Concept of Income : Changing Horizon of Real income to Deemed Income under Income Tax Act (Act)

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1. Preface

Word income as primarily referred in Entry 82 of List 1 (union list) in seventh schedule (vide article 246) of Indian constitution giving exclusive power to parliament to make laws on "taxes on income other than agricultural income" has been matter of considerable judicial hermeneutics. Apotheosis on the scope of income is adumbrated at length in locus classicus decision of Apex court in case of Sanyasi Rao 219 ITR 330 where in context of constitutional validity of section 206C and section 44AC of the Act respectively dealing with tax collection at source on sale/purchase of specified items (like liquor etc) and presumptive taxation on specified persons engaged in specified business in section 44AC (measured on straight basis of 40% of purchase price without any benefit of deduction in section 28 to 43C of the Act) , after making a detailed analysis of entire case law on the subject, it was inter-alia held by Apex court that: firstly *"The above decisions establish that the word " income " occurring in entry 82 in List I of the Seventh Schedule should be construed liberally and in a very wide manner and the power to legislate will take in all incidental and ancillary matters including the authorisation to make provision to prevent evasion of tax, in any suitable manner. Bearing the above principles in mind, we have to examine further whether collecting " tax " as enjoined in sections 44AC* *and 206C of the Act at the time of " purchase of goods " can be justified as " income-tax " ?"* secondly since The Constitution does not define the expression " income ", it was observed that *"..We have seen that the object in enacting sections 44AC and 206C was to enable the Revenue to collect the legitimate dues of the State from the persons carrying on particular trades in view of the peculiar difficulties experienced in the past and the measure was so enacted to check evasion of substantial revenue due to the State. It is a matter of common knowledge that trade or business produces or results in income which can be brought to tax. In order to prevent evasion of tax legitimately due on such " income ", section 44AC and section 206C were enacted, so as to facilitate the collection of tax on that income which is bound to arise or accrue, at the very inception itself or at an anterior stage and considered in the said perspective, it is idle to contend that the aforesaid statutory provisions lack legislative competence.."* and thirdly, it was observed that *"....e should bear in mind that there is a clear distinction between the subject-matter of a tax and the standard by which the amount of tax is measured. Having regard to the past difficulties in making a normal assessment and collection in the case of certain categories of assessees, for convenience' sake, the Legislature has chosen to make appropriate provision for collection of tax at an anterior stage by adopting the purchase price as the measure of tax. In our view, this is permissible and the standard by which the amount of tax is measured, being the purchase price, will not in any way alter the nature and basis of levy, viz., that the tax imposed is a tax on income. It cannot be labelled as a tax on purchase of goods.We are further of the view that the basis of a charge relating to income-tax is laid down in sections 4 to 9 of the Income-tax Act, 1961. Section 4 is the charging section. Income-tax is levied in respect of the total income of the* *previous year of every person. Section 5 deals with the scope of total income. Section 6 deals with the residence in India. Section 7 deals with the income deemed to* be received. Section 8 deals with dividend income. Section 9 deals with the income deemed to accrue or arise in India" , fourthly , it was held that *"…The charge for the levy of the income that accrued or arose is laid by the charging sections, viz., sections 5 to 9 and not by virtue of section 44AC or section 206C. The fact that the income-tax is levied at a flat rate or at an earlier stage will not in any way alter the nature or character of the levy since such matters are completely in the realm of legislative wisdom. We hold that what is brought to tax, though levied with reference to the purchase price and at an earlier point is none the less income liable to be taxed under the Income-tax Act. We repel the plea by the assessees to the contrary"* and fifthly it was thereafter observed that *"… the denial of relief provided by* Sections 28 *to* 43C *to the particular businesses or trades dealt with in* Section 44AC *calls for a different consideration. Even according to Revenue, the provisions (*Sections 44AC *and* 206C*) are only "machinery provisions". If so, why should the normal reliefs afforded to all assessees be denied to such traders? Prima facie, all assesses similarly placed under the* Income Tax Act *are entitled to equal treatment…….The denial of such reliefs to trades specified in* Section 44AC*, available to other assessees, has no nexus to the object sought to be achieved by the legislature. To this extent it appears to us that the non-obstante clause in Section 44AC denying such reliefs has no basis and so unfair and arbitrary and equality of treatment is denied to such persons, necessitating grant of appropriate relief (see Royappa vs. State of Tamil Nadu : AIR 1974 SC 555, Maneka Gandhi vs. Union of India : AIR 1978 SC 597, Ajay vs. Khalid : AIR 1981 SC 487 and other cases)…… 20. We perused the aforesaid judgment of* *the Andhra Pradesh High Court with care and we hold that in view of the absence of materials, the Court was justified in its view that the remedy specified by section 44AC is disproportionate to the evil that prevailed and so to the extent the non-obstante clause in Section 44AC excluded the provisions of Sections 28 to 43C (applicable to all assessees), the provisions are unreasonable.*"

So from above we may very well understand that where a taxing provision is made to counteract the identified and existing tax evasion practices then if said provision made is duly proportionate to said object, constitutionality of a taxing provision can be upheld , however if either there is no rationale for enacting a particular deeming provision or if the provision made has no nexus & is arbitrary vis a vis given legislative object sought to be achieved , then same may be struck down or read down proportionally.

1.1 For reading down theory one may allude to Apex court leading decision Delhi Transport Corporation v. DTC Mazdoor Congress AIR 1991 SC 101, a Constitution Bench of the Supreme Court explained in what cases the doctrine of „reading down‟ of statutes to save their constitutionality could be deployed:

"The doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible--one rendering it constitutional and the other making it constitutional the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made.

However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the Court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. If the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. The doctrine can never be called into play where the statute requires extensive additions and deletions." It was further explained in the same decision as under:"The Courts, though, have no power to amend the law by process of interpretation, but do have power to mend it so as to be in conformity with the intendment of the legislature. Doctrine of reading down is one of the principles of interpretation of statute in that process. But when the offending language used by the legislature is clear, precise and unambiguous, violating the relevant provisions in the constitution, resort cannot be had to the doctrine of reading down to blow life into the void law to save it from unconstitutionality or to confer jurisdiction on the legislature."

1.2 Further in Sanyasi Rao (supra) it was clearly laid down that there is distinction between subject matter of tax and standard by which tax is measured and further in every case where tax is levied valid charge of tax has to be there from section 4 to 9 of the Act. This aspect of valid charge vs computation , is further reiterated by Apex court in case of Sedco Forex case reported at 399 ITR 1 wherein it was observed likewise that *"…It is, however, pertinent to point out that Section 44BB(2) makes certain receipts as "deemed income" for the purposes of taxation in the said provision. Therefore, aid of this provision is to be necessarily taken to determine whether a particular amount will be "income" within the meaning of Section 5 of the Act. Likewise, Section 44BB(2) also acts as guide to determine whether a particular income is attributed as income occurred in India. Section 44BB of the Act provides for special provision* *for computing profits and gains. However, that would not mean that if the income is to be computed under this provision, we have to give a go-by to Sections 5 and 9 of the Act. To this extent, remarks of the High Court may not be correct. Law in this behalf is settled by the judgment of this Court in A. Sanyasi Rao case..".*

1.3 Further in Sanyasi Rao (supra) one may easily make out that Apex court while upholding constitutional validity of section 44AC and 206C maintained that income of business of said assessee has to be computed in regular assessment *after giving benefit of section 28 to 43C of the Act* which cant be simply taken away by legislature and thus it was maintained that business income of assessee has to be computed as per commercial principle of accountancy , which is soul of section 29 of the Act.

