®

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 6TH DAY OF AUGUST, 2026

PRESENT

THE HON'BLE MR. JUSTICE D K SINGH

AND

THE HON'BLE MR. JUSTICE T.M.NADAF

INCOME TAX APPEAL NO. 3025 OF 2005
C/W
INCOME TAX APPEAL NO. 3022 OF 2005,
INCOME TAX APPEAL NO. 3023 OF 2005 &
WRIT PETITION NO. 192 OF 2011 (T-IT)

IN ITA NO. 3025/2005

BETWEEN:

1. JINDAL THERMAL POWER COMPANY LIMITED
(EARLIER KNOWN AS JINDAL TRACTEBEL
POWER COMPANY LTD.), 707
BARTON CENTRE, M.G.ROAD, BANGALORE
ALSO AT: 'RAHEJA TOWERS', EAST WING
6TH FLOOR, 26-27, M.G.ROAD
BANGALORE-560 001

...APPELLANT

(BY SRI SUHAIL DUTT, SENIOR ADVOCATE FOR
SRI T S VENKATESH, ADVOCATE ALONG WITH
SRI R S MITTAL & SRI M S SEEHA BANSAL, ADVOCATES)

AND:

1. DY. COMMISSIONER OF INCOME TAX
(TDS), BANGALORE

...RESPONDENT

(BY SRI E I SANMATHI, SENIOR STANDING COUNSEL
A/W SRI NIRMAL MATHEW, STANDING COUNSEL)

THIS ITA IS FILED U/S 260A OF THE INCOME TAX ACT, 1961 PRAYING TO SET ASIDE THE JUDGMENT AND ORDER DATED 18.05.2005 OF THE ITAT, BANGALORE, PASSED IN ITA NO.245/BANG/1999 FOR THE ASSESSMENT YEAR 1996-97 AND ETC.

IN ITA NO.3022/2005

1. JINDAL THERMAL POWER COMPANY LIMITED
(EARLIER KNOWN AS JINDAL TRACTEBEL
POWER COMPANY LTD.), 707
BARTON CENTRE, M.G.ROAD, BANGALORE
ALSO AT: 'RAHEJA TOWERS', EAST WING
6TH FLOOR, 26-27, M.G.ROAD
BANGALORE-560 001

...APPELLANT

(BY SRI SUHAIL DUTT, SENIOR ADVOCATE FOR
SRI T S VENKATESH, ADVOCATE ALONG WITH
SRI R S MITTAL & SRI M S SEEHA BANSAL, ADVOCATES)

AND:

1. DY. COMMISSIONER OF INCOME TAX
(TDS), BANGALORE

...RESPONDENT

(BY SRI E I SANMATHI, SENIOR STANDING COUNSEL
A/W SRI NIRMAL MATHEW, STANDING COUNSEL)

THIS ITA IS FILED U/S 260A OF THE INCOME TAX ACT, 1961 PRAYING TO SET ASIDE THE JUDGMENT AND ORDER DATED 18.05.2005 OF THE ITAT, BANGALORE, PASSED IN ITA NO.238/BANG/1999 FOR THE ASSESSMENT YEAR 1996-97 AND ETC.

IN ITA NO. 3023/2005

BETWEEN:

1. JINDAL THERMAL POWER COMPANY LIMITED
(EARLIER KNOWN AS JINDAL TRACTEBEL
POWER COMPANY LTD.), 707
BARTON CENTRE, M.G.ROAD, BANGALORE
ALSO AT: 'RAHEJA TOWERS'
EAST WING, 6TH FLOOR, 26-27, M.G.ROAD
BANGALORE-560 001

...APPELLANT

(BY SRI SUHAIL DUTT, SENIOR ADVOCATE FOR
SRI T S VENKATESH, ADVOCATE ALONG WITH
SRI R S MITTAL & SRI M S SEEHA BANSAL, ADVOCATES)

AND:

1. DY. COMMISSIONER OF INCOME TAX
(TDS), BANGALORE

...RESPONDENT

(BY SRI E I SANMATHI, SENIOR STANDING COUNSEL
A/W SRI NIRMAL MATHEW, STANDING COUNSEL)

THIS ITA IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961, PRAYING TO SET ASIDE THE JUDGMENT AND ORDER DATED 18.05.2005 OF THE ITAT, BANGALORE, PASSED IN ITA NO.247/BANG/1999 FOR THE ASSESSMENT YEAR 1998-99 AND ETC.

IN WP NO. 192/2011

BETWEEN:

1. M/S JSW ENERGY LIMITED
(FORMERLY KNOWN AS JINDAL TRACTEBEL

POWER COMPANY LIMITED, ERSTWHILE KNOWN
AS JINDAL THERMAL POWER COMPANY LIMITED)
HAVING ITS OFFICE AT 707, BARTON CENTRE
M G ROAD, BANGALORE
ALSO AT "RAHEJA TOWERS", EAST WING
6^{TH} FLOOR, 26-27, M G ROAD
BANGALORE-560 001
REPRESENTED BY ITS PRESIDENT AND GROUP
GENERAL COUNSEL SRI RAJINDER SHARMA
...PETITIONER

(BY SRI SUHAIL DUTT, SENIOR ADVOCATE FOR
SRI T S VENKATESH, ADVOCATE ALONG WITH
SRI R S MITTAL & SRI M S SEEHA BANSAL, ADVOCATES)

AND:

1. UNION OF INDIA
MINISTRY OF FINANCE
GOVERNMENT OF INDIA
THROUGH THE SECRETARY
DEPARTMENT OF REVENUE
NORTH BLOCK
NEW DELHI-110 001

2. DEPUTY COMMISSIONER OF
INCOME TAX (TDS)
INCOME TAX DEPARTMENT
BANGALORE

...RESPONDENTS

(BY SMT. K S ANASUYA DEVI, ADVOCATE FOR R-1;
SRI E I SANMATHI, SENIOR STANDING COUNSEL
A/W SRI NIRMAL MATHEW, STANDING COUNSEL FOR R-2)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE AMENDMENT BROUGHT IN SECTION 9(1)(vii) OF THE INCOME TAX ACT, 1961 TO EXPLANATION BY WAY OF

FINANCE ACT, 2010 AND/OR ITS RETROSPECTIVE OPERATION AND ETC.

