IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 4325 OF 2024

Hindustan Unilever Ltd.
Unilever House,
B.D. Sawant Marg, Chakala,
Andheri East, Mumbai – 400 099. … Petitioner

Versus

1. The Deputy Commissioner of Income-tax
(International Taxation), Circle-2(2)(2),
Bandra (East), Mumbai. …Respondents

2. Union of India
Through the Joint Secretary & Legal Advisors
Branch Secretariat, Dept. of Legal Affairs,
Ministry of Law and Justice,
Aayakar Bhavan, Mumbai- 400 020.

Mr. J.D. Mistri, Senior Advocate a/w. Mr. Ankul Goyal, Mr. P.C. Tripathi i/b. Mr. Atul Jasani for the petitioner.
Mr. N. Venkatraman, ASG a/w. Ms. Shilpa Goel for the respondents.

CORAM: G. S. KULKARNI &
SOMASEKHAR SUNDARESAN, JJ.
RESERVED ON : 20 September, 2024
PRONOUNCED ON: 23 September, 2024

Oral Order (Per G.S. Kulkarni, J.):

1. This petition filed under Article 226 of the Constitution of India assails an order dated 23 August, 2024 passed by the Deputy Commissioner of Income-tax under section 201(1) raising a demand and interest under section

201(1A) of the Income-tax Act, 1961 (for short **"the Act"**) against the petitioner of an amount of Rs.962,75,14,624/-. The demand in question is *inter alia* on the basis that the petitioner did not comply with the provisions of Section 195 of the Act to deduct tax at source (TDS) in relation to the acquisition/purchase of a Trade Mark registered in India, namely, of a Health Food Drink of the brand Horlicks ("India HFD IP"), by the petitioner from the foreign/non-resident group entities of GlaxoSmithKline Plc. who assigned such rights in favour of the petitioner under an Assignment Deed dated 1 April, 2020. The petitioner paid the foreign assignors an amount of Rs.3045.14 crores (EUR 375.6 million), which was remitted by the petitioner against the invoice raised by Horlicks Ltd., a British Company(HUK).

2. On 7 October, 2022, a notice under section 133(6) of the Act was issued by the Deputy Commissioner of Income-tax/Assessing Officer to the petitioner calling upon the petitioner to furnish a detailed note of the nature of transaction qua the foreign remittance. Between the period October, 2022 and January, 2023, multiple notices under section 133(6) were issued seeking details of the transactions. Such notices were duly responded by the petitioner and also at times, seeking extension of time.

3. It is the case of the petitioner that on 28 February, 2023, a notice

under section 201 of the Act was issued to the petitioner *inter alia* recording that in connection with the proceedings under section 201 of the Act for the assessment year in question (AY 2021-22) the petitioner should submit details, namely, the valuation report from Ernest & Young (E&Y) about the valuation of 375 million Euro for FY 2020-21 on the trademark of Horlicks brand "pertaining to India". The petitioner was also called upon to show cause as to why such trademark "Horlicks" should not be considered as a capital asset situated in India, basis the above valuation report of E&Y at the time of sale. The petitioner has stated that thereafter various notices were issued under section 201 read with Section 133(6) of the Act, which were duly replied by the petitioner.

4. The petitioner next contended that on 11 March, 2024 a detailed show cause notice under section 201 of the Act was issued to the petitioner calling upon the petitioner to show cause as to why consideration paid for assignment of India specific Intellectual Property Rights, be not held to be in lieu of acquisition of assets situated in India. The petitioner in response to the said notice, addressed letter dated 15 March, 2024 to the Deputy Commissioner *inter alia* requesting the Deputy Commissioner to grant adjournment for four weeks from 15 March, 2024, as the petitioner was

occupied with last quarter advance tax compliance and it needed time to file a response to the detailed show cause notice issued by the department. The petitioner recorded that the petitioner may require time for seeking/collating information from external stakeholders so as to respond to the show cause notice, hence extension of time will facilitate the petitioner to address all the queries effectively. Quite significantly, it was stated by the petitioner that the proceeding is "*not time barring*", while making a request for extension of time. The following contents in that regard are required to be noted, which reads thus:

> "**Further, as the proceeding is not time barring, we request your support for extension of time**. We once again reiterate our commitment to provide all the information available to us as the taxpayer and are committed to being a compliant assessee, as always.
>
> We apologize for any inconvenience caused to your goodself in this regard. We trust you will accede to our request and oblige. We assure full cooperation to respond to your notice."
>
> (emphasis supplied)

5. It is the petitioner's case that further two notices were issued to the petitioner, on 18 March, 2024. On 22 March, 2024, the petitioner filed reply to the show cause notice dated 11 March, 2024 intending to establish its *bona fides* with regard to non-taxability of the payments. The petitioner *inter alia* contended that the issue qua the basis of the demand stood covered in favour

of the petitioner by the decision of the Delhi High Court in the case of **CUB PTY Ltd. (formerly known as Foster's Australia Ltd.) vs. Union of India & Ors.**[1] as also the decision of this Court in **Mahyco Monsanto Biotech (India) Pvt. Ltd. vs. Union of India & Ors.**[2]

6. The petitioner has contended that another notice dated 27 March, 2023 under section 201 of the Act was issued by the Deputy Commissioner to the petitioner granting additional time to make submissions on or before 12 April, 2024. On 8 April, 2024, the petitioner filed a reply clarifying that no additional time was sought by the petitioner as petitioner's submissions were already on record.

