respect of a coordinate bench's order dated 24th November 1997, would not really make a difference. While dealing with judicial precedents from non-jurisdictional High Courts, however, we may also usefully take of the observations of Hon'ble jurisdictional High Court in the case of CIT v. Thane Electricity Co. Ltd. [1994] 206 ITR 727 (Bom.), to the effect "The decision of one High Court is neither binding precedent for another High Court nor for the courts or the Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect". Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower forums, even outside the jurisdiction of Hon'ble non-jurisdictional High Court, on account of the persuasive effect of these decisions and on account of the concept of judicial propriety- factors which are inherently subjective in nature. Quite clearly, therefore, the applicability of the non-jurisdictional High Court is never absolute, without exceptions and as a matter of course. That is the principle implicit in Hon'ble Supreme Court's judgment in the case of ACIT v. Saurashtra Kutch Stock

Exchange Ltd. ((2008) 173 Taxmann 322/305 ITR 227 (SC)) wherein Their Lordships have upheld the plea that "non-consideration of a decision of Jurisdictional Court or of the Supreme Court can be said to be a mistake apparent from the record". The decisions of Hon'ble non-jurisdictional High Courts are thus placed at a level certainly below the Hon'ble jurisdictional High Court, and it's a conscious call that is required to be taken with respect to the question whether, on the facts of a particular situation, the non- jurisdictional High Court is required to be followed. The decisions of non-jurisdictional High Courts do not, therefore, constitute a binding judicial precedent in all the situations. To a forum like us, following a jurisdictional High Court decision is a compulsion of law and absolutely sacrosanct that way, but following a non-jurisdictional High Court is a call of judicial propriety which is never absolute, as it is inherently required to be blended with many other important considerations within the framework of law, or something which cannot be, in deserving cases, deviated from. While on this aspect of the matter, it is also useful to bear in mind the following observations made in a Full Bench decision of Hon'ble Andhra Pradesh High Court, in the case of CIT VS BR Constructions [(1993) 202 ITR 222 (AP-FB)]:

29. It may be noticed that precedent ceases to be a binding precedent-

- (i) if it is reversed or overruled by a higher court,*
- (ii) when it is affirmed or reversed on a different ground,*
- (iii) when it is inconsistent with the earlier decisions of the same rank,*
- (iv) when it is sub silentio, and*
- (v) when it is rendered per incuriam,*

30. In paragraph 578 at page 297 of Halsbury's Laws of England, Fourth edn., the rule of *per incuriam* is stated as follows:

"A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

31. In *Punjab Land Development & Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court* [1990] 3 SCC 682, the Supreme Court explained the expression '*per incuriam*' thus:

"The Latin expression *per incuriam* means through inadvertence. A decision can be said generally to be given *per incuriam* when the Supreme Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court."

As has been noticed above, a judgment can be said to be *per incuriam* if it is rendered in ignorance or forgetfulness of the provisions of a statute or a rule having statutory force or a binding authority. But, if the provision of the Act was noticed and considered before the conclusion arrived at, on the ground that it has erroneously reached the conclusion the judgment cannot be ignored as being *per incuriam*. In *Salmond on Jurisprudence*, Twelfth edn., at page 151, the rule is stated as follows:

"The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is

no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force."

32. *In Choudry Bros.' case (supra) as noticed above, the Division Bench treated the judgment in Ch. Atchiaiah's case [1979] 116 ITR 675, as per incuriam on the ground that the earlier Division Bench did not notice the significant changes, the charging section 3 has undergone by the omission of the words 'or the partners of the firm or the members of the association individually'. In our view, this cannot be a ground to treat an earlier judgment as per incuriam. The change in the provisions of the Act was present in the mind of the Court which decided Ch. Atchiaiah's case (supra). Merely because the conclusion arrived at on construing the provisions of the charging section under the 1922 Act as well as under the 1961 Act, did not have the concurrence of the latter Bench, the earlier judgment cannot be called per incuriam.*

Though a judgment rendered per incuriam can be ignored even by a lower Court, yet it appears that such a course of action was not approved by the House of Lords in Cassell & Co. Ltd v. Broome [1972] 1 All ER 801, wherein the House of Lords disapproved the judgment of the Court of Appeal treating an earlier judgment of the House of Lords as per incuriam Lord Hailsham observed: "It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way." (p. 809)

33. *It is recognised that the rule of per incuriam is of limited application and will be applicable only in the rarest of rare cases.*

[Emphasis, by underlining, supplied by us]

10. There is no dispute that Hon'ble Calcutta High Court's decision in the case of Bank of Tokyo Mitsubishi (*supra*) deals with the legal position prevailing prior to the retrospective insertion of Explanation 1 to Section 90, and that the applicable statutory provisions not having been brought to the notice of Their Lordships.