THE ITAs AND WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 29.06.2026, COMING ON FOR PRONOUNCEMENT THIS DAY, ***HON'BLE MR.JUSTICE D K SINGH*** PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE D K SINGH
and
HON'BLE MR. JUSTICE T.M.NADAF

CAV JUDGMENT

(PER: HON'BLE MR. JUSTICE D K SINGH)

1. The appellants in ITA Nos.3022/2005, 3023/3005, and 3025/2005 and the Petitioner in W.P.No.192/2011 are the common parties and shall be referred to as Appellant-Petitioner.

I **BRIEF FACTS:**

2. The brief facts leading to the present appeals and the writ petition are as under:

The Appellant entered into contracts with Raytheon Ebasco Overseas Ltd. (REOL), Badger Energy Inc. (BEI), and Energy Overseas International Inc. (EOI) dated 20.09.1995 for

Offshore Equipment Supply and Related Services, Engineering Transportaion and Erection Services, along with Construction Materials and Erection related services respectively.

3. On 31.03.1996, the Appellant deducted base tax of Rs.20,18,071/- while crediting a part of the payments to REOL. Subsequently, the Assistant Commissioner of Income-Tax (TDS)-I, Bangalore passed an order u/s 201(1) of the Income Tax Act, 1961 for Assessment Year 1996-97 dated 23.01.1998, raising a demand of Rs.1,64,89,026/- and for Assessment Year 1997-98 dated 17.02.1998, raising a demand of Rs.15,22,95,395. The order dated 23.01.1998 was rectified by the Assistant Commissioner of Income-Tax (TDS) vide order dated 25.03.1998 passed u/s 154 of the Act, revising the demand to Rs.1,86,32,311/-. The order dated 17.02.1998 was rectified vide order dated 19.05.1998 passed u/s 154 of the Income Tax Act.

4. The Appellant filed an appeal on 21.09.1998 before the Commissioner of Income-Tax (Appeals) IV, Bangalore, challenging the orders of the ACIT-TDS dated 25.03.1998 and 19.05.1998 for Assessment Years 1996-97 and 1997-98. The

Commissioner of Income-Tax (Appeals) passed a common order dated 21.01.1999, dismissing both the appeals and confirmed the orders of the ACIT-TDS. The Commissioner held that Section 195 of the Act does not provide scope to the Appellant-Petitioner to decide to deduct tax at source or not. The Commissioner relied on CBDT Circular No. 152 dated 27.11.1974 F.No.284/31/74-FTD and Circular No. 685 dated 17.06.1994 to hold that the Appellant-Petitioner was under a statutory obligation to deduct income-tax at source on payment to a non-resident, and failure to do so will attract interest and penalty including penalty u/s 271C of the Act, along with prosecution. The Commissioner also held that since the services rendered by REOL were utilized in a business or profession carried on in India, the fees for technical services earned would be income deemed to accrued or arisen in India, and thus taxable in India as per Section 9(1)(vii) of the Act, regardless of the fact that there is no business connection between the REOL and Appellant-Petitioner. The Commissioner held that on a combined reading of Section 9(1)(vii) of the Act and Article 12(4)(b) of the India-USA DTAA, the place that is relevant is the place where services are actually utilized and not rendered, and since the services were utilized in India, the income is chargeable to tax and that tax was required to be deducted by the Appellant-Petitioner as per Section 195 r/w 200 r/w Section 201 of the Act, along with Articles 12(1), 12(2), and 12(4) of the DTAA.

5. Aggrieved by the order dated 21.01.1999, the Appellant filed an appeal before the ITAT, Bangalore dated 03.02.2005 for Assessment Years 1996-97, 1997-98, and 1998-99. Vide common impugned order dated 18.05.2005, the ITAT Bangalore, dismissed all the appeals. The ITAT held that the payment was towards 'fees for technical services' and is chargeable to tax under Section 9(1)(vii) of the Act and under Article 12(4) of the DTAA as it is arising from India and utilized such services in a business carried on in India.

6. Aggrieved by the impugned order dated 18.05.2005, the Appellant filed the present appeals.

7. On 04.01.2007, the Supreme Court in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. V. DIRECTOR OF***

INCOME TAX, MUMBAI[1] interpreted Section 9 of the Income Tax Act, 1961 and held that for income to be chargeable to tax in India, two conditions need to be fulfilled: i.e., services, which are source of income sought to be taxed in India must be (i) utilized in India and (ii) rendered in India.

8. During the pendency of the appeals, the Ministry of Finance enacted the Finance Act, 2007, which came into effect from 01.06.2007. As per the Finance Act, Section 9 of the Income Tax Act, 1961 was amended and was given effect to from 01.06.1976, thereby giving retrospective application.

> *Prior to Finance Act, 2007*
>
> *"**9.** (2) Notwithstanding anything contained in sub-section (1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in article 314 of the Constitution or to a person who, having been appointed before the 15th day of August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India."*

[1] [2007] 288 ITR 408 (SC), (2007) 3 SCC 481

After Finance Act, 2007

"9. (2) Notwithstanding anything contained in sub-section (1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in article 314 of the Constitution or to a person who, having been appointed before the 15th day of August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub-section (1), such income shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India."

9. A Coordinate Bench of this Court vide judgment and order dated 16.03.2009 in ITA No.3022, 3023 and 3025/2025 along with ITA No.3021/2005 partly allowed the appeals to the extent that the Appellant-Petitioner was entitled to a refund of tax in respect of the payment made to REOL for technical services. The Coordinate Bench interpreted Section 9(1)(vii) and Explanation to Section 9(2), holding that although the Finance

Act, 2007 removed the condition of the non-resident having a place of business or business connection, the criteria of rendering service in India and the utilization of the service in India laid down by the Supreme Court in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** to attract tax liability u/s 9(1)(vii) remained untouched and unaffected by the Explanation to Section 9(2) of the Act, thereby granting partial relief to the Appellant-Petitioner to the extent of the refund of tax in respect of payment made to REOL. Being aggrieved by the order dated 16.03.2009, the Appellant-Petitioner challenged the said order before the Supreme Court in SLP No.25295/2009.