7. It is on the aforesaid conspectus, the Deputy Commissioner of Income-tax passed the impugned order dated 23 August, 2024 under section 201 of the Act wherein it is held that the purchase of intellectual property "India HFD IP" was sale of an intellectual property (asset) situated in India liable to be taxed as capital gains. The petitioner was treated as an assessee-in-default for non-deduction of tax and accordingly a demand of Rs.962,75,14,624/- was raised which was payable by 21 September, 2024.

[1] (2016) 388 ITR 617

[2] 2016 SCC OnLine Bom 5274

Consequent to such demand, on 4 September, 2024, a notice under section 271C of the Act was issued to the petitioner initiating penalty proceedings for non-deduction of TDS.

8. In the aforesaid circumstances, the present petition has been filed assailing the impugned order dated 23 August, 2024 passed by the Deputy Commissioner of Income-tax under section 201(1) and (1A) raising a demand against the petitioner as noted us by us hereinabove.

9. Mr. Mistri, learned senior counsel for the petitioner has made detailed submissions. At the outset, Mr. Mistri would submit that in the acquisition/ purchase of the trade mark in question, although the trade mark is an intellectual property registered in India, the owner of the same being a foreign entity, such acquisition does not involve transfer of a capital asset in India, so as to attract any capital gains, falling within the purview of Section 9(1)(i) of the Act. It is his submission that for such reason there was no obligation on the petitioner under the provisions of Section 195 of the Act to deduct tax at source. It is Mr. Mistri's submission that the issue in regard to such acquisition of an intellectual property not attracting any obligation to 'deduct tax at source' is no more *res integra* in view of the decision of the Delhi High Court in **CUB Pty Ltd.** (supra). It is Mr. Mistri's submission that

in such context the view taken by the Deputy Commissioner in the impugned order is in the teeth of the judgment of the Delhi High Court in **CUB PTY Ltd.** (supra). It is thus submitted that on the ground of judicial discipline, the impugned order is required to be held to be illegal and accordingly deserves to be quashed and set aside. Mr. Mistri has also criticized the tenor of the Assessing Officer in commenting on the said judgment of the Delhi High Court. It is his submission that the observations as made by Assessing Officer that the judgment of the Delhi High Court is *per incuriam* shows complete lack of propriety as also it undermines the authority of the Court. It is Mr. Mistri's submission that the decision of the Delhi High Court in fact settles the issue that such acquisition/ purchase of Intellectual Property Rights as involved in the present case would not attract the provisions of Section 201 of the Act and as there was no obligation whatsoever on the petitioner to deduct tax considering it to be a domestic transaction.

10. Mr. Mistri would next submit that the impugned order would be also required to be held to be illegal when tested on limitation, inasmuch as the same is not passed within a period of one year from the date of initiation of the proceedings, which according to Mr. Mistri needs to be on 28 February 2023 when a notice under Section 201 was issued to the petitioner. It is submitted

that the limitation of one year is held to be reasonable period by the Income Tax Appellate Tribunal in the case of **Mahindra and Mahindra Limited,** which came to be accepted by this Court in the decision of **Director of Income Tax (International Taxation) Vs. Mahindra and Mahindra Limited**[3]. It is therefore Mr. Mistri's submission that the petition needs to be admitted and interim relief is required to be granted.

11. On the other hand, Mr. N. Venkatraman, learned Additional Solicitor General has opposed the admission of the petition and the interim reliefs as prayed by the petitioner. At the outset, Mr. Venkatraman would submit that the Writ Petition ought not to be entertained as the petitioner has an efficacious alternate remedy of an appeal under Section 253 of the Income Tax Act. In support of such submission Mr. Venkatraman would submit that the issues as raised by the petitioner would require determination of several aspects involving adjudication on facts and law, and such enquiry can be effectively gone into in the appellate proceedings. It is submitted that the impugned order which is a detailed order of about 179 pages, would certainly require adjudication before the appellate forum. It is submitted that it is thus not appropriate for the petitioner, to call upon this Court to exercise its

3 2014 SCC OnLine Bom 693

extraordinary jurisdiction under Article 226 of the Constitution to examine such factual matrix under the garb of a case on the legal issues as being made out by the petitioner. It is also his submission that the entire interest of the petitioner is to by-pass the statutory remedy, with the sole intent to seek a stay on the impugned order, without making a deposit which would be necessary when pursuing an appeal.