11. The fact that the Bank of Tokyo Mitsubishi decision (*supra*) is a judgment by the Hon'ble non-jurisdictional High Court and the fact that this decision does not take into account a provision of law which was on the statute at the material point of time apart, even otherwise what really matters for the doctrine of precedents is the ratio decidendi and that must essentially take into account "statements of the principles of law applicable to the legal problems disclosed by the facts". As a corollary to this legal position, unless the relevant legal position has not come up for consideration in the process of decision-making, even though the said decision will undoubtedly settle the matter between the parties and their privies, it would appear that the decision may not have precedence value. Explaining this position, a three-judge bench of Hon'ble Supreme, in the case of *Mavaliayi Service Cooperative Bank Ltd Vs CIT [(2021) 12 taxmann.com 161 (SC)]*, has observed as follows:

25. An illuminating discussion is to be found in the dissenting judgment of Justice A.P. Sen in *Dalbir Singh v. State of Punjab [1979] 3 SCR 1059*. Since the dissenting judgment refers to a principle of general application, not refuted by the majority, it is worth setting out this part of the judgment as follows:

"With greatest respect, the majority decision in *Rajendra Prasad* case does not lay down any legal principle of general applicability. A decision on a question of sentence

depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less "law declared" within the meaning of Article 141 of the Constitution so as to bind all courts within the territory of India. According to the well-settled theory of precedents every decision contains three basic ingredients:

"(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of (i) and (ii) above."

For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi. [R.J. Walker & M.G. Walker: The English Legal System. Butterworths, 1972, 3rd Edn., pp. 123-24] It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of Qualcast (Wolverhampton) Ltd. v. Haynes [LR 1959 AC 743] it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The

other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the judge is not bound to draw the same inference as drawn in the earlier case."

[Emphasis, by underlining, supplied by us]

12. In the case of Farhan A Shaikh Vs DCIT [(2021) 125 taxmann.com 253 (Bom FB)], a full bench of Hon'ble jurisdictional High has thoroughly examined, in an extended and profound discussion on the subject, the theory of binding judicial precedents, and felicitously explained the mechanism of its implementation. While it is not possible, given our limited context and purpose, to reproduce the entire profound discussion on the theory of binding judicial precedents, we may refer to a couple of important observations made by the Hon'ble jurisdictional High Court. Their Lordships have, inter alia, observed that "An issue raised not addressed or an issue that has altogether gone sub silentio cannot support a precedent". Their Lordships have also observed as follows:

It is one thing to say that a precedent should be followed; it is another to say what it means to follow a precedent. And what is a precedent, anyway? Before we answer that question, we need to accept that before a court applies the doctrine of stare decisis to a given case, it must first determine what that previous decision purports to establish.

Salmond defines a precedent as a judicial decision, "which contains in itself a principle. The underlying principle, which thus forms its authoritative element, is often termed the ratio decidendi." According to him, it is "the abstract

ratio decidendi which alone has the force of law as regards the world at large." Professor John Chipman Gray, in his *The Nature and Sources of the Law* (2d ed. 1921) 261 stresses that "it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*."

125. Putting both the above views in perspective, Allen in his *Law in the Making* (2d ed. 1930) 155, observes that "any judgment of any Court is authoritative only as to that part of it, called the *ratio decidendi*, which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true *ratio decidendi* was."

[Emphasis, by underlining, supplied by us]

13. Elsewhere in the same full bench judgment, Their Lordships have put a question to themselves as to "what binds" in a judicial precedent, and observed as follows:

What Binds?

142. Then, we can adopt Arthur L. Goodhart's assertion [15] that it is not the rule of law "set forth" by the court, or the rule "enunciated", which necessarily constitutes the principle of the case. There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow. Goodhart quotes from Oliphant's *A Return to Stare Decisis* (1927) that the predictable element in a case is "what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions."