10. During the pendency of the Special Leave Petition, the Legislature passed the Finance Act, 2010 on 08.05.2010, which further amended Section 9 of the Income Tax Act, 1961 with retrospective effect from 01.06.1976. Vide orders dated 12.07.2010 and 26.07.2010, the Supreme Court disposed of the SLP, granting liberty to the Department to move the High Court by way of review petition in light of the retrospective amendments made by the Finance Act, 2010. The amended provision is as follows:

"9. (2) Notwithstanding anything contained in sub-section (1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in article 314 of the Constitution or to a person who, having been appointed before the 15th day of August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,—

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India."

11. Pursuant to the orders dated 12.07.2010 and 26.07.2010, the Department filed Review Petitions before this Court in R.P.No.317 to 319/2010. Vide order dated 24.07.2015, a Coordinate Bench of this Court allowed the Review Petitions and restored the ITAs to the file of this court in the light of the Judgment passed by the Supreme Court in ***GVK INDUSTRIES***

LIMITED v. INCOME-TAX OFFICER reported in (2015)54 taxmann.com 347 (SC).

12. The Appellant-Petitioner filed W.P.No.192/2011 before this Court challenging the constitutionality of the Finance Act, 2010 with regard to the retrospective effect of the amendment to Section 9 of the Income Tax Act, 1961 vide Finance Act, 2010. The writ petition is connected with the ITAs and is being decided along with the ITAs.

13. Heard Sri Suhail Dutt, Learned Senior Counsel along with Learned Counsel TS Venkatesh, Learned Counsel for the Appellant-Petitioner and Sri E.I. Sanmathi, Learned Senior Standing Counsel along with Sri Nirmal Mathew, Learned Standing Counsel for the Respondent.

II <u>CONTENTIONS OF THE APPELLANT-PETITIONER:</u>

(A) <u>Requirement of territorial nexus :</u>

14. Learned Senior Counsel Sri Suhail Dutt submits that the amendment brought about by Finance Act, 2010 to Section 9(1)(vii) and Section 9(2) of the Act, do not have any effect on the judgment and order dated 16.03.2009. Reliance was placed

on the decision laid down in the case of ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** where the Supreme Court laid down the twin conditions of the services being (i) rendered in India and (ii) utilized in India to be fulfilled, for the income to be chargeable to tax. It was further submitted that since the services were rendered outside India but utilized in India, hence the twin conditions were not satisfied and the income is not chargeable to tax. The decision in the case of ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** interpreted Section 9 with the doctrine of territorial nexus i.e., there must be a nexus between the income generated and the territory of India, and noted that merely because the services were utilized in India, when the same were rendered offshore, there was no sufficient nexus towards payments made for such offshore services, to be taxable in India.

14.1 Learned Senior Counsel further placed reliance on the judgment in ***GVK INDUSTRIES LTD. V. ITO (2011) 4 SCC 36*** wherein it was held that any law needs to have sufficient nexus with India. In the present case, such nexus needs to be present, between the services rendered offshore to be taxable in India, and the income deemed to have been accrued in India. Thus, the judgment laid down by the Coordinate Bench is not liable to be reviewed. It was further submitted that in light of the judgment in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)***, the amended Explanation does not in any manner address the ratio in the said judgment that there is no sufficient nexus between the offshore services rendered and the fees paid for such services rendered outside India, with the utilization of those services in India, so as to render the same as taxable. It was further submitted that since the Finance Act, 2010 does not seek to confer any nexus in Section 9(1)(vii) between the fees paid for offshore services and utilization of the services in India, the judgment in the case of ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** still holds good and thus, the judgment dated 16.03.2009 is valid and binding.

14.2 It was further submitted that the Legislature does not have the power to levy tax without there being sufficient nexus with its fiscal jurisdiction. Instead of charging a portion of the income to tax as attributable to the Indian territory, the impugned amendment seeks to tax the total income of the non-resident, without there being any territorial nexus. 'Territorial nexus' as per Section 9 was interpreted in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** as requiring rendition and utilisation of services in India. Territorial jurisdiction must be established with the territory of India in order to subject the foreign income of a non-resident to tax. The impugned amendment goes against the settled tax rule of 'Source Rule.'

14.3 Learned Senior Counsel further submitted that mere change in law cannot be a ground for review of a settled judgment. Reliance was placed on the decision in ***BEGHAR FOUNDATION V. K.S. PUTTASWAMY (2021) 3 SCC 1.***

14.4 On the issue of retrospective application of the amendment brought out by the Finance Act, 2010 to Section 9(1)(vii) and Section 9(2), Learned Senior Counsel submitted that the application of the amendment to Section 9 by the Finance Act, 2010 cannot be made retrospective. It was submitted that even though the explanation states that it is for the removal of doubts, but in effect it alters or broadens the scope of the taxing statute, it has to be read prospectively and cannot be read retrospectively. Reliance was placed on ***ENGINEERING ANALYSIS CENTRE OF EXCELLENCE (P) LTD. V. CIT (2022) 3 SCC 321*** to contend that the liability to deduct tax cannot be made retrospective for the past period as nobody can be expected to perform an impossibility, even if it is a retrospective amendment in a tax statute. Further reliance was placed on the decision in ***M.M. AQUA TECHNOLOGIES LTD. V. COMMISSIONER OF INCOME TAX, DELHI-III (2021 SCC ONLINE SC 575),*** wherein the Supreme Court refused to read the explanation added to the Section with retrospective effect, while *inter alia* holding that a retrospective provision in Tax Law, which is for removal of doubts, cannot be presumed to be retrospective, even when such language is used, if it alters or changes the law as it stood earlier.