12. On the issues as raised by the petitioner, Mr. Venkatraman would submit that the approach of the Deputy Commissioner in passing the impugned order, is legal and valid, inasmuch as in initiating an action under Section 201 and raising the demand in question on the transactions in question, the Assessing Officer has taken into consideration the well settled principles of law on the territoriality principle as laid down by the Supreme Court in **Toyota Jidosha Kabushiki Kaisha Vs. Prius Auto Industries Limited & Ors.**[4]. Applying such principles, it is Mr. Venkatraman's submission that the territoriality principle would govern the matter inasmuch as the trade mark as purchased by the petitioner by virtue of its registration under the Trade Marks Act, 1956, would necessarily be required to be held to be an asset, within the territory of the country. It is submitted that for such reason, it would be

[4] (2018) 2 SCC 1

required to be held to be purchase of an asset, attracting the provisions of Section 195 of the Income Tax Act requiring deduction of tax at source. It is submitted that this principle has been recognized by the Deputy Commissioner/Assessing Officer in initiating action against the petitioner under Section 201.

13. Mr. Venkatraman would next submit that the petitioner's reliance on the decision of the Delhi High Court, is not correct, inasmuch as the Delhi High Court has not considered the effect of registration of a Trade Mark and the applicability of the provisions of the Trade Mark Act. It is his submission that in any event, all these issues are issues of facts and law which can be appropriately considered in the appellate proceedings and for such reason the extraordinary jurisdiction of this Court under Article 226 of the Constitution ought not to be exercised. Accordingly, Mr. Venkatraman has submitted that the petition be dismissed.

14. On Mr. Mistri's submission on the tenor and irresponsible language used by the Deputy Commissioner in commenting on the decision of the Delhi High Court in **CUB PTY Ltd.** (supra), Mr. Venkatraman would submit that there cannot be any justification to such observations. He agrees that apart from being totally unwarranted, such observations wholly lacked

propriety. He is apologetic about such observation made by the Deputy Commissioner. He submits that departmentally, a strict view of such observations would be taken. It is also his submission that however this ought not to be a ground, for an otherwise detailed and well reasoned order, to be interfered by the Court in the present proceedings, as according to him the impugned order is an extensive order, on the issues as involved. It is submitted that if at all the petitioner is aggrieved by the same, an appropriate remedy for the petitioner is to avail of a statutory appeal.

Analysis and Conclusion

15. We have heard learned counsel for the parties. With their assistance, we have also perused the record. More particularly we have carefully gone through the relevant provisions referred during the course of the arguments.

16. At the outset, we may observe that as the impugned order is passed under Section 201 (1) and sub section (1A) read with Section 195 of the Income Tax Act, an alternate remedy of an appeal is available to the petitioner under the provisions of Section 253 of the Act as urged on behalf of the Revenue. In such context the foremost question would be whether we entertain this writ petition, which would amount to permitting the petitioner -

assessee, to bypass the two fold appellate remedies as provided by law, and available to the petitioner? To determine such question we would examine whether the petitioner has made out any case of patent illegality of the impugned order and / or of any gross jurisdictional error going to the root of the proceedings, so that an exception needs to be carved out, to deviate from the well settled principle of law, that once a statutory remedy as prescribed by law is available, a litigant needs to take recourse to such statutory remedy. In deciding such question we would certainly adhere to the principles of uniformity and not look merely at the quantum of the tax involved as the issue for consideration on entertainability of the petition is certainly a legal issue. We have examine such issues. The following discussion would aid our conclusion:

17. Mr. Mistri's submission that the petition be entertained is primarily on two grounds. Firstly, the impugned order is in the teeth of the principles of law in regard to the situs or location of intellectual property namely, the Trade Mark was not in India and hence, there was no question of the provisions of Section 195 being attracted requiring the petitioner to deposit tax at source and consequently for any action to be initiated against the petitioner under Section 201 of the Act. It is submitted that the decision of the Delhi High Court in

CUB Pty Limited (supra) is followed by Division Bench of this Court in **Mahyco Monsanto Biotech (India) Private Limited (Supra),** squarely covered the issue. Hence, the Deputy Commissioner had no jurisdiction or he has illegally exercised jurisdiction to pass the impugned order.