1.4 Interestingly one may note that in underlying AP high court decision reported at 178 ITR 31 duly approved by apex court in above decision it was held that *"... Several items have been brought within the definition from time to time by various amending Acts. The said definition cannot, therefore, be read as exhaustive of the meaning of the expression "income" occurring in entry 82 of List I in the Seventh Schedule. This, of course, does not mean that an amount which can, by no stretch of imagination, be called "income" can be treated as "income" and taxed as such by Parliament. It must have some characteristics of income, as broadly understood. So long as the amount taxed as income can rationally be called income as generally understood, it is competent for Parliament to call it "income" and levy tax thereon."* which in present day context of section 2(24)(xviii) of the Act where subsidies/grants /reimbursements etc in stated circumstances is treated *as income* by Finance Act 2015 and provisions like section 28(ii)(e) and section

56(2)(xi) whereby specified compensation in given case is made taxable as deemed income which needs to tested on their constitutional validity in light of Sanyasi Rao(supra).

1.5 Even TDS and TCS provisions introduced recently in section 194N and section 206C of the Act, in so far as tax withholding on *cash withdrawal* in specified circumstances and tax collection on *remittance abroad by authorized dealer* are concerned, same are apparently misfit in the income tax TDS/TCS Chapter where there is no income payer and income recipient in first place , then putting TDS and TCS on such self to self transaction, where admittedly there is zero/no element of chargeable income in stated cash withdrawal and remittance abroad transactions, ergo it is unfathomable as to on what basis TDS/TCS can be applied when analysed on touchstone of Sanyasi Rao (supra). The apparent miss in new TDS and TCS requirement in 194N and 206C is merely on pretext of collecting more information/data and keeping a tab on transactions , can TDS and TCS liability/provision be fastened where admittedly in terms of charging provision of section 4(1) there is no chargeable income present and transactions are with self only .Moreover here in 194N and section 206C unlike sanyasi rao (supra) there is no such tax evasion present and also these provisions are ex-facie apparently having no intelligible nexus with their given object (“***in order to widen and deepen the tax net”*** is the main object referred in explanatory memorandum to Finance Bill 2020 for section 206C amendment as discussed above ***and “In order to further discourage cash transactions and move towards less cash economy”*** are words referred for section 194N in Press release dated 30/08/2019 as legislative object). *One may refer to recent Bombay high court decision in case of Rupesh Shah reported at 417 ITR 169* *holding perspicaciously that no TDS provision can create chargeability which otherwise is not there, that if no chargeability is there on an income, TDS provisions cant apply on first principles*. Looking from another angle even if a person (assumingly) responsible to make TDS/TCS in sec. 194N and 206C in remittance case does not comply with stated requirement can any additional tax liability in section 201(1) (for default assessee) be created given the admitted fact that there is no existing and chargeable income qua these transactions (of cash withdrawal and remittance abroad) in hands of assessee concerned? Answer seems *No refer AP High court decision in case of Superintending Engineer, 152 ITR 753 held That the purpose of determining the tax in respect of which the person responsible for making the payment could be deemed to be in default the ITO must determine the tax only on the appropriate proportion of income chargeable under the Act. There is no prohibition in s. 201 of the Act against the ITO so determining the tax. Indeed, the power to determine the appropriate amount of tax deductible at source under s. 195 is implicit in s. 201 of the Act.* ***(Same principle in Jagran Prakshan case of Allahabad high court reported at 345 ITR 288 held that ""……….it is clear that deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly. In the present case, the Income tax authorities had not adverted to the Explanation to Section 191 nor had applied their mind as to whether the assessee has also failed to pay such tax directly. Thus, to declare a deductor, who failed to deduct the tax at source as an assessee in default, condition precedent is that assessee has also failed to pay tax directly. The fact that assessee has failed to pay tax directly is thus, foundational and jurisdictional fact and only after finding that***

assessee has failed to pay tax directly, deductor can be deemed to be an assessee in default in respect of such tax…..")

Even if one refer to constitution bench Apex court decision in case of Kikabhai 24 ITR 506 one may gainfully refer to following observations in above context of constitutional validity of TDS/TCS in sec.**194N and 206C, where constitution bench has held that** *"7. We are of opinion that the learned Attorney-General's secound contention is unsound because, for income-tax purposes, each year is a self contained accounting period and* ***we can only take into consideration income, profits and gains made in that year and are not concerned with potential profits which may be made in another year any more than we are with losses which may occur in the future…****… 8. As regards the first contention, we are of opinion that the appellant was right in entering the cost value of the silver and shares at the date of the withdrawl, because it was not a business transcation and by that act the business made no profit or gain, nor did it sustain a loss, and the appellant derived no immediate pecuniary gain the State cannot tax them, for under the Income-tax Act the* ***State has no power to tax a potential future advantage****. All it acn tax is income, profits and gains made in the relevant accounting year…. it is impossible to get away from the fact that the business is owned and run by the assessee himself. In a such circumstances we are of opinion that it is wholly unreal and artificial to separate the business from its owner and treat them as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which in truth and in fact is non-existent.." On self to self transaction no tax should be there, one may apply recent Apex court verdict in case of Yum Restaurant (24.04.2010) where while explaining mutuality concept Apex court has inter-alia* *observed that* "..14. The doctrine of mutuality traces its origin from the basic principle that a man cannot engage into a business with himself. For that reason, it is deemed in law that if the identity of the seller and the buyer; or the vendor and the consumer; or the contributor and the participator is marked by oneness, then a profit motive cannot be attached to such a venture. Thus, for the lack of a profit motive, the excess of income over the expenditure or the "surplus" remaining in the hands of such a venture cannot be regarded as "income" taxable under the Income Tax Act, 1961 (for short, "the 1961 Act"). **What is taxable under the 1961 Act is "income" or "profits" or "gains" as they accrue to a person in his dealings with other party or parties that do not share the same identity with the assessee.** ***For income, there is an underlying exchange of a commercial nature between two different entities."***

So applying above rudimentary principles which have stood all times, the constitutional validity of section 194N and 206C as discussed above needs to tested appropriately.

1.6 Even Kikabhai (supra) needs to be still tested to examine the otherwise *validity* of sections 56(2)(x) where in effect a future advantage is sought to be taxed like on purchase of immovable property below specified stamp value rate etc. which is broadly speaking in substance a tax on potential future advantage only which Kikabhai (supra) says state has no power to do.

1.7 Proceeding further, since Sanyasi Rao (supra) has clearly said *sans* *chargeability of income in section 4 to 9, no taxation could be there* , as subject matter of tax is qualitatively different from computation and measure of tax , in that sense , one may allude to detailed and guiding principles from Bombay high court in case of Vodafone vs Union of India (order dated 10/10/2014).