14.5 On the question of interpretation of expression 'removal of doubts', Learned Senior Counsel placed reliance on the following decisions:

1. ***UNION OF INDIA V. MARTIN LOTTERY AGENCIES LTD. (2009) 12 SCC 209***

2. SREE SANKARACHARYA UNIVERSITY OF SANSKRIT AND OTHERS V. DR. MANU AND ANOTHER 2023 SCC OnLine SC 640

(B) <u>Retrospective liability:</u>

14.6 Learned Senior Counsel further submitted that it is well settled law that the Assessee cannot be fastened with the liability to deduct tax on account of subsequent retrospective amendment, as the Assessee did not have the benefit of such change or clarification brought by the retrospective amendment. It was submitted that the liability to deduct tax depends on the law as it existed at the relevant time or the point of time when the subject payments were made. The liability to withhold tax for payment to non-residents, as set out in Section 195, accrues only as per the rates of income-tax as in force at that point of time. Since the Appellant-Petitioner was not subject to any rates in force at the time of making payments or at the time of credit of such income to the non-resident, the order of the Coordinate Bench dated 16.03.2009 stands valid.

14.7 It was further submitted that the Assessee cannot be compelled to perform an impossible task, relying upon the maxim '*lex non cogit ad impossibilia'*, and that there would be a disability that would make it impossible to obey the law, relying upon another maxim '*impotentia excusat legem'*. The Assessee cannot be questioned or penalised for performing an impossible task of deducting tax in accordance with the law which was retrospectively brought into force.

14.8 Learned Senior Counsel placed reliance on the following decisions:

1. ***ENGINEERING ANALYSIS CENTRE OF EXCELLENCE (P) LTD. V. CIT (2022) 3 SCC 321***

2. ***KRISHNASWAMY S. PD. V. UNION OF INDIA (2006) 3 SCC 286***

3. ***CIT V. REVATHI EQUIPMENT LIMITED (2008) 298 ITR 67***

14.9 Learned Senior Counsel submitted that the impugned amendment vide Finance Act 2010 is arbitrary and unreasonable. The impugned amendment, applicable retrospectively, must be reasonable and not excessive or harsh. It was also submitted that the assessment of tax must be made with reference to the law which is in existence at the relevant time, and the mere fact that the assessments were pending cannot be a cogent reason to retrospectively apply the amendment to pending cases of the Assessee. Reliance was placed on ***RAI RAMAKRISHNA V. STATE OF BIHAR, AIR 1963 SC 1667.***

14.10 The impugned amendment takes away the vested rights of the Appellant-Petitioner and imposes a liability for a period when the law was not in effect. An Explanation cannot take away a statutory right with which any person under the statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same. A statute should not be given retrospective operation so as to effect, alter, or destroy an existing right or create a new liability or obligation. Reliance was placed on the following cases:

4. ***BIMLA DEVI V. FIRST ADJ, AIR 1984 SC 1376***

5. ***TATA MOTORS LTD. V. STATE OF MAHARASHTRA, AIR 2004 SC 3618***

6. ***UNION OF INDIA V. PRAMOD GUPTA, (2005) 12 SCC 1***

7. ***STATE OF GUJARAT V. RAMAN LAL KESHAV LAL SONI, AIR 1984 SC 161***

8. ***K.C. ARORA V. STATE OF HARYANA, AIR 1987 SC 1858***

9. ***HARIBANS MISRA V. RLY. BOARD, AIR 1989 SC 696***

10. ***UNION OF INDIA V. TUSHAR RANJAN MOHANTY, (1994) 5 SCC 450***

11. ***CHAIRMAN, RLY. BOARD V. C.R. RANGADHAMAIAH, AIR 1997 SC 3828***

14.11 It was further contended that the withdrawal of the Board Circulars No. 23 dated 23.07.1969 and 786 dated 07.02.2000,, which clarified on the taxation of non-residents u/s 9, does not allow for retrospective withdrawal of the benefits conferred by the said circulars. The CBDT withdrew the said circulars vide Circular No. 7/2009 dated 22.10.2009, and the said action cannot result in the levy of tax on remittances to non-residents retrospectively.

14.12 It was further submitted that the impugned amendment, in the garb of a clarification, is not merely clarificatory in nature, but it brings a substantive change in the existing law. An Explanation cannot enlarge the scope of the original section, but only makes the meaning clear beyond dispute. Reliance was placed on ***M.P. CEMENT MANUFACTURERS' ASSN. . STATE OF MP, (2004) 2 SCC 249.***

III <u>CONTENTIONS OF THE RESPONDENT:</u>

15. Per contra, Sri E.I. Sanmathi, Learned Senior Standing Counsel for the Respondent submitted that the order dated 16.03.2009 passed by this Court is to be reviewed and revised in light of the amendment brought in Section 9 by the Finance Act, 2010. The Learned Senior Standing Counsel further submitted that the decision laid down by the Supreme Court in ***ENGINEERING ANALYSIS CENTRE OF EXCELLENCE (P) LTD. (SUPRA)*** cannot be referred to or relied upon as the same is under review by the Supreme Court pursuant to a Review Petition filed by the Tax Department. It was contended that the hearing in the present appeals be deferred till the review is decided by the Supreme Court.

15.1 Learned Senior Standing Counsel submitted that the Appellant-Petitioner was liable to deduct tax on the total income of the non-resident as per Sections 4, 5, 9, and 195 of the Act. Section 5(2) of the Act read with Article 12(4)(b) of the DTAA provides that the total income of a non-resident includes all incomes from whatever source derived which accrues or arises or deemed to accrue or arise in India.

15.2 Learned Senior Standing Counsel further submitted that the Appellant-Petitioner's reliance on the decision in ***ENGINEERING ANALYSIS CENTRE OF EXCELLENCE (P) LTD. V. CIT (SUPRA)*** is not applicable to the present case in light of the decision in ***GVK INDUSTRIES LTD. V. ITO (SUPRA)*** which, having similar facts to the present case, interpreted 'Source Rule', thereby holding that when a non-resident company offered services outside India for the purposes of business carried in India, and payments were made by Indian Company, then No-Objection certificate for non-deduction of tax cannot be granted, and the Non-resident Company is liable to pay tax by applying Source Rule. It was further contended that the judgment of this Court dated 16.03.2009 was before the decision in ***GVK INDUSTRIES LTD. V. ITO (SUPRA)***.