18. Responding to the above submissions of Mr. Mistri, Mr. Venkataraman has relied on the provisions of Section 38 of the Trade Marks Act, 1999 which provides for assignability of Trade Mark to contend that Section 38 begins with a *non-obstante* clause to the effect "*notwithstanding anything in any other law to the contrary a registered trade mark shall, subject to the provisions of Chapter V (Assignment and Transmission), be assignable and transmissible, whether with or without the goodwill of the business concerned and in respect either of all the goods or services*". It is thus his submission that the trademark in question as dealt / acquired by the petitioner necessarily was an intellectual property available for sale in India attracting the provisions of the Income Tax Act, whereunder the petitioner was liable to deduct tax at source in purchasing such property. It is hence submitted that such acquisition squarely fell within the provisions of Section 9(1)(i) read with Section 195 of the Act. According to him, as admittedly there was a non-compliance of the TDS obligation, rightly action under Section 201 of the Act

was initiated against the petitioner.

19. It is Mr. Venkataraman's submission that the effect of the provisions of the Trademark Act and such asset being available in the Country for its sale was not the subject matter of consideration in the decision of the Delhi High Court in **CUB PTY Pvt. Ltd**. as also referred to in **Mahyco Monsanto Biotech (India) Private Limited** (supra). It is also Mr. Venkatraman's submission that when the intellectual property in question was registered under the Trade Marks Act and was available as an asset to be dealt, the territoriality principle had become applicable, as discussed in detailed in the impugned order. It is his submission that the principles of territoriality are now well recognized in the Indian jurisprudence as held by the Supreme Court in the decision of **Toyota Jidosha Kabushiki Kaisha (supra)**. The following observations of the Supreme Court in such decision are relied upon:

> "28. Whether a trade mark is to be governed by the territoriality principle or by universality doctrine? Prof. Cristopher Wadlow in his book "The Law of Passing-Off8" has analysed the problem and its possible resolution in the following words:
>
> > "in the worst case, an international company seeking to expand into a new territory may find itself blocked by a small business already trading under the same name or style, perhaps on a miniscule scale; and perhaps having been set up for the very same purpose of blocking anticipated expansion by the claimant or being bought out

> for a large sum. On the other hand, a rule of law dealing with this situation has to avoid the opposite scenario of bona fide domestic traders finding themselves open to litigation at the suit of unknown or barely-known claimants from almost anywhere in the world. Some of the more radical proposals for 8 5th Edn., Sweet & Maxwell changing the law to assist foreign claimants ignore the need for this balancing exercise, without which the opportunities for abuse are simply increased, and further uncertainty created"

33. The overwhelming judicial and academic opinion all over the globe, therefore, seems to be in favour of the territoriality principle. We do not see why the same should not apply to this Country.

34. To give effect to the territoriality principle, the courts must necessarily have to determine if there has been a spill over of the reputation and goodwill of the mark used by the claimant who has brought the passing off action. In the course of such determination it may be necessary to seek and ascertain the existence of not necessarily a real market but the presence of the claimant through its mark within a particular territorial jurisdiction in a more subtle form which can best be manifested by the following illustrations, though they arise from decisions of Courts which may not be final in that particular jurisdiction.

38. The next exercise would now be the application of the above principles to the facts of the present case for determination of the correctness of either of the views arrived at in the two-tier adjudication performed by the High Court of Delhi. Indeed, the trade mark 'Prius' had undoubtedly acquired a great deal of goodwill in several other jurisdictions in the world and that too much earlier to the use and registration of the same by the defendants in India. But if the territoriality principle is to govern the matter, and we have already held it should, there must be adequate evidence to show that the plaintiff had acquired a substantial goodwill for its car under the brand name 'Prius' in the Indian market also. The car itself was introduced in the Indian market in the year 2009-2010. The advertisements in automobile magazines, international business magazines; availability of data in information-disseminating portals like Wikipedia and online Britannica dictionary and the information on the internet, even if accepted, will not be a safe basis to hold the existence of the necessary goodwill and reputation of the product in the Indian market at the relevant point of time, particularly having regard to the limited online exposure at that point of time, i.e., in the year 2001. The news items relating to the launching of the product in Japan isolatedly and singularly in the Economic Times (Issues dated 27.03.1997 and 15.12.1997) also do not firmly establish the acquisition and existence of goodwill and reputation

of the brand name in the Indian market. Coupled with the above, the evidence of the plaintiff's witnesses themselves would be suggestive of a very limited sale of the product in the Indian market and virtually the absence of any advertisement of the product in India prior to April, 2001. This, in turn, would show either lack of goodwill in the domestic market or lack of knowledge and information of the product amongst a significant section of the Indian population. While it may be correct that the population to whom such knowledge or information of the product should be available would be the section of the public dealing with the product as distinguished from the general population, even proof of such knowledge and information within the limited segment of the population is not prominent.

