DIFFERENT COMPLEXION OF CONTROVERSY IN RELATION TO DOCTRINE OF PRECEDENTS – VIEW AT A GLANCE

APHC FB in B.R.Constructions 202 ITR 222	***MPHC in National Textiles 216 CTR 153***	***Pune ITAT in Aurangabad Resorts 111 TTJ 741***	***Special Bench in Nararng overseas 300 ITR 1(AT) and ITC Ltd 112 ITD 57***
AT SAME COURT : PROCEDURE TO TAKE DIFFERENT DECISION	***LOWER COURT ALWAYS BOUND BY HIGHER COURT CANNOT DEVIATE FROM SUPERIOR COURT***	***DUTY OF ITAT: WHEN NON JURISDICTIONAL HC ORDER IS THERE AND SPECIAL BENCH ORDER IS THERE: NON JURISDICTIONAL WILL PREVAIL OVER SPECIAL BENCH***	***ON DUTY OF ITAT VIS A VIS TWO NON JURISDICTIONAL CONFLICTING HC ORDERS (WHICH ONE TO FOLLOW)***
Quote "The effect of binding precedents in India is that the decisions of the Supreme Court are binding on all the courts. Indeed, article 141 of the Constitution embodies the rule of precedent. ***All the subordinate courts are bound by the judgments of the High Courts***. A single judge of a High Court **is bound by** the judgment of another single judge and a fortiori judgments of Benches consisting of more judges than one. So also, a Division Bench of a High Court is bound by judgments of	Quote ". ***The Tribunal by order out of which this reference arises accepted the contention of Revenue and ignoring the law laid down by jurisdictional High Court of M.P. rendered in Premier Industries case (supra) held that since the High Court has not taken into account the retrospective amendment made in s. 143(1A) of the Act, hence the decision cannot be relied on***. The Tribunal then allowed the appeal filed by Revenue. This is what the Tribunal held :	Quote (per SH. PRAMOD KUMAR) "5. As observed by a co ordinate bench of this Tribunal, in the case of Tej International Pvt Ltd Vs DCIT (69 TTJ 550), in the hierarchical judicial system that we have in India, the wisdom of the court below has to yield to the higher wisdom of the court above, and, therefore, once an authority higher than this Tribunal has expressed its esteemed views on an issue, normally the decision of the higher judicial authority is to be followed. The bench has further held that the fact that the judgment of the higher judicial forum is from a non jurisdictional	In Narang Overseas; "48. The above analysis clearly reveals that there is cleavage of opinion between High Courts. The Hon'ble Madras High Court has held that mesne profits is recompense for deprivation of income which the owner would have enjoyed but for the interference of the persons in wrongful possession of the property. Consequently, the

another Division Bench and Full Bench. A single judge or Benches of High Courts cannot ***differ from the earlier judgments of co-ordinate jurisdiction*** merely because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice are of paramount importance. But, if the earlier judgment is erroneous or adherence to the rule of precedents results in manifest injustice, differing from the earlier judgment), the Supreme Court explained the expression " per incuriam " thus (at page 36 of 77 Fjr)... Though ***a judgment rendered per incuriam can be ignored even by a lower court, yet it appears that such a course of action was not approved by the House of Lords*** in Cassell and