15.3 The Learned Senior Standing Counsel submitted that the judgment in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** has been distinguished by the Supreme Court in ***KANCHANGANGA SEA FOODS LTD. V. COMMISSIONER OF INCOME TAX & ANOTHER (2010) 325 ITR 0540***. It was further submitted that as it is a case of 'technical services', it falls under Article 12(4)(b) of the DTAA, which does not require a permanent establishment, and the respondent can levy tax as it is chargeable to income tax in India as per Section 4 r/s 5, 9, and 195 of the Act.

(A) <u>NO RETROSPECTIVE APPLICATION–MERELY CLARIFICATORY:</u>

15.4 On the issue of the retrospective application of the amendment brought in Section 9 by the Finance Act, Learned Senior Standing Counsel contended that the Appellant-Petitioner has no locus standi to challenge the same as the tax is payable by the non-resident and not the Appellant-Petitioner. Since Appellant-Petitioner's rights are not violated directly or substantially by the impugned amendment, the writ petition is liable to be dismissed. Reliance was placed on ***SEDCO FOREX***

INTERNATIONAL DRILL INC. V. CIT (2005) TAXMAN 352 (SC) where it was held that Explanation to a statutory provision may clear the ambiguity in the main provision or can add to and widen the scope of the main section. But if it changes the law, it is not presumed to be retrospective, irrespective of the fact that the phrase used is 'it is declared' or 'for the removal of doubts'. It was submitted that in the present case, no such change was made to law but only clarified the position that the 'source rule' applies in the main provision.

15.5 Learned Senior Standing Counsel submitted that the charge was created u/s 9(1) of the Act r/s. 4 and 5. The charge u/s 9(1)(vii) was always present and was never altered. The conditions in the Explanation in Impugned Amendment do not apply when giving effect to the charging provision of Section 9(1)(vii). It was contended that the provision in its original sense did not impose the twin conditions as set out in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA).***

15.6 Learned Senior Standing Counsel placed reliance on ***GVK INDUSTRIES LTD. V. ITO (SUPRA)*** to contend that the

Indian Legislature has the power and competence with respect to extra-territorial aspects or causes that have a nexus with India.

16. Heard the Learned Counsels for the parties. On considering the submissions of the Learned Counsels, the following issues arise for consideration:

(a) Whether the judgment dated 16.03.2009 passed by this Court is liable to be reversed/modified in light of the amendment to Section 9 vide the Finance Act, 2010?

(b) Whether the retrospective application of the amendment to Section 9 vide the Finance Act, 2010 from 01.06.1976 is unconstitutional and bad in law?

IV <u>ANALYSIS AND CONCLUSION</u>

17. Before we decide on the issues at hand, it is necessary to extract Sections 4, 5, 9(1)(vii), Explanation to Section 9(2), 195 of the Act, Article 12 of the Indo-USA DTAA:

> *"**Charge of income-tax.***
>
> ***4.** (1) Where any Central Act enacts that income-tax shall be charged for any*

assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person :

***Provided** that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.*

(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.

Scope of total income.

***5.** (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—*

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year ; or

(c) accrues or arises to him outside India during such year :

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is *derived from a business controlled in or a profession set up in India.*

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Income deemed to accrue or arise in India.

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

(vii) income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in *pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.*

Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries";

(2) Notwithstanding anything contained in sub-section (1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in article 314 of the Constitution or to a person who, having been appointed before the 15th day of August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under *clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,—*

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India.

Other sums.

195. *(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force…*

Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India.

> ***ARTICLE 12 - Royalties and fees for included services*** –
>
> ***1.*** *Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State…*
>
> ***4.*** *For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :*
>
> *(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or*
>
> *(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.*

18. It is well-settled law that a writ petition is maintainable even when there are no direct or substantial violations of any rights of the Petitioner, as long as the vires of a Statute are challenged. *In* ***WHIRLPOOL CORPORATION VS. REGISTRAR OF TRADE MARKS, MUMBAI AND ORS.***[2], the Court laid down the three conditions where the writ petition under Article 226 would be maintainable before the High Court: (i) when the writ

[2] MANU/SC/0664/1998, (1998) 8 SCC 1.

is filed for enforcement of Fundamental Rights or (ii) where there is a violation of principles of natural justice or (iii) where the vires of an Act is challenged. This was followed in ***HARBANSLAL SAHNIA V INDIAN OIL CORPN. LTD***[3]. In the present case, the vires of the impugned Finance Act, 2010 are being challenged on the ground of being unconstitutional. The Appellant-Petitioner is aggrieved by the impugned amendment on the ground that the right vested in him prior to such amendment is now taken away retrospectively, and instead, a tax liability is placed. There are a plethora of cases on the same issue, and following the same, we are of the view that the present Writ Petition is maintainable.

19. Section 4 states that tax shall be deducted at source where it is so deductible under the provisions of the Act. Section 5 states that the total income of a non-resident shall include income which is received or is deemed to be received in India in such year by or on behalf of such person or accrues or arises or is deemed to accrue or arise to him in India during such year. Section 9 provides the incomes which shall be deemed to accrue or arise in India. Sub-clause (c) of Clause

[3] (2003) 2 SCC 107.

(vii) of sub-section 2 provides for income by way of fees for technical services payable by a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India. Explanation to Section 9(2) provides that income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India, or the non-resident has rendered services in India. Section 195 states that any person responsible for paying to a non-resident, not being a company, or to a foreign company shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force. Article 12 of the India-USA DTAA provides the taxing rights of payment of Royalties and Fees for Technical Services (FTS) to the other Contracting State. Clause (4) provides as to what constitutes 'fees for technical services.'

20. Section 9 as it stood unamended did not have clause (2) on the date of the payment made by the Appellant-Petitioner to REOL. On the date of payment, the Appellant-Petitioner deducted tax u/s 195 of the Act. It was contended that the same was not required to be deducted as there was an exception granted vide Board Circulars No. 23 dated 23.07.1969 and 786 dated 07.02.2000, which provided that Section 9 brings to tax net profits of the non-resident which can be attributable to operations carried out in India, even when there is a business connection. Taking the statutory benefit, the Appellant-Petitioner claimed refund of the amount of tax deducted. Subsequently, vide Circular No. 7/2009 dated 22.10.2009, the Board withdrew the said circulars, thereby taking away the benefit of allowing tax exemption to the Appellant-Petitioner.