14. Viewed in the backdrop of these discussions also, and in the light of the undisputed position that retrospective insertion

to Explanation to Section 90 did not come up for consideration before the Hon'ble Calcutta High Court, the Bank of Tokyo Mitsubishi judgement (supra) cannot be an authority for the proposition that dehors the insertion of Explanation (now Explanation 1) to Section 90, the levy of the income tax on the assessee company at a rate higher than the domestic companies can be regarded as less favourable charge.

15. In this backdrop, and having noted that this decision is from a non-jurisdictional High Court and without the benefit of analysis of the impact of retrospective insertion of Explanation to Section 90, in the light of specific guidance by Hon'ble jurisdictional High Court in the case of Thane Electricity (supra), of Hon'ble Andhra Pradesh High Court's Full Bench guidance in the case of B R Constructions (supra), Hon'ble Supreme guidance in the case of Mavaliayi Service Cooperative Bank Ltd (supra), and Hon'ble jurisdictional High Court's full bench judgment in the case of Farhan A Sheikh (supra), we are of the considered view is that Hon'ble Calcutta High Court's judgment in the case of Bank of Tokyo Mitsubishi (supra), strictly speaking, does not constitute a legally binding judicial precedent to forums like benches of the Tribunal outside the jurisdiction of Hon'ble Calcutta High Court. This judgment, whether for the post-amendment period or the pre-amendment period, is without the benefit of taking note of a critical judicial development, which has not been brought to the notice of the Hon'ble Court. Undoubtedly it has the highest persuasive value, but, in the rare circumstances when admittedly the applicable legal provisions have not been brought to the notice of Their Lordships, even this persuasive value cannot be of any help to the assessee

16. As observed by the Hon'ble Supreme Court, in the case of CIT Vs Sun Engineering Works Pvt Ltd [(1992) 198 ITR 297

(SC)). *"The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the Court must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur v. Union of India [1971] 3 SCR 9 this Court cautioned: "It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment." This decision, therefore, cannot be an authority on the implication of insertion of Explanation 1 to Section 90, because Their Lordships had no occasion to take a call on the same.*

17. *We must, therefore, be rather guided by the plain words of Explanation 1 to Section 90. as we do not have the benefit of Their Lordships guidance on the scope of this Explanation being inserted in the statute, which is the core issue requiring our adjudication. Learned counsel for the assessee has no other argument in support of the plea raised in the first ground of appeal against the applicable higher rate of tax for foreign companies.*

18. *In view of these discussions, as also bearing in mind the entirety of the case, we hold that the applicable rate of taxation, under the Income Tax Act 1961, for the assessee company cannot be read down in the light of the provisions of a double taxation avoidance agreement, as is the specific mandate of*

Explanation 1 to Section 90 or even on the first principles without the benefit of this Explanation.

19. We may also add that as for the mention, in paragraph 7 of the Bank of Tokyo Mitsubishi decision (supra), of some clarification issued by the CBDT with respect to ABN Amro Bank, even if that be so, it is only elementary that Section 119(1)(a) does not visualize issuance of a circular "so as to require any income-tax authority to make a particular assessment or to dispose of a particular assessment in a particular manner", and, therefore, such a clarification will not have any bearing on cases other than ABN Amro Bank, or the legally binding force of Section 119. In any event, even going by the observations made by the Hon'ble High Court, this communication was issued prior to 24th November 1997 - much before the retrospective insertion of Explanation 1 to Section 90 took place. With the amendment in law and with this significant change in the legal position, even if there is an old circular, issued in the context of pre- amendment law, it will not hold good any longer. Nothing, therefore, turns on the said communication either, and, in any event, even this communication has not been sighted before us.

20. In view of these discussions, and for detailed reasons set out earlier in this order, we are of the considered view that the plea of the assessee is, therefore, devoid of any sustainable merits. We reject the plea of the assessee, and decline to interfere in the matter."

5. Respectfully following the same view, we confirm the action of the AO and uphold the taxation of the assessee at the higher rate of 40% instead of 30%.
6. In the result, the appeal of the assessee is dismissed.

Order Pronounced in Open Court on 28.06.2024

Sd/-

(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-

(RENU JAUHRI)
ACCOUNTANT MEMBER

Place: Mumbai

Date 28.06.2024

ANIKET SINGH RAJPUT/STENO

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench,
Mumbai.