39. All these should lead to us to eventually agree with the conclusion of the Division Bench of the High Court that the brand name of the car Prius had not acquired the degree of goodwill, reputation and the market or popularity in the Indian market so as to vest in the plaintiff the necessary attributes of the right of a prior user so as to successfully maintain an action of passing off even against the registered owner. In any event the core of the controversy between the parties is really one of appreciation of the evidence of the parties; an exercise that this Court would not undoubtedly repeat unless the view taken by the previous forum is wholly and palpably unacceptable which does not appear to be so in the present premises.

40. If goodwill or reputation in the particular jurisdiction (in India) is not established by the plaintiff, no other issue really would need any further examination to determine the extent of the plaintiff's right in the action of passing off that it had brought against the defendants in the Delhi High Court. Consequently, even if we are to disagree with the view of the Division Bench of the High Court in accepting the defendant's version of the origin of the mark 'Prius', the eventual conclusion of the Division Bench will, nonetheless, have to be sustained. We cannot help but also to observe that in the present case the plaintiff's delayed approach to the Courts has remained unexplained. Such delay cannot be allowed to work to the prejudice of the defendants who had kept on using its registered mark to market its goods during the inordinately long period of silence maintained by the plaintiff."

(emphasis supplied)

20. Considering the issues as involved and the contentions as urged on behalf of the parties, we are of the opinion that necessarily mixed issues of fact

and law arise for consideration in the present proceedings in testing the impugned order on its merits, which would include applicability of the principles of territoriality as recognized by the Supreme Court in **Toyota Jidosha Kabushiki Kaisha (Supra)**. Also the petitioner's contention relying on the decision in **Cub Pty Limited** (supra) of the Delhi High Court when it recognizes principles of situs of the Trade Mark being of the ownership of the foreign entity, whether would apply in the facts of the present case, and more particularly on examining the different clauses / terms and conditions of the agreement, so as to be considered that the situs fell outside India, are issues which can be effectively gone into by the Appellate Authority, for appropriate findings of fact to be recorded and thereafter the issue being tested on the principles of law as laid down in the different decisions being relied on behalf of the parties. It would thus be certainly within the jurisdiction of the Appellate Authority to apply its mind and take an appropriate view of the matter by considering the materials, including examining the agreement on its merits and the legal status of the asset as available in the Indian market, by virtue of its registration and the applicability of the provisions of the Trade Marks Act.

21. Mr. Venkatraman appears to be correct in his contention that the

principles of territoriality as also applicability of the provisions of the Trade Marks Act were issues not placed for consideration of the Delhi High Court in **CUB Pty Limited (Supra).** In our opinion, it may not be correct for Mr. Mistri to contend that merely because there is a decision of the Delhi High Court as relied by the petitioner and which has been held to be not applicable by the Deputy Commissioner, we need to nonetheless conclude that the issue as sought to be urged by the petitioner would stand concluded by such decision. This would also not bring about a situation that the impugned order for such reason would be required to be held to be without jurisdiction, calling for interference of the Court in the writ jurisdiction. To accept such proposition would be too extreme, as issues of jurisdiction and more particularly, as arising in the present proceedings, cannot be tested in such manner, so as to come to a conclusion that the Assessing Officer has acted in patent lack of jurisdiction merely because he holds that a particular decision would not cover the issue in the facts of the case.

22. We may also observe that this is certainly not a case where the Assessing Officer has conferred upon himself a jurisdiction which is not vested in him in law, in passing the impugned order, so that the Court needs to hold that the authority lacked jurisdiction to pass the impugned order. Certainly, if

the Assessing Officer was to exercise jurisdiction not vested in him or in a patently illegal manner or *ex facie* contrary to the substantive provisions of the Income Tax Act, then certainly following the well settled principles of law as laid down in catena of judgments of the Supreme Court, the Court would unhesitatingly interfere in writ proceedings. However, the petitioner's contention that the Deputy Commissioner in view of the decision of the Delhi High Court in **CUB Pty Ltd**. (supra) ought to have held that the transaction in question fell outside the purview of the Income Tax Act, as the seller of the trade mark was a foreign entity, is certainly a debatable issue on applicability of the legal principles vis-a-vis the substantive provisions of the Act. This cannot be said to be an issue determining the substantive jurisdiction of the Dy. Commissioner as conferred under the provisions of the Act to initiate an action under Section 201. It would be a question, merely as to whether the principles of law in a given decision, were applicable in the facts and circumstances of the case, and more particularly when it is vehemently contested on behalf of the Revenue that such decision of the Delhi High Court is not applicable to the facts in hand. In our opinion, these are routine issues which arise before the authorities under the Income Tax Act as also the Income Tax Appellate Tribunal or in any adjudicatory process before the Court. However, the applicability or non applicability of any decision, in our opinion, certainly does

not present a core jurisdictional issue when tested on the powers conferred on the authority under the substantive provisions of the Act.