1.8 In this case of Vodafone of Bombay high court , where issue involved was applicability of transfer pricing provisions of chapter X of the Act to share premium recd. from non residents , which was agitated by assessee to be untenable on the principal aspect of absent any valid charge on stated share premium recd from non residents in section 56(2)(viib) (which applied for residents share holder – premium only) , accepting this plea of assessee, it was held by Bombay high court that *firstly Chapter X (Transfer pricing provisions) did not replace the concept of Income or Expenditure as normally understood in the Act for the purposes of Chapter X of the Act; The objective of Chapter X of the Act is certainly not to punish Multinational Enterprises and/or AEs from doing business inter se.*; secondly, It cannot be disputed that income will not in its normal meaning include capital receipts unless it is so specified, as in Section 2(24) (vi) of the Act. In such a case, Capital Gains chargeable to tax under Section 45 of the Act are, defined to be income; Thirdly, it observed that "*<u>Share premium have been made taxable by a legal fiction under Section 56(2)(viib) of the Act and the same is enumerated as Income in Section 2(24)(xvi) of the Act. However, what is bought into the ambit of income is the premium received from a resident in excess of the fair market value of the shares. In this case what is being sought to be taxed is capital not received from a non-resident i.e. premium allegedly not received on application of ALP. Therefore, absent express legislation, no amount received, accrued or arising on capital</u>*

account transaction can be subjected to tax as Income. This is settled by the decision of this Court in Cadell Weaving Mill Co. vs. CIT 249 ITR 265 was upheld by the Apex Court in CIT vs. D.P. Sandu Bros. Chember (P) Ltd. 273 ITR 1." Fourthly, it went on to observe that "*The charge of Income now has to be found in Section 4 of the Act. If it is income which is chargeable to tax, under the normal provision of the Act, then alone Chapter X of the Act could be invoked. Sections 4 and 5 of the Act brings /charges to tax total income of the previous year. This would take us to the meaning of the word income under the Act as defined in Section 2(24) of the Act. The amounts received on issue of shares is admittedly a capital account transaction not separately brought within the definition of Income, except in cases covered by Section 56(2) (viib) of the Act. Thus such capital account transaction not falling within a statutory exception cannot be brought to tax as already discussed herein above while considering the challenge to the grounds as mentioned in the impugned order".;* Fifthly, it observed that, "*In tax jurisprudence, it is well settled that following four factors are essential ingredients to a taxing statute:(a) subject of tax; (b) person liable to pay the tax; (c) rate at which tax is to be paid, and (d) measure or value on which the rate is to be applied. Thus, there is difference between a charge to tax and the measure of tax (a) & (d) above. This distinction is brought out by the Supreme Court in Bombay Tyres India Ltd. Vs. Union of India reported in 1984 (1) SCC 467 wherein it was held that the charge of excise duty is on manufacture while the measure of the tax is the selling price of the manufactured goods.". Sixthly it held that "The tax can be charged only on income and in the absence of any income arising, the issue of applying the measure of ALP to transactional value/consideration itself does not arise. The ingredient (a) above is not satisfied i.e. subject of tax is income* *which is chargeable to tax. The issue of shares at a premium is a capital account transaction and not income. The classical distinction between income and capital is that which exists between fruits and tree. Income is a flow while capital is a fund." Seventhly it observed that "It was contended by the Revenue that in any event the charge would be found in Section 56(1) of the Act. Section 56 of the Act does provide that income of every kind which is not excluded from the total income is chargeable under the head income from other sources. However, before Section 56 of the Act can be applied, there must be income which arises. As pointed out above, the issue of shares at a premium is on Capital Account and gives rise to no income" . Eighthly it observed that "Chapter X of the Act is a machinery provision to arrive at the ALP of a transaction between AEs. The substantive charging provisions are found in Sections 4, 5, 15 (Salaries), 22 (Income from house property), 28 (Profits and gains of business), 45 (Capital gain) and 56 (Income from other Sources). Even Income arising from International Transaction between A.E. must satisfy the test of Income under the Act and must find its home in one of the above heads i.e. charging provisions. This the revenue has not been able to show."*

1.9 If one keeps in mind above principles on taxability of income , then one may better appreciate the inferences to be drawn in a fact situation to decide on where a receipt is revenue or capital receipt and whether it is taxable or not. (Like Mumbai bench of ITAT in case of Shilpa Shetty reported at 178 ITD 471 held that applying above Bombay high court Vodafone case that *" Chapter X transfer pricing pre-supposes the existence of 'income' and lays down machinery provision to compute ALP of such income, if it arises from an 'international transaction'.*

Section 92 is not an independent charging section to bring in a new head of income or to charge tax on income which is otherwise not chargeable under the Act. No income had accrued to or received by the assessee under section 5, no notional income can be brought to tax under section 92.")

1.10 So once we are done with Apex court decisions in cases of Sanyasi Rao (on permitted scope of income and taxability laid down in Indian constitution) and Kikabhai (on tax on potential future advantage and tax on self to self transaction) and Bombay high court in Vodafone case (on scope of charging provision cant be expanded in computation provision like transfer pricing chapter X) and then we need to peek into apex court verdict in case of Ashirwad Films order dated 18/05/2007 (*on validity of tax rate which is confiscatory*) in specific/current context of sec. 115BBE of the Act and Apex court verdict in case of Parimsetti vs CIT 57 ITR 532 in context of concept of capital receipt and *burden on revenue to prove an income is taxable* and its present relevant in the Act.

2. Apex court in Ashirwad Films case (on confiscatory tax rate & its validity)

In context of special tax rate levied on non-Telugu film has been fixed at 24% in comparison to tax rate on telgu films at10%, holding 24% tax rate on non telugu film is arbitrary and unconstitutional , Apex court inter-alia observed that *"20. It is also required to be realized that imposition of reasonable tax is a facet of good governance.21. Another aspect of the matter cannot also be lost sight of. Taxing statute like penal statues should receive strict construction. It cannot be arbitrary. [See Bidhannagar (Salt Lake) Welfare Asson.*

V. Central Valuation Board & Ors., Civil Appeal No. 6345 of 2000 decided this date]22. It may be true that the Court ordinarily is not concerned with the rate of tax unless the same is wholly arbitrary or confiscatory. However, it is well settled that generally speaking a tax imposed must be reasonable. We may only notice that a Constitution Bench of this Court in Jindal Stainless Ltd. v. State of Haryana & Ors. [JT 2006 (4) SC 611] stated : "38. Tax is levied as a part of common burden. The basis of a tax is the ability or the capacity of the taxpayer to pay. The principle behind the levy of a tax is the principle of ability or capacity. In the case of a tax, there is no identification of a specific benefit and even if such identification is there, it is not capable of direct measurement. In the case of a tax, a particular advantage, if it exists at all, is incidental to the States' action. It is assessed on certain elements of business, such as, manufacture, purchase, sale, consumption, use, capital etc. but its payment is not a condition precedent. It is not a term or condition of a licence. A fee is generally a term of a licence. A tax is a payment where the special benefit, if any, is converted into common burden."
Applying above observations to section 115BBE present tax rate of 60% on income referred to in section 68 to 69D (apart from other incident of surcharge/cess and penalty in sec.271AAC) where earlier tax rate of 30% was doubled to 60% by Taxation Amendment ordinance of 2016 (passed on 16.12.2016) on reason given in statement of objects and reasons explaining said ordinance that "*Evasion of taxes deprives the nation of critical resources which could enable the Government to undertake anti-poverty and development programmes. It also puts a disproportionate burden on the honest taxpayers who have to bear the brunt of higher taxes to make up for the revenue leakage.* ***As a step forward to curb black money, bank notes of existing series of denomination of the value of five hundred rupees and one thousand rupees (hereinafter referred to as specified bank notes) issued by the Reserve Bank of India have been ceased to be legal tender with effect from the 9th November,***