21. It is trite law that when a circular is issued by a tax authority, it is to be seen whether it favours the assessee by granting a benefit, or it favours the Revenue by withdrawing a benefit. A beneficial circular is to be given retrospective effect, while an oppressive circular is to be given prospective effect. In ***SUCHITRA COMPONENTS LTD.* V. *CCE* [2008] 12 STT 25**,

the Supreme Court upheld the same. This was furthered by the Supreme Court in ***CCE* V. *MYSORE ELECTRICALS INDUSTRIES LTD.* 2007 TAXMANN.COM 1555.** In the present case, the Circular dated 22.10.2009 withdrawing the exemption from tax is oppressive to the taxpayer as it widens the scope of taxability to include previously exempted assesses, thereby subjecting them to tax.

22. It is also settled that the Circular dated 22.10.2009 is to be applied prospectively and not retrospectively. This was held in a catena of decisions:

1. ***CIT V. GUJARAT RECLAIM & RUBBER PRODUCTS LTD., (2016) 383 ITR 236***
2. ***UNIT TRUST OF INDIA V. P.K. UNNY, (2001) 249 ITR 612***
3. ***CIT V. ANGELIQUE INTERNATIONAL LTD., (2013) 359 ITR 9***
4. ***SANJIV GUPTA V. DCIT [2011-TII-06-ITAT-LKW-INTL]***
5. ***SATELLITE TELEVISION ASIA REGION ADVERTISING SALES BV V. ADIT, (2010 TII 58 ITAT MUM.-INTL.)***

Thus, the withdrawal of the Circulars dated 23.07.1969 and 07.02.2000 do not take away the benefit conferred on the Appellant-Petitioner.

23. In the case of ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)***, the issue before the court was similar to the one in the present case: whether Section 9(1)(vii) requires a nexus between the services rendered by the non-resident in India, and the income generated from such services. The Court answered as follows:

> ***90.*** *Section 9(1)(vii)(c) of the Act states that:*
>
> *"9. (1)(vii)(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:"*
>
> *(emphasis supplied)*
>
> ***Reading the provision in its plain sense, it can be seen that it requires two conditions to be met—the services which are the source of the income that is sought to be taxed, has to be rendered in India, as well as utilised in India, to be taxable in India.*** *In the present case, both these conditions have not been satisfied simultaneously, therefore, excluding this income from the ambit of taxation in India.* ***Thus, for a non-resident to be taxed on income for services, such a service needs to be rendered within India,***

and has to be a part of a business or profession carried on by such person in India*. The petitioners in the present case have provided services to persons resident in India, and though the same have been used here, it has not been rendered in India.*

91. *Section 9(1)(vii) of the Act whereupon reliance has been placed by the learned Additional Solicitor General, must be read with Section 5 thereof, which takes within its purview the territorial nexus on the basis whereof tax is required to be levied, namely: (a) resident; and (b) receipt or accrual of income.*

93. *What is relevant is receipt or accrual of income, as would be evident from a plain reading of Section 5(2) of the Act. The legal fiction created although in a given case may be held to be of wide import, but it is trite that the terms of a contract are required to be construed having regard to the international covenants and conventions. In a case of this nature, interpretation with reference to the nexus to tax territories will also assume significance. Territorial nexus for the purpose of determining the tax liability is an internationally accepted principle. An endeavour should, thus, be made to construe the taxability of a non-resident in respect of income derived by it. Having regard to the internationally accepted principle and DTAA, it may not be possible to give an extended meaning to the words "income deemed to accrue or arise in India" as expressed in Section 9 of the Act. Section 9 incorporated various heads of income on which tax is sought to be levied by the Republic of India.* ***Whatever is payable by a resident to a non-resident by way of fees for technical services, thus, would not always come***

within the purview of Section 9(1)(vii) of the Act. It must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax*. Whereas a resident would come within the purview of Section 9(1)(vii) of the Act, a non-resident would not, as services of a non-resident to a resident utilised in India may not have much relevance in determining whether the income of the non-resident accrues or arises in India.* ***It must have a direct live link between the services rendered in India, when such a link is established, the same may again be subjected to any relief under DTAA.*** *A distinction may also be made between rendition of services and utilisation thereof.*

94. *Section 9(1)(vii)(c) clearly states "where the fees are payable in respect of services utilised in a business or profession carried on by such person in India".* ***It is evident that Section 9(1)(vii), read in its plain, same envisages the fulfilment of two conditions: services, which are source of income sought to be taxed in India must be (i) utilised in India, and (ii) rendered in India.*** *In the present case, both these conditions have not been satisfied simultaneously.*

95. *The provisions of Section 9(1)(vii) of the Act are plain and capable of being given a meaning. There, therefore, may not be any reason not to give full effect thereto. However, even in relation to such income, the provisions of Article 7 of DTAA would be applicable, as services rendered outside India would have nothing to do with permanent establishment in India. Thus, if any services have been rendered by the head office of the appellant outside India, only because they were connected with permanent establishment (sic). Even in relation* *thereto, principle of apportionment shall apply."*

24. Thus, as per the Supreme Court, Section 9(1)(vii)(c) required the fulfillment of twin conditions in order for the income to be chargeable to tax: the services must be (i) rendered through a business or profession in India and (ii) must be utilized in India. Upon fulfillment of these twin conditions, the income will be chargeable to tax in the hands of the non-resident as per Section 5 of the Act. If either of the conditions are not fulfilled, then income is not chargeable to tax.

25. Subsequent to the above decision, the Finance Act, 2007 was enacted on 01.06.2007, which amended Section 9 by including an Explanation to Section 9(2) as follows:

> *"Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub-section (1), such income shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India."*

26. The Judgment laid down the twin conditions of services being rendered & utilized in India in order for income from such services to be chargeable to tax. In other words, the Supreme Court integrated the territorial nexus doctrine with the provisions of the Act in light of the DTAA. Thus, for taxability under Section 9(1)(vii), there should be a nexus between the income generated, the services rendered, and the territory of India. On a reading of the Explanation, it is evidently clear that the Legislature intended to nullify the judgment and order passed in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** to the extent that there need not be any territorial nexus between the services rendered and the territory of India. In other words, the amendment seeks to clarify that for income to be chargeable to tax, the services rendered need not be in the territory of India. The non-resident is not required to have a place of business or a business connection in India for the purposes of rendering services. Therefore, the amendment vide Finance Act, 2007 seeks to tax income as long as the services are utilized in India, irrespective of the non-resident having a business connection or a place of business in India.