23. We may also observe that it is well settled that an appeal is a proceeding where a higher forum reconsiders the decision of a lower forum, on questions of facts and questions of law, with jurisdiction to confirm, reverse, modify the decision. Also "appeal" is a term used in a comprehensive sense which carries with it a wide range of connotations conferring powers with the appellate authority to exercise jurisdiction in variety of forms. Thus, any error of law or fact, in an order passed by any authority whose orders are appealable, are matter which are certainly within the jurisdiction of the appellate authority, which can authoritatively correct any such lacunae, deficiencies or errors in the orders impugned before it and pass appropriate orders, as the law would mandate. Thus, considering the facts of the case, once a substantive statutory remedy is provided and available to the petitioner, it would not be appropriate that the Court exercises its extraordinary jurisdiction under Article 226 of the Constitution and entertain this writ petition. If the proposition as canvassed by Mr. Mistri is to be applied, then the appellate remedy as provided under the Act would remain to be a paper provision and every order passed by the Assessing Officer, on the considerations as canvassed before us, would be

amenable to challenge in writ proceedings. In our opinion, this is certainly not an acceptable proposition.

24. We may usefully refer to the decision of this Court in **Kharghar Co-op. Housing Societies Federation Ltd., through General Secretary & Anr. vs. Municipal Commissioner, Panvel Municipal Corporation & Ors.**[5] to which one of us is a member (G.S. Kulkarni, J.) wherein referring to the decision of the Supreme Court in **Shivram Poddar vs. Income Tax Officer, Central Circle II, Calcutta and Anr.**[6]as also a decision of three Judge Bench of the Supreme Court in **Income-Tax Officer, Lucknow vs. M/s. S.B. Singar Singh & Sons & Anr.**[7], this Court had held that it may not be appropriate for the Writ Court to short circuit or circumvent statutory procedures and it is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require a recourse to Article 226 of the Constitution be permitted. The following observations as made by the Court are required to be noted, which reads thus:

> "29. About 59 years back, a three Judge Bench of the Supreme

[5] 2023 SCC Online Bom 775
[6] AIR 1964 SC 1095
[7] (1976) 4 SCC 325

Court in the case of Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta and Anr. has held that resort to the High Court in exercise of its extraordinary jurisdiction conferred and recognized by the Constitution in matters relating to assessment, levy and collection of tax (in such case, income-tax) may be permitted only when questions of infringement of fundamental rights arise, and where on undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess. In attempting to bypass the provisions of the statute by inviting the High Court to decide the questions which are primarily within the jurisdiction of the Revenue Authorities, the party approaching the Court has often to ask the Court to make assumptions of facts which remain to be investigated by the Revenue Authorities.

30. In another decision of a three Judge Bench of the Supreme Court in "Income-Tax Officer, Lucknow Vs. M/s. S.B. Singar Singh & Sons & Anr.", it was held that the High Court was not justified in deciding the matter primarily within the jurisdiction of the revenue authorities by entertaining a writ petition. The Supreme Court also referring to the decision in **Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta and Anr. (supra)** observed thus:-

> "19. In the light of what has been observed above, we are of opinion that the High Court could not justifiably interfere in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution with the appellate orders of the tribunal. In any case, the question as to whether the omission to record a finding on ground no. 1 by the tribunal was due to the failure of the appellant to urge that ground or due to a lapse on the part of the tribunal which deserved rectification, was a matter entirely for the authorities under those taxation statutes. It will be well to recall once more what this Court speaking through J.C. Shah, J. (as he then was), had stressed in Shivram Poddar vs. Income-tax Officer, AIR 1964 SC 1095.
>
> Resort to the High Court in exercise of its extraordinary jurisdiction conferred or recognized by the Constitution in matters relating to assessment, levy and collection of income-tax may be permitted only when questions of infringement of fundamental rights arise, or where on undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess. In attempting, to bypass the provisions of the Income-tax Act by inviting the High Court to decide questions which are primarily within the jurisdiction of the revenue authorities,

the party approaching the court has often to ask the court to make assumptions of facts which remain to be investigated by the revenue authorities.

20. In the instant case, the High Court had assumed jurisdiction on the assumption that a certain ground had been urged before the Income-tax Appellate Tribunal which had arbitrarily refused to consider the same and record a finding thereon. This assumption, in our opinion, stood thoroughly discounted by the concomitant circumstances of the case, including the dilatory and questionable conduct of the assessee. This was therefore not a fit case for the exercise of its special jurisdiction under Article 226 by the High Court."

31. In Assistant Collector of Central Exicse, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. & Ors.12 referring to the decision in Titaghur Paper Mills Co.Ltd. Vs. State of Orissa 13, the Supreme Court observed that Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it, it may take recourse to Article 226 of the Constitution. It was held that the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute.