2016.2. Concerns have been raised that some of the existing provisions of the Income-tax Act, 1961 could possibly be used for concealing black money. It is, therefore, important that the Government amends the Act to plug these loopholes as early as possible so as to prevent misuse of the provisions. *The Taxation Laws (Second Amendment) Bill, 2016, proposes to make some changes in the Act to ensure that defaulting assessees are subjected to tax at a higher rate and stringent penalty provision.”* , with this hypothesis section 115BBE was straightway amended to double the already prevailing maximum marginal rate of 30% in section 115BBE to 60% . This provision was originally brought by Finance Act 2012 (w.e.f AY 2013-2014) *in order to deter the generation and use of unaccounted money* (refer FM Speech of Finance Bill 2012 dated 16/03/2012) and *in order to curb the practise of laundering of unaccounted money by taking advantage of basic exemption limit* (refer explanatory memorandum to finance bill 2012). It may noted at this juncture that section 115BBE from inception, till date, depends for its jurisdictional applicability on valid foundational existence of unexplained income /investment/expenditure as referred in section 68 to 69D which as said earlier was originally put at maximum marginal rate of 30% covering all assesses, without any threshold. Till AY 2016-2017 section 115BBE remained predominantly same. Significant changes came with effect from AY 2017-2018 . First significant amendment made by Finance Act 2016 in section 115BBE with prospective effect from AY 2017-2018 is prohibition brought in section 115BBE(2) qua set off of losses form income referred in section 115BBE which amendment as clarified in CBDT Circular no 11/2019 would only be effective from AY 2017-2018 and till AY 2016-2017 losses can be set off against income referred in sec. 115BBE. Next and far reaching amendment in section

115BBE which is subject matter of the present discussion came from amendment ordinance of December 2016 as stated above whereby in effect rate of tax was doubled to 60% on reasons as mentioned above which covered entire assessment year 2017-2018 as effective date of change mentioned is Ist April 2017 (that is with effect from FY 2016-2017 and AY 2017-2018).

Here on basis of Sanyasi Rao(supra) and Ashirwad Films (supra) in authors opinion this doubling of tax rate to 60% can be argued to be untra vires to the constitution of india for following reasons:

Firstly as evident from above there is no intelligible basis as to why doubling of tax rate is required to achieve the object stated as already tax rate in sec 115BBE was 30% that is maximum marginal rate ;

Secondly as evident from above merely because an income is treated as unexplained in section 68 to 69D in subjective opinion of Assessing officer (AO) can it be a valid and justified basis to differentiate this subjective unexplained income to be put at draconian rate of 60% where even today section 68 to 69D which have principally remained unchanged throughout (from AY 2013-2014 to AY 2017-2018 except proviso to section 68) and no where these provisions (section 68 to 69D plus 115BBE) tallies/ matches with stated objects of unaccounted money, laundering of unaccounted money , concern for misuse of statutory provisions for concealing black money as emerging post demonetization. None of the objects and reasons behind section 115BBE *specially 60% rate reasons stated in amendment ordinance,* are mentioned/ present in plain text of section 68 to 69D plus section 115BBE, so as to achieve desired alignment in text of the provisions with legislative object. Thus amendment made to double tax rate at 60% in sec. 115BBE with given object not tallying with plain text of provisions, might fall foul of manifest arbitrariness in article 14 of Indian constitution.

Thirdly 60% rate of taxation is ex-facie confiscatory and arbitrary when separate penalty provisions and surcharge and cess still applies to section 115BBE (refer Ashirwad Films above). Like even today for income in section 115BB (lottery and gambling income) and section 115BBC (anonymous donations) etc same are taxed @ 30% and no where 60% rate is there on date even for these incomes in sec 115BB and sec 115BBC etc.

Fourthly, there is total mismatch between object of doubling the tax rate from 30% to 60% in section 115BBE being meant for addressing black money emerging from demonetization announcement and the operative date fixed for said change being made applicable from beginning of financial year that is 1/4/2016 which is no where tallying with objects of change in amendment ordinance of 2016.

On all the above reasons author humbly pleads that not only validity of 60% rate in section 115BBE (for unexplained income/investment /expenditure) can be constitutionally debated in light of prevailing jurisprudence being confiscatory in nature, but also same can be argued to be read down in terms of apex court decisions discussion in para 1 above to be legitimately confined to those areas where legislature wanted it to be. For this one may gainfully refer to Apex court leading decisions in cases of Sati Oil Udyog **(2015) 7 SCC 304**,and Rajasthan State elececticity Board (relying Sati Oil Udyog case) in income tax act, where apex court has ingeminated on the aspect that provisions brought to address mischief of tax evasion cant be applied unless tax evasion is established by revenue first.Further one may refer to illuminating discussion on heydon rule in Apex court decision in case of Ms Era vsGovt of NCT of delhi wherein it is held that:

> *"24. It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the 'Lakshman Rekha' has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon's case, which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon's case."*
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> *While so holding the Hon'ble Supreme Court has emphasised that "Interpretation must depend on*

the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual". .

On Income Tax Act , in above apex court decision of Ms Era (supra) , one criticism which was made by the court is worth noting here:

"13. The Indian Income Tax Act, 1960 has also been the subject matter of judicial criticism. Often, amendment follows upon amendment making the numbering and the meaning of its sections and sub-

sections both bizarre and unintelligible. One such criticism by Hegde, J. in Commissioner of Income Tax v. Distributor (Baroda) (P) Ltd., (1972) 4 SCC 353, reads as follows:

"We have now to see what exactly in the meaning of the expression "in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments" in the main Section 23-A and the expression "in the case of a company whose business consist wholly or mainly in the dealing in or holding of investments" in clause (i) of Explanation 2 to Section 23-A. The Act contains many mind-twisting formulas but Section 23-A along with some other sections takes the place of pride amongst them. Section 109 of the 1961 Income Tax Act which has taken the place of old Section 23-A of the Act is more understandable and less abstruse. But in these appeals we are left with Section 23-A of the Act." (Para 15)

14. All this reminds one of the old British ditty:

> *"I'm the Parliament's draftsman, I compose the country's laws, And of half the litigation I'm undoubtedly the cause!"..."*

So applying above one may plead for suitable reading down of section 115BBE to save its constitutionality and to make fine tuning of text of section 115BBE with underlying legislative intent, ergo one may plead that confiscatory 60% tax rate in section 115BBE is applied in deserving cases, where intended elements of black money etc are established to be existing by revenue.