27. This Court in the impugned order dated 16.03.1999 interpreted the amendment brought by the Finance Act, 2007 and held as follows:

> *"The explanation incorporated in Section 9(2) declares that 'where the income is deemed to accrue or arise in India under clauses (v)(vi)(vii) of sub-section(1), such income shall be included in the total income of the non-resident; whether or not the non-resident has a residence or business or business connection in India.' The plain reading of the said provision suggests that criterion of residence, place of business, or business connection of a non-resident in India has been done away with for fastening tax liability. However, the criteria of rendering service in India and the utilization of the service in India as laid down by the Supreme Court in Ishikawajma's case to attract tax liability u/s 9(1)(vii) remains untouched and unaffected by the explanation to Section 9(2).*
>
> *When the purport of the explanation to Section 9(2) is plain in its meaning, it is unnecessary and impermissible to refer to the Memorandum explaining the Finance Bill 2007. Therefore, it is explicit from the reading of Section 9(1)(vii)(c) and explanation to Section 9(2) that the ratio laid down by the Supreme Court in Ishikawajma's case still holds the field."*

28. It is contended by the Learned Senior Counsel for the Appellant-Petitioner that the decision in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** is applicable to

the facts in the present case in respect of income not being chargeable to tax.

29. Subsequent to the passing of the impugned order, the Finance Act, 2010 was passed to include the following explanation after Section 9(2) with retrospective application from 01.06.1976:

> *"Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,—*
>
> *(i) the non-resident has a residence or place of business or business connection in India; or*
>
> *(ii) the non-resident has rendered services in India."*

30. On a reading of the same, it can be noticed that another criteria has been added to the Explanation: the rendering of services. As a result of this amendment, the income from technical services is chargeable to tax when the services are utilized in India. This amendment virtually neutralized one of

the criteria to be fulfilled as laid down in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA).*** In other words, the condition of the services to be rendered in India is done away with, and as long as the services are rendered in India, income from such services is liable to be taxed.

31. It is well settled law that a mere change of law is not a sufficient reason for the court to re-open and review matters which are already decided. In ***BEGHAR FOUNDATION V. K.S. PUTTASWAMY (AADHAAR REVIEW-5 J.), (2021) 3 SCC 1***, a 5-Judge Bench of the Supreme Court held that change in the law or subsequent decision/judgment of a coordinate or larger Bench by itself cannot be regarded as a ground for review. In ***K. VASUDEVAN, IN RE, 1943 SCC ONLINE MAD 277***, the Madras High Court held that the passing of the Amending Act, even though it changed the law with retrospective effect, was not a sufficient reason for re-opening matters which were already decided on the basis of the law as it stood before the amendment. In the present case, it is rightly contended by the Learned Counsel for the Appellant-Petitioner that the change in law vide the amendments in Finance Acts 2007 and 2010 are not sufficient grounds for this Court to sit in review. However,

since these amendments concern retrospective application of the same, we shall decide the issue of such retrospective application first.

32. As rightly contended by the Counsel for Appellant-Petitioner, a clarificatory provision using the phrase 'for the removal of doubts' needs to be read prospectively, when in effect alters or broadens the scope of taxing statute. In ***M.M. AQUA TECHNOLOGIES LTD. V. CIT, (2021) 19 SCC 816***, it was held as follows:

> *"**19.2.** Second, a retrospective provision in a Tax Act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in Sedco Forex International Drill. Inc. v. CIT [Sedco Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717] as follows : (SCC pp. 724-25, paras 17-19)*
>
> > *"17. As was affirmed by this Court in Goslino Mario [CIT v. Goslino Mario, (2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute & Industries Ltd. v. CIT [Reliance Jute & Industries Ltd. v. CIT, (1980) 1*

SCC 139 : 1980 SCC (Tax) 67] .) ***An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section*** *[See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585 at p. 598] .* ***If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force*** *[See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24, para 44; Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352 at p. 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482 at p. 506] .* ***But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".***

18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in S.G. Pgnatale [CIT v. S.G. Pgnatale, 1980 SCC OnLine Guj 138 : (1980) 124 ITR 391] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with

> *effect from 1979, 'income payable for service rendered in India'.*
>
> *19.* ***When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively****."*
>
> *This being the case, Explanation 3-C is clarificatory — it explains Section 43-B(d) as it originally stood and does not purport to add a new condition retrospectively, as has wrongly been held [CIT v. M.M. Aqua Technologies Ltd., 2015 SCC OnLine Del 9537] by the High Court."*

33. In the present case, the phrase 'for the removal of doubts' in Explanation to Section 9(2) of the Act added by the impugned Amendment is applicable from 01.06.1976. Such retrospective application of the amendment, which is admittedly a mere clarification by the Legislature, is to be interpreted in a prospective manner. The benefits accrued to the Appellant-Petitioner from such provision prior to the impugned Amendment cannot be taken away by the retrospective application of a mere clarification. A provision of law added by an amendment under the garb of a clarification

cannot create a fresh charge of tax and impose tax liability on an assessee whose transaction was not covered by the said amendment. It is well settled that retrospective amendments cannot impose a tax liability on the Assessee. In ***UNION OF INDIA V. MARTIN LOTTERY AGENCIES LTD. (2009) 12 SCC 209***, the Supreme Court held that an Explanation clause, which appears to be a charging provision and widens the taxing net, cannot be held to be retrospective in operation on the premise that it is clarificatory or declaratory in nature. Relevant paragraphs are as follows:

> *"**33.** The Explanation so read appears to be a charging provision. It states about taxing need. It can be termed to be a sui generis tax. If it is a different kind of tax, the same may be held to be running contrary to the ordinary concept of service tax. It may, thus, be held to be a stand alone clause. A constitutional question may have to be raised and answered as to whether the taxing power can be segregated.* ***If by reason of the said Explanation, the taxing net has been widened, it cannot be held to be retrospective in operation.***
>
> ***34. No doubt, the Explanation begins with the words "for removal of doubts". Does it mean that it is conclusive in nature? In law, it is not. It is not a case where by reason of a judgment of a court, the law was found to be vague or ambiguous.*** *There is also nothing to show that it was found to be vague or ambiguous by the executive. In*

> *fact, the Board circular shows that invocation of sub-clause (ii) had never been in contemplation of the taxing authorities.*

34. From a combined reading of the decision of ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA),*** the amendment brought in by the Finance Act, 2007, the decision of this Court dated 16.03.2009, and the impugned amendment, it can be observed that the Legislature, under the garb of issuing clarificatory amendments, is creating fresh charges on the non-residents under Section 9(1)(vii), thereby going against the decision and interpretation as laid down in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA).*** The effect of the impugned amendment is to nullify the judgment in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** as well as the decision of this Court dated 16.03.2009.

35. The Learned Senior Standing Counsel contended that the decision in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** which laid down the twin conditions of the services 'not only being rendered but also utilised in India', is not the true intention of the Legislature. Reliance was placed on

the Explanatory notes to the Provisions of Finance Act, 2010, whereby it was clarified that the intention of the legislature to use the source rule was to tax the income deemed to accrue or arise in India on the basis of the place of utilisation of such service and not the place of rendition of such service. Thus, from the combined reading of Sections 4, 5, 9(1)(vii) and Explanation to 9(2) of the Act, the charge was always there, and the impugned amendment is a mere clarification.

36. At the cost of repetition, it is already discussed that the charging section cannot be widened or altered in its scope under the garb of a clarification which applies retrospectively. It then effectively becomes a charging provision. However, the language of Section 9(1)(vii) is not altered. Clause (c) provides that *a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India*. The phrase 'business or profession carried on by such person in India' still holds the interpretation as laid down in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA)*** i.e., requiring the condition of the service to be

rendered in India. The decision of this Court dated 16.03.2009 interpreted that the operation of the Finance Act, 2007 does not affect the interpretation of Section 9 as laid down in ***ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES LTD. (SUPRA),*** we do not have any hesitation to hold that the impugned amendment does not have any effect on the interpretation of Section 9 as per the *ISHIKAWAJMA* Case.

37. Even if it were to be construed that the impugned amendment is valid and alters the interpretation of Section 9, Article 12(4) of the India-USA DTAA provides that the fees for technical services is paid for the services *rendered* and not utilised. Following the settled principle of law as laid down in Section 90(2) of the Act, when there is a possibility of two interpretations of domestic law i.e., the Income Tax Act, 1961 vis-à-vis a tax treaty, the one more beneficial to the Assessee must be taken. In the present case, we are inclined to follow the same and hold that the impugned amendment widening the scope of taxability is contrary to the India-USA DTAA and settled principles of law.

38. The Learned Senior Standing Counsel further relied upon the decision laid down by the Supreme Court in ***SEDCO FOREX INTERNATIONAL DRILL INC. V. CIT (SUPRA)*** to contend that the Explanation clause added by the impugned Amendment is not changing the law by widening the scope of the main section, unlike the facts in the case relied upon. However, the decision goes contrary to the stand of the Respondent and instead favours the Appellant-Petitioner. The Explanation introduced by the impugned Amendment adds more people under the taxing umbrella. Vide the Finance Act 2007, the taxing umbrella widened to include non-residents who do not have a residence or place of business or business connection in India. Subsequently, vide the impugned Amendment Act, the taxing umbrella was widened to include non-residents who do not render services in India. This widening of the scope of the charging provision is virtually creating a charge on the taxpayers. By altering the scope of the charging provision i.e., Section 9(1)(vii) r/s. 4 and 5, the impugned amendment is creating a fresh levy of tax liability on the assessee with retrospective effect, which is contrary to the settled principles of law.

39. The Supreme Court in ***SEDCO FOREX INTERNATIONAL DRILL INC. V. CIT (SUPRA)*** held as follows:

> *"**10.** In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT v. S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] was followed in 1989 by a Division Bench of the Gauhati High Court in CIT v. Goslino Mario [(2000) 241 ITR 314 (Gau)] . It found that the 1983 Explanation had been given effect from 1-4-1979 whereas the year in question in that case was 1976-77 and said: (ITR p. 318)*
>
> > ***"[I]t is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has (sic) somehow remained pending on 1-4-1979, cannot be cogent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at hand."***
>
> ***11.** The reasoning of the Gauhati High Court was expressly affirmed by this Court in CIT v. Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] . These decisions are thus authorities for the proposition that the 1983 Explanation expressly introduced with effect from a particular date would not effect the earlier assessment years.*
>
> ***13.** The Explanation as introduced in 1983 was construed by the Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49*

(Ker)] while following the Gujarat High Court's decision in S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] to hold that the Explanation was not declaratory but widened the scope of Section 9(1)(ii). It was further held that even if it were assumed to be clarificatory or that it removed whatever ambiguity there was in Section 9(1)(ii) of the Act, it did not operate in respect of periods which were prior to 1-4-1979. It was held that since the Explanation came into force from 1-4-1979, it could not be relied on for any purpose for an anterior period.

17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139 : 1980 SCC (Tax) 67] .) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24] . If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506] . But if it changes the law it is not presumed to be retrospective, irrespective of the fact that

> ***the phrases used are "it is declared" or "for the removal of doubts"***.
>
> ***19.*** *When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively.*

40. Accordingly, all the appeals as also the writ petition are allowed. The impugned Amendment Act – Finance Act 2010 – is to be read down as prospectively applicable and not retrospectively applicable from 01.06.1976. The Review Petitions in R.P.Nos.317 to 319/2010 stand dismissed.

Pending interlocutory applications, if any, do not survive for consideration and accordingly, they stand disposed of.

Sd/-
(D K SINGH)
JUDGE

Sd/-
(T.M.NADAF)
JUDGE

BKV
CT:SN