(emphasis supplied)

50. We find that Mr.Kumbhakoni's reliance on the decision in M/s. Mestra A.G.Switzerland (supra), certainly would assist the case of the PMC. In this case, the Division Bench taking review of the decisions on alternate remedy being available to the petitioner therein, has held that in any matter relating to tax, where the party has an option of approaching the appellate forum, it would not be prudent in the judicious exercise of discretion to derail from the procedure as ignoring the law as contained in the statute in question. The observations of the Court in paragraph nos.17 to 19 reads thus:

"17. Mr. Sridharan is again right, but only partially. Notwithstanding that questions of fact emerged for decision in Thansingh Nathmal (supra), the Supreme Court had the occasion to lay down therein a principle of law which is salutary and not to be found in any other previous decision rendered by it. The principle, plainly is that, if a remedy is

available to a party before the high court in another jurisdiction, the writ jurisdiction should not normally be exercised on a petition under Article 226, for, that would and allow the machinery set up by the concerned statute to be bye-passed. The relevant passage from the decision reads as follows:

> "The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Article. But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy which, without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit, by entertaining a petition under Article 226 of the Constitution, the machinery created under the statute to be by-passed, and will leave the party applying to it to seek resort to the machinery so set up."
> (emphasis supplied)

18. Echo of the aforesaid view is found in a later decision of the Supreme Court reported in (1983) SCC 2 433 [Titaghur Paper Mills Co.Ltd. & Anr. Vs. State of Orissa and Ors.],

arising out of the Orissa Sales Tax Act, 1947. Such enactment, quite similar to the MVAT Act, provided a hierarchy of authorities who could be approached for redress. Instead of pursuing the remedy thereunder, the writ jurisdiction of the Orissa High Court was invoked challenging orders of assessment. The law laid down therein is in the following terms:

> "6. We are constrained to dismiss these petitions on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the Prescribed Authority under sub-section(1) of Section 23 of the Act, then a second appeal to the Tribunal under sub-section(3)(a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act….."
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> ***
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> "11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. …"

19. Drawing guidance from the aforesaid dicta, rendered in connection with matters relating to tax and not any other subject, we are of the considered opinion that since the petitioner has the option of approaching this Court in a different jurisdiction at an appropriate stage, if at all the decision of the Tribunal is adverse to its interest, it would not

> be prudent in the judicious exercise of discretion to derail the procedure ignoring the law contained in the MVAT Act."

25. Insofar as the issue of limitation is concerned, it appears to be an admitted position that Section 201 *ipso facto* has not provided for any limitation of one year. In our opinion also the decision of this Court in ***Director of Income Tax Vs. M & M Limited*** **(Supra)** although affirms the decision of the tribunal when the tribunal, observed that maximum time limit for passing an order under section 201(1) or section 201(1A) would be the same as prescribed under section 158(2) that is one year from the end of the financial year for which proceedings under section 201(1) are initiated. The High Court has not conclusively and categorically held that the Tribunal was correct in laying down such limitation when the legislature itself has not prescribed any limitation. We also have a quarrel on the proposition as to whether the Tribunal could at all prescribe and / or lay down any period of limitation, which is wholly within the domain of the legislature, when the legislature itself has not prescribed the same in Section 201. We may refer to the observations of the Division Bench in **Mahindra and Mahindra Limited** (Supra) which, in our opinion, would in no manner indicate that there is any specific approval to such observations of the Tribunal, so as to hold it to be an absolute position in law of such limitation being prescribed by the tribunal

needs to be accepted as a statement of law. In fact, from the reading of the observations of the High Court, it appears that such issue was in fact left open and what has been recognized is that the powers under Section 201 are required to be exercised within a reasonable time. We note the observations of the Division Bench which reads thus :

> "35. **Once same provisions are invoked in the present case, then, the Honourable Delhi High Court, with respect, rightly concluded that though Section 201 does not prescribe any limitation period for the Assessee being declared as an Assessee in Default yet the Revenue will have to exercise the powers in that regard within a reasonable time**. In such circumstances we are of the view that the Tribunal's order in this case does not suffer from any error of law apparent on the face of record or perversity warranting our interference in appellate jurisdiction.
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> …..
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> 37. **However, we clarify that our order shall not have any impact on the Appeal which has been filed by the Assessee in this Court and which is stated to be pending. Our judgment and order shall not be construed as expression of any opinion as to what should be the reasonable time. In other words, whether it should be as indicated in the Delhi High Court Judgments or otherwise is an aspect which is kept open.** Equally, once we uphold the view of the Tribunal on the point of limitation, then, we must also clarify that we have expressed no opinion on merits of the impugned deductions/ claims in that regard. Therefore, we do not express any opinion on the rival contentions particularly as to whether there is any liability in terms of Section 201 of the Income Tax Act, 1961 in the present case."
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> (emphasis supplied)