3. Apex court decision in case of Parimsetti reported at 57 ITR 532

It dealt with a case where a substantial amount by way of cash and jewellery had been gifted by one of the members of a royal family of Baroda to a maid servant/secretary. The question that arose for the consideration of the Court was whether the said gifts were taxable as income. The Court held that the Act does not make a blanket provision whereby any and every receipt is to be treated as income and thereby made exigible to tax. The Supreme Court in the instant case held that the testimonials and personal gifts do not fall within the ambit of the term „income". In all cases, the burden lies on the Revenue to prove that the receipt is income within a taxing provision, but where the receipt is in the nature of income, the burden to prove that it is exempt is on the assessee. In the said case, the appeal of the assessee succeeded on the ground that the Revenue had proceeded on the wrong interpretation of the law that the assessee had failed to discharge the burden of leading evidence that the receipt was not income within the taxing provision. ***The legal burden was actually on the Revenue to prove that the receipt was income. The decision has covered three aspects: - all receipts are not income; testimonials and personal gifts are not income; and burden was on the Revenue to show that the receipt was income within the taxable provisions.*** In view of the factual matrix of the said case, the majority judgment held that the circumstances did not establish that what was paid to the assessee was remuneration for the services already rendered or to be rendered. The Court reversed the decision of the High Court, the Tribunal and the Authorities as the Revenue had failed to discharge its burden of proving that the receipts were income. Apart from above important findings, Apex court in this case categorically held that *" Whether a receipt is liable to be treated as income depends very largely upon the facts and circumstances of each case : it is open to the Income-tax authorities to raise an inference that a receipt by an assessee is assessable income where he fails to disclose satisfactorily the source and the nature of the receipt. But in this case the source of the income was ,disclosed by the appellant, and there was no dispute about the truth of that disclosure."....*and *"...The Tribunal rightly observed that the information collected by the Department from different sources which consisted of record of ex parte statements of certain persons about the relation between Sita Devi and the appellant, which they even declined to give in writing, could have no value in establishing the case of the Department."....*and *"... The conclusion of the Tribunal is, therefore, based on matters which may at the highest create some suspicion, and upon its view that the burden of proving that the receipts were not taxable lay upon the appellant. But a conclusion recorded by the Tribunal by wrongly throwing the burden of proof upon the assessee cannot be regarded as binding upon the High Court in a reference..'* and finally held that *"...it must be recorded that what the assessee received in the relevant years of account was not assessable to tax..".* These observations of Apex court to decide the taxability of income and *corresponding burden on revenue which is held same cant be discharged by suspicion only* are quite apposite before a receipt is called as taxable income in the provisions of the Act. Like wise one may refer to Apex court decision in case of In Divecha (P.H.) vs. CIT, (1963) 48 ITR 222 (SC), it was observed that the motive and intent of the person who pays is not relevant and it is the nature of the receipt in the hands of the person who receives the same, which determines the quality of the receipt. However, for this purpose, one may examine the intent of the person paying/ donee. The quantum of the amount paid may not be decisive. Even the nomenclature given to the payment under consideration may not be determinative of the true nature of the receipt. This judgment held that periodicity is not conclusive, but the term „periodicity" refers to the recurring nature of the payment and not a regular source of payment over a certain period of time. In the said case, the payment was made to the partners by a third party, which earlier had business relationship with the partnership firm. This agreement between the third party and the firm was terminated. This payment to the partners, it was held was not for any service performed or likely to be performed in the future. It was not remuneration, but was made out of regard for qualities of the three partners and their long association. It was a payment out of appreciation and gratitude and not as a recompense for past service or services to be rendered in futuro.

Therefore, the payment was held to be not taxable. Though the statutory amendments made thereafter would require consideration, in case of a similar nature, **<u>some paragraphs of this judgment lucidly elucidate the principle in question and hence they merit a reproduction:-</u>**

> *"In determining whether this payment amounts to a return for loss of a capital asset or is income, profits or gains liable to income-tax, one must have regard to the nature and quality of the payment. If the payment was not received to compensate for a loss profits of business, the receipt in the hands of the appellant cannot properly be described as income, profits or gains as commonly understood. To constitute income, profits or gains the must be a source from which the particular receipt has arisen, and a connection must exist between the quality of the receipt and the source. If the payment is by another person it must be found out why that payment has been made. ... It may also be stated as a general rule that the fact that the amount involved was large or that it was periodic in character*

have no decisive bearing upon the matter. A payment may even be described as "pay", "remuneration", etc., but that does not determine its quality, though the name by which it has been called may be relevant in determining its true nature, because this gives an indication of how the person who paid the money and the person who received it viewed it in the first instance. The periodicity of the payment does not make the payment a recurring income because periodicity may be the result of convenience and not necessarily the result of the establishment of a source expected to be productive over a certain period. ... XXX Even if it be not regarded as a payment for loss of capital it cannot be regarded payment for any services rendered or likely to be rendered, The services in the past were amply remunerated. The payment does not contemplate that the agreement in the past had not been sufficiently remunerative to the firm. It does not pretended to pay them for past services. The minutes do not show that any services in the future was expected from these appellants. What remained to be done was to wind up the business with regard to the agreement of 1938 itself. For this purpose, the company agreed to give all facilities to the firm in respect of easily saleable articles and to make over those which required a longer duration to sell. The only service, if services it can be called, was that the firm was to hand over to the company a list of customers and the supplies made to them during the past six months. It cannot be said that for this service the payment was made. The payment was thus not related to any services in the past or in the future. Both side have relied upon cases in which certain payments were held to be taxable or not taxable according as the facts in those cases suggested that the payment was for some services in the past or future or was entirely gratuitous. No useful purpose will be served by going over such cases because the facts of two very dissimilar cases lead to different principles. ... . It was in no sense a remuneration. It was in fact a payment made out of regard for the qualities of the three partners of the firm who were long associated with the company to its profits and who had built up a vast net-work of sales organisation of which the company would have obtained benefit when it entered on the business of selling for itself. This payment need not be given a particular name. ..."

In the above said case, the argument raised on behalf of the Revenue was that the receipt in question was not exempt under sub section (3) to Section 10, and therefore would be taxable income. *The Supreme Court in the quoted portion (see paragraph 23) has clearly and categorically held that the question of exemptionwould not arise where the receipt itself does not fall within the ambit of income. The question whether or not income is exempted and thus non-taxable would only arise when the receipt itself is income. The question of exemption is distinct and separate and would arise at a secondary stage.* **This is very apposite in present context where sometime it is sought to be impressed that *all income which are not exempt in section 10 are taxable by default which is a myth and duly clarified in above enunciation.*** Rather on basis of Delhi high court decision in Aroon Purie case reported at 277 CTR Page 1 where it was held that Rs. 1 lakh received by the appellant- assessee as an award from B.D. Goenka Trust for Excellence in Journalism would be a capital receipt and hence not income taxable under the Act, i.e. Income Tax Act, 1961, after reviewing entire case law on subject it was clarified that "*In the considered opinion of this Court, the correct legal position is that Section 10 exclusively deals with the exempt income not exigible to tax and should not per se be relied upon to ascertain whether the receipt would be a revenue receipt i.e. income chargeable to tax under sub-section (24) to Section 2 read with the charging provisions. The question of exemption under Section 10 would only arise if at the first instance, the receipt is found to be a revenue receipt. It would be incorrect to first examine whether a particular receipt has been exempted and then on the said reasoning and ratio proceed to decipher and hold that the amount/receipt is income for the purposes of the Act i.e. the Income Tax Act." And "...just because a certain receipt is not exempt under Section 10, it doesn"t follow that it is a revenue receipt and hence income."*

On same footing is another landmark Delhi high court decision in case of Girish Bansal reported at 289 CTR 514 while holding that *", the sum of Rs.20 lakhs* *received by the Assessees was in the context of the cancellation of the sale certificate and the sale deed executed in their favour in relation to an immovable property and neither Assessee was dealing in immovable property as part of his business.* ***While it could if at all be said to be in the nature of a capital receipt, what is relevant for the present case is that the Revenue has been unable to make out a case for treating the said receipt as of a casual and non-recurring nature that could be brought to tax under Section 10(3) read with Section 56 of the Act. … Following the decision in Cadell Weaving Mill (supra), there can be no manner of doubt that what is in the nature of capital receipt, cannot be sought to be brought to tax by resorting to Section 10(3) read with Section 56 of the Act*.” ,** has relied on the principle that *"The settled legal position is that all receipts do not constitute income. For a receipt sought to be taxed as income, the burden lies upon the Revenue to prove that it is within the taxing provision" and Supreme Court decision in Parimisetti Seetharamamma v. CIT (1965) 57 ITR 532 (SC) and has taken further note of leading Apex court decision in case of* CIT v. Saurashtra Cement Ltd., 325 ITR 422 (SC), wherefrom it was highlighted that *"the Assessee had entered into an agreement for supply of a cement plant with a condition that in the event of delay caused in delivery of the machinery, the Assessee would be compensated at 5% of the price of the respective portion of the machinery without proof of actual loss. With the supplier failing to supply the machinery within the stipulated time, the Assessee received Rs. 8,50,000 by way of liquidated damages, whereby the ITAT held this to be a capital receipt and the High Court answered in favour of the Assessee, the Revenue went in appeal before the Supreme Court. Affirming the decision of the High Court, the Supreme Court in CIT v. Saurashtra Cement Ltd. (supra) held the damages received by the Assessee were "directly and intimately linked with the procurement of a capital asset viz., the cement plant. The amount received by the assessee towards* *compensation for sterilization of the profit-earning source, not in the ordinary course of business, was a capital receipt in the hands of the assessee."*

For same proposition like in case of Girish Bansal (supra), one may refer to delhi itat detailed decision in case of INS Finance and Investment P Ltd (ITA 505/Del/2016 order dated 13.04.2018) where after relying on Chandigarh bench ITAT order in case of Winsome Yarns 50 taxmann.com 318 and SC in Saurasthra case (supra) that excess sum so recd on cancellation of sale contract (where breach of contract happened) over and above what assessee deposited is a capital receipt non chargeable to tax and same would not fall in section 56(2)(viii) also which only covers interest recd on compensation and not compensation *per se and it was also held that stated amount is not interest u/s 2(28A) of the Act.*

So from above cogitation on capital receipt concept, we may safely infer that *"every capital receipt is still not income*.'(refer Delhi high court Aroon Purie case) and section 56 cant make a universal alchemy and convert and then tax , every capital receipt which is non chargeable to tax to chargeable income , like compensation received by assessee as practically seen in cases of real estate flat/property buyers for delayed /non possession of immovable property etc. For this one may refer to Delhi bench of ITAT detailed order in case of Chitranjan Dua case (Ita 5803/Del/2015 dated 29.10.2018) wherein after discussing entire case law on subject it is held that amount recd on settlement by assessee over and above advance amount is capital receipt non chargeable to tax and it cant be also called as interest in section 2(28A) of the act as there is no transaction of lending/borrowing etc. In this context one may again refer to Bombay high court in Rupesh Shah case (supra) that *"However, the fundamental question is does section 194A make the interest income chargeable to tax if it otherwise is not. The answer has to be in the negative. The provision for deduction of* *tax at source is not a charging provision. It only makes deduction of tax at source on payment of same, which, in the hands of payee, is income. If the payee has no liability to pay such income, the liability to deduct tax at source in the hands of payer cannot be fastened. In other words, the provision of deducting tax at source cannot govern the taxability of the amount which is being paid…… The question of deduction of tax at source would arise only if the payment is in the nature of income of the payee"*

This may be pleaded by recipient to payer to request for no TDS u/s 194A where receipt is compensation and capital receipt non chargeable to tax. Same is Karnataka high court decision in case of Karnataka Power Transmission case 383 ITR 59 holding that for purpose of deducting tax at source the income which finally partakes the character of income alone is allowable for deduction of income tax. If the amount is not considered to be income in hands of deductee, provisions of TDS would not be made applicable.

On compensation one may refer to:Charge of income-tax -Celebrity-Damages for reputation- **Compensation received by a film actress from Coca Cola India Limited (CCIL) towards damages caused to her reputatio**n *(also for not to initiate civil/criminal proceedings)*-Cannot be assessed as any benefit, perquisites arising to her out of exercise of profession- Not liable to tax. [S. 2(24) 28 (i)]in case of Sushmita Sen. v. ACIT (2018) 172 DTR 201/ 196 TTJ 801 / (2019) 174 ITD 8 (Mum.)(Trib.) Likewise in case of Jacki shroff (ITA 2792/Mum/2016 dated 23.05.2018) held that compensation and damages received for withdrawal of criminal complaint is a capital receipt and same could not be treated as income u/s 2(24) of the Act where Bombay high court decision in case of Amar dye chem (74 Taxman 254). Since Finance Act 2018 has inserted two clauses in section 28 and section 56 respectively and limitedly dealing with *compensation for termination/modification of business /employment contract as specified therein* has made it taxable with prospective effect from AY 2019-2020 and before that (till AY 2018-2019) one may plead confidently that even said compensation *for termination/modification of business /employment contract* was capital receipt non chargeable to tax. Even after this amendment , in authors opinion , not all type of compensation are made taxable (which in above decided cases are held exempt in hands of **real estate buyer**, compensation against **right to sue** , compensation **on sale deed cancellation** , compensation for **loss to reputation**, compensation/liquidated damages for **late and delayed supply** of contracted goods etc) and only when compensation is given on termination or modification of specified contract (business or employment) then only any taxability might come in stated cases.

Interestingly after referring to entire case law on subject , in case of Anil Gulab Das Shah (ITA 5134/2017 order dated 09/08/2019) Mumbai bench of ITAT has held that "there cant be any transfer of right to sue under Indian law and any capital receipt arising from a right to sue cant be considered for capital gains in section 45 of the Act and since cost of right to sue is also indeterminate applying Apex court in B.C.Shrinivasa Shetty case, charging section would fail and thus this amount would be capital receipt non chargeable to tax. **Even in author opinion in present section 56(2) in other sources head same position should arguably prevail that is amount recd against right to sue should not fall in section 56(2) also .**

Further in very recent case, Mumbai bench of ITAT in case of Anik Industries Limited (ITA 7189/Mum/2014 order dated 19.03.2020) has held that compensation recd by an existing partner for other partners for reduction in profit sharing ratio is non chargeable to tax and is not taxable in capital gains u/s 45 of the Act.

4. Now we turn to concept of real income as highlighted in various Apex court rulings in the Act. First mention is made to leading decision in case of Excel Industries case 358 ITR 295 wherein it is held after referring to various earlier decisions of apex court that *"First of all, it is now well settled that income tax cannot be levied on hypothetical income and …. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is not hypothetical and it has really accrued to the assessee." Likewise one may refer here itself to old Apex court ruling in case of* CIT, Bombay City I Vs.Messrs. Shoorji Vallabhdas And Company [reported in 46 ITR144] stating *that no doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a "hypotheticalincome", which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable." Like wise one may refer to old and important Apex court ruling in case of Sunil Sindharth bhai reported at 156 ITR 509 wherein it is held that "The third contention of learned counsel for the assessee is that no profit or gain car. be said to arise to a partner when he brings his personal asset into a partnership firm as his contribution to its capital. It is urged that the capital gains chargeable under s.45 are real capital gains computed on the ordinary principles of commercial accounting and that the capital gains must be embedded in the capital asset. In Miss Dhun Dadabhoy Kapadia v. Commissioner of Income-Tax, Bombay, (1967) 63 I.T.R.. 651, the appellant held by way of investment some ordinary shares in a limited company. An offer was made by the company to her by which she was entitled to apply for an equal number of new ordinary shares at a premium with an option of either taking the*

shares or renouncing them in favour of others. The appellant renounced her rights to all the shares and realised Rs. 45,262.50. When this amount was sought to be wholly taxed as a capital gain the appellant claimed that on the issue of the new shares the value of her old shares depreciated and that as a result of the depreciation she suffered a capital loss in the old shares which she was entitled to set off against the capital gain of Rs. 45,262.50. In the alternative she claimed that the right to receive the new shares was a right which was embedded in her old shares and consequently when she realised the sum of Rs. 45,262.50 by selling her right, the capital gain should be computed after deducting from that amount the value of the embedded right which became liquidated. This Court upheld the claim of the appellant that she was entitled to deduct from the sum of Rs. 45,262.50 the loss suffered by way of depreciation in the old shares. The Court proceeded on the basis that in working out capital gain or loss, the principles which had to be applied are those which are a part of commercial practice or which an ordinary man of business would resort to when making computation for his business purposes. It will be noticed that this principle was applied by the Court in a case where a capital gain was sought to be taxed under the Income Tax Act. That profits or gains under the Income Tax Act must be understood in the sense of real profits or gains, that is to say, on the basis of ordinary commercial principles on which actual profits are computed, a sense in which no commercial man would misunderstand, has been regarded as a principle of general application, and there is a catena of cases of this Court which affirms that principle. Reference may be made to Calcutta Co. Ltd. v. Commissioner of Income-Tax, West Bengal, (1959) 37 I.T.R. 1, Commissioner of Income-Tax v.Bai Shirinbai K. Kooka, (1962) 46 I.T.R. 86, Poona Electric Supply Co. Ltd. v. Commissioner of Income-Tax, Bombay City I, (1965) 57 I.T.R. 521, Commissioner of Income-Tax, West Bengal II v. Birla Gwalior (P) Ltd. (1973) 89 I.T.R. 266 and Bafna Textiles v. Income-Tax officer, Assessment-4, Circle II, Bangalore, (1975) 98 I.T.R. 209. ...Having regard to the nature and quality of the consideration which the partner may be said to acquire on introducing his personal asset into the partnership firm as his contribution to its capital it cannot be said that any income or gain arises or accrues to the assessee in the true commercial sense which a business man would understand as real income or gain."

To the same effect on real income concept, one may refer to three recent decisions of Apex court having far reaching impact in cases of Balbir Singh Maini 398 ITR 531 and T.Jayachandran 406 ITR 1 (held That the revenue has to see what income has really accrued, not by reference to physical receipt of income, but by the receipt of income in reality; that when the assessee had acted only as a broker and not allowing any claim of ownership, the receipt of money was only on behalf of his clients in trust; and that, therefore, such receipt cannot be termed to be the income of the assessee) and case of Pearless General Finance & Investment Co. Ltd. vs CIT (2019), 416 ITR 1 (SC) wherein the Hon'ble Apex Court held that it is not a theoretical aspect but the reality of the situation that has to be viewed as a whole, which may lead to the conclusion that the receipts in question were capital and not income.

If we apply above apex court decisions on real income concept , to case study where let us say director of a company has given *as security* his immovable property for loan given by bank to company where he is director , and no loan amount is advanced to director, and later when company is not able to pay off the loan to bank etc property of director which was given as security is put on sale by bank to recover loan advanced to company , where not a single penny comes to director from bank on sale of his property, **can director relying on real income concept plead that no capital gains should be taxable in section 45 and section 48 in his hands on basis of above dictum , in authors humble opinion Yes** albeit this issue is not free from doubt and already two views are there on this.

On accrual of income concept one may refer to old Apex court verdict in case of E.D.Sasoon case reported at 26 ITR 27 which has been recently applied in detail by apex court in case of P.G.Sawoo case reported at 385 ITR 60:
Held that "Viewed from the aforesaid perspective, it is clear that no such right to receive the rent accrued to the assessee at any point of time during the assessment year in question, inasmuch as such enhancement

though with retrospective effect, was made only in the year 1994. The contention of the Revenue that the enhancement was with retrospective effect, in our considered view, does not alter the situation as retrospectivity is with regard to the right to receive rent with effect from an anterior date. The right, however, came to be vested only in the year 1994."

*Applying :***Apex Court in E.D. Sassoon (supra) would go to show that the income to be chargeable to tax must accrue or arise at any point of time during the previous year. This Court in E.D. Sassoon (supra) has held in categorical terms that income can be said to have accrued or arisen only when a right to receive the amount in question is vested in the appellant-assessee. The following extract from the judgment in E.D. Sassoon (supra) amply illustrates the above position** *: "The word "earned" has not been used in Section 4 of the Income-tax Act. The section talks of "income, profits and gains" from whatever source derived which (a) are received by or on behalf of the assessee, or (b) accrue or arise to the assessee in the taxable territories during the chargeable accounting period. Neither the word "income" nor the words "is received", "accrues" and "arises" have been defined in the Act. The Privy Council in Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.1 attempted a definition of the term "income" in the words following : "Income, their Lordships think, in the Indian Income-tax Act, connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall." Mukerji, J., has defined these terms in Rogers Pyatt Shellac & Co. v. Secretary of State for India2 "Now what is income ? The term is nowhere defined in the Act.....In the absence of a statutory definition we must take its ordinary dictionary meaning -'that which comes in as the periodical produce of one's work, business, lands or investments (considered in reference to its amount and commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation " (Oxford Dictionary). The word clearly implies the idea of receipt, actual or constructive. The policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. 'Accrues', 'arises' and 'is received' are three distinct terms. So far as receiving of income is concerned there can be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning plainer than the word 'receiving' itself. The words 'accrue' and 'arise' also are not defined in the Act. The* *ordinary dictionary meanings of these words have got to be taken as the meanings attaching to them. 'Accruing' is synonymous with 'arising' in the sense of springing as a natural growth or result. The three Expressions 'accrues', 'arises' and 'is received' having been used in the section, strictly speaking 'accrues' should not be taken as synonymous with 'arises' but on the distinct sense of growing up by way of addition for increase or as an accession or advantage; while the word 'arises' means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed out by Fry, L.J. in Colquhoun v. Brooks3, [this part of the decision not having been affected by the reversal of the decision by the House of Lords] that both the words are used in contradistinction to the word 'receive' and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate. One other matter need be referred to in connection with the section. What is sought to be taxed must be income and it cannot be taxed unless it has arrived at a stage when it can be called 'income'." The observations of Lord Justice Fry quoted above by Mukerji J. were made in Colquhoun v. Brooks4 while construing the provisions of 16 and 17 Victoria Chapter 34, Section 2 , Scehedule'D'. The words to be construed there were "profits or gains, arising or accruing" and it was observed by Lord Justice Fry at page 59:- "In the first place, I would observe that the tax is in respect of 'profits or gains arising or accruing.' I cannot read those words as meaning 'received by'. If the enactment were limited to profits and gains 'received by' the person to be charged, that limitation would apply as much to all Her Majesty's subjects as to foreigners residing in this country. The result would be that no income-tax would be payable upon profits which accrued but which were not actually received, although profits might have been earned in the kingdom and might have accrued in the kingdom. I think, therefore, that the words 'arising or accruing' are general words descriptive of a right to receive profits." To the same effect are the observations of Satyanarayana Rao J. in Commissioner of Income-tax, Madras v. Anamallais Timber Trust Ltd.5, and Mukherjea J. in Commissioner of Income-tax, Bombay v. Ahmedbhai Umarbhai & Co., Bombay6, where this passage from the judgment of Mukerji J. in Rogers Pyatt Shellac & Co. v. Secretary of State for India7,* *is approved and adopted. It is clear therefore that income may accrue to an assesee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed debitum in presenti, solvendum in futuro; See W. S. Try Ltd. v. Johnson (Inspector of Taxes8), and Webb v. Stenton and Others, Garnishees9. Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him."*

Above decision in E.D.Sasoon on accrual of income is a locus classicus on subject.

One practical case study on accrual of income is whether a refundable deposit recd by a club (refundable on occurrence of certain contingences mentioned in rules etc of the club) can it be called as revenue receipt or is capital receipt , in case of Gulmohar Green Golf and Country Club case (order dated 16/11/2016) Gujarat high court has held it to be capital receipt non taxable.

Next case study which one may allude to is whether concept of deferred consideration can be there in capital gains head in section 45 where certain portion of sale consideration in Sale agreement etc is made contingent on future event , if one looks plainly to section 45 then it would be given an impression entire sale consideration would become taxable at the time and year of transfer u/s 2(47) of the Act, where as if one looks deeply into it then it may divulge that concept /aesthetics of deferred consideration (on basis of first principle of accrual of income as discussed above) would be applicable to section 45 also. For this proposition (again subject matter of cleavage of judicial opinion) one may refer to Bombay high court leading decision in case of Hemal Raju Shete (239 Taxmann 176)where in it is held that consideration not accrued to assessee and where for same there is no right to receive available to assessee, applying SC orders in 26 ITR 27, 46 ITR 144, 82 ITR 835, it was inferred that same can be taxed only in year when it accrues to assessee (transferor). This decision is recently followed by Mumbai bench of ITAT in case of Universal Medicare (ITA 4418/2016 order dated 06.03.2020) wherein after considering entire case law on subject, para 40 it is held that *"40. In view of the aforesaid discussion, we are of the view that the income* *for the year under consideration of Rs. 447.30 crore and further Rs. 17.89 crore was accrued to the assessee. The assessee offered the same under the head Capital Gain and no other income which is not accrued to the assessee is not liable to tax in the year under consideration. The remaining income was accrued only in subsequent Assessment Year i.e. A.Y. 2013-14 to 2016-17 that is an amount of Rs. 17.89 Crore each in four subsequent years, and the same has been offered for taxation under the head Capital Gain. Even this fact is not disputed by the revenue"*

5. Then one may refer to concept that book entries by itself are not determinative to taxation ,is fairly very well settled principle and for this proposition one may peek into apex court decisions in cases of 82 ITR 363 (Kedar Nath Jute case) and recent decision in case of Taparia Tools (372 ITR 605) which is apposite to decide accrual and taxability of income under the provisions of the Act.

6. On diversion of income by overriding title , one may refer to recent Apex court decision in case of Yum Restaurant (date of order 24.04.2020) where important observation on diversion of income are made in:

   "38. The law on what amounts to a case of diversion before accrual and what amounts to application post accrual is well settled and can be summarised by making reference to Dalmia Cement Ltd., Rajasthan v. Commissioner of Income Tax, New Delhi9, wherein the following extract of The Commissioner of Income Tax, Bombay City II v. Sitaldas Tirathdas10 was quoted with approval:

   "16… In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Whereby the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first

kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable..."

Furthermore, in Associated Power Co. Ltd. v. Commissioner of Income Tax11, this Court again observed thus:

"13. The application of the doctrine of diversion of income by reason of an over-riding title is quite inapposite. The doctrine applies when, by reason of an over-riding title or obligation, income is diverted and never reaches the person in whose hands it is sought to be assessed..."

Similarly, in The Commissioner of Income Tax, Kerala, Ernakulam v. The Travancore Sugars & Chemical Ltd.12, this Court restated thus:
"22... It is thus clear that where by the obligation income is diverted before it reaches the assessee, it is deductible. But, where the income is required to be applied to discharge an obligation after such income reaches the assessee it is merely a case of application of income to satisfy an obligation of payment and is therefore not deductible."

So applying above principles one may decide whether in given facts an income is diverted at source itself or not. Further one may refer to T.Jayachandran also 406 ITR 1.

7. Finally last case study is taken where in case of unregistered trust (having no registration u/s 12AA) and which happen to receive voluntary contribution and donations and grants etc where after from there certain expenses are incurred as per object of trust and terms of donation/grant etc. . Can revenue say that in present section 56(2)(x) entire gross receipt would be taxable (read with section 2(24)(xviii) of the Act)) or trust can plead that only net income after giving benefit of expenses etc is taxable u/s 56(2) ? In authors opinion relying on spirit of the act and above principle of real income taxability , and scheme of the Act where gross receipts per se are not taxable in the Act, taking support from Delhi high court decision in case of Petroleum Sports Promotion Board reported at

362 ITR 235____, trust can say that only net income is taxable in the Act (be it business head or other sources head). In other source head also section 57 is there which provides for deduction of expenses .

IN THE HIGH COURT OF DELHI AT NEW DELHI % *Date of decision: 3rd March, 2014* + ITA 262/2013 + ITA 264/2013 + ITA 265/2013
PETROLEUM SPORTS PROMOTION BOARD
(**ITR Volume 362 : Part 2 page 235)**

The learned standing counsel for the revenue submitted that the order of the Tribunal is untenable since it indirectly confers the benefit of Section 11 upon the assessee. We are, however, not inclined to accept the contention. The CIT (Appeals) has actually not held so. He never examined the question whether the assessee was eligible for the exemption under Section 11 since there was no ground before him, taken by the assessee, to that effect. All that the assessee claimed before the CIT (Appeals) was that the entire expenditure should be allowed as a deduction since it was incurred for the very objects for which the assessee was established in 1979 i.e. promotion of sports and, therefore, the assessing officer was not justified in restricting the allowance of expenditure to Rs.1,20,000/- only for all the three years. It was this claim that was accepted by the CIT (Appeals). The objection of the learned standing counsel for the revenue that since the grants were assessed under the residual head, there was no scope for allowing the expenditure incurred on the promotion of the sports activities is not acceptable since even under Section 57(iii), any expenditure incurred for the purpose of making or earning the income is allowable as a deduction. It is open to the income-tax authorities to deny the exemption under Section 11 of the Act in the absence of registration under Section 12A and if they do so,

then the assessment has to be completed in accordance with the provisions of the Income Tax Act; if the income is assessed under the residual head full play must be allowed to Section 57(iii). Though prima facie it would appear that the phraseology employed in Section 57(iii) is different from Section 37(1), it has been held by the Supreme Court in CIT vs. Rajendra Prasad Moody, 115 ITR 519 that Section 57(iii) must be construed broadly and the somewhat wider language of Section 37(i) should not affect the interpretation of Section 57(iii). The assessee in the present case was created in 1979 with the object of promoting sports; there was no other object and all its constituents were giving grants/ funds only for that purpose. In truth and reality the assessee was merely acting as a custodian or conduit to the constituents for the purpose of promoting sports activity inside and outside the country. ***The expenditure incurred by the assessee is only for the purpose of promoting the sports events and activities and in this respect there is no challenge to the finding of fact recorded by the Tribunal. If such expenditure is not allowed, it may amount to taxing the gross receipts of the assessee and not the income, which is not permissible under the income tax law. Same is view of Madras high court in recent case of Pentafour Software Employees Welfare Federation reported at 418 ITR 427.***
(same is AP high court Y.S.R. Foundation,20/11/2014 & Society for Integrated Development in Urban & Rural Areas vs. DCIT [90 itd 493]

8. Conclusion

After making dispassionate hermeneutics on concept of income , real income and deemed income, it is vivid that concept of capital receipt non chargeable to tax is gradually decreasing but still relevant and practical in various scenarios and concept of real income based on actual accrual is still given weightage and taxation on hypothetical , notional and theoretical income(unless statute very clearly says otherwise) same should be avoided. Further section 115BBE confiscatory tax rate of 60% from AY 2017-2018 needs to be tested for its validity in a constitutional court. Lastly every taxation must satisfy article 265 of Indian constitution that no tax can be collected except by authority of law (valid law). So deemed taxation on subsidies , advances against immovable property, share capital and share premium , specified compensations in section 2(24), section 56 etc has transgressed into providence of capital receipt. *Still after all this attempt must be made ordinarily to tax only real/net income and non gross receipts.*