26. We may also refer to the decision of the Division Bench of the Telangana High Court, which considered the decision of this Court in **Mahindra & Mahindra Limited** (supra) as also the decision of the Delhi High

Court in **Bharti Airtel Limited Vs. Union of India**[8], wherein the Division Bench held that the legislature has consciously not prescribed any time limit for an order under Section 201(1) of the Act insofar as non-resident is concerned; the reason being that deductee is a non-resident, it may not be administratively possible to recover the tax from the non-resident. The following observations of the Telangana High Court are required to be noted which reads thus:

> "26. With utmost respect, we are unable to agree with the views expressed by the Delhi High Court. As we have already seen, initially the statute did not provide for any limitation, be it a resident Indian or a non-resident Indian. Subsequently, by way of amendment, sub-section (3) was inserted in Section 201 of the Act. Presently, the limitation for passing of an order under Section 201(1) of the Act post the last amendment is seven years insofar a person resident in India is concerned. The present case covers the assessment year 2016-2017, which is well after the last of the amendments were made and when limitation period qua resident Indians is seven years.
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> 27. We have also seen that the legislature has consciously not prescribed any time limit for an order under Section 201(1) of the Act insofar a non-resident is concerned; the reason being that if the deductee is a non-resident, it may not be administratively possible to recover the tax from the non-resident. Therefore, it would be wrong to read into Section 201(3) of the Act a period of limitation insofar non-resident is concerned; doing so would amount to legislating by the Court which is not permissible.
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> 28. At the same time, it must also be kept in mind that even though there is no limitation prescribed by the statute, the order under Section 201(1) of the Act qua non-resident has to be passed within a reasonable period.
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> 29. Now the question is, what is a reasonable period in the absence of any statutory limitation? In our considered opinion, there cannot be a straight jacket answer to such a question. What is a reasonable period would depend upon the facts and circumstances of each case. Therefore, as a general principle it may not be possible as well as feasible on the part of the Court to say definitely that a period of four years or one year would be the period of

[8] [2016] 76 taxmann.com 256 (Delhi)

> limitation for passing an order under Section 201(1) or 201(1A) of the Act when the legislature has consciously not prescribed any such limitation. But one thing is very clear, that is, when the legislature has prescribed a period of seven years as the limitation for a resident Indian, it would not be justified to read a limitation of less than seven years in the case of a non-resident. The difficulty that would accrue to realisation of tax qua a non- resident would be much more than that of a person, who is a resident. In our view, limitation period of seven years prescribed for a resident Indian would be a useful guide to determine what would be a reasonable period in the case of a non-resident Indian."
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> (emphasis supplied)

27. In the light of the above discussion, we are not persuaded to accept the case of the petitioner that the present writ petition be made an exception and the same be entertained, by not relegating the petitioner to avail of alternate remedy of an appeal, as provided under the Act. We accordingly dismiss this petition permitting the petitioner to avail of the statutory remedy of an appeal. All contentions of the parties on all issues of facts and law are expressly kept open.

28. We permit the petitioner to file an appeal within 15 days from the receipt of the fresh order along with stay application including to make appropriate prayers in regard to penalty proceedings. Till appropriate orders are passed on the stay application, the demand be not enforced against the petitioner.

29. Before parting, we record that we have taken a serious note of the

observations as made by the Deputy Commissioner in dealing with the decision of the Delhi High Court in **CUB Pty Ltd.** (supra). Such observations were totally unwarranted. The Deputy Commissioner could not have commented on the decision of the Delhi High Court in such irresponsible manner. We accept Mr. Venkatraman's contention that such observations can in no manner, have any sanctity. In this view of the matter, we direct that, within two days from today, all such observations as made by the Deputy Commissioner in the impugned order, be expunged and after such deletion a fresh copy of the order be made available to the parties. We also warn the concerned officer to be extremely cautious and careful in future so as to remain within the limits of propriety, in the discharge of his quasi-judicial role, conferred under the provisions of the Income Tax Act. We also urge the learned ASG that in the larger interest of the officers of the Revenue and with a hope that such issues do not percolate in the orders being passed by the Officers of the Revenue, this concern needs to be taken up at the appropriate level of the Ministry, so that the limits of propriety, the tenor and language used by the officials in passing orders, and on understanding of the legal principles, is well inculcated in such officers, of the Revenue, by having regular training sessions. This more particularly, considering that such officers-in-discharge of their quasi-judicial powers are required to deal with legal issues,

involving the applicability of the decisions rendered by different Courts. If we were not to make such observations so as to indicate the righteous and solemn path which needs to be followed by the Officers in the course of statutory adjudication, we would have possibly failed in our duty as a Constitutional Court.

30. Disposed of. No costs.

(SOMASEKHAR SUNDARESAN, J.) (G. S. KULKARNI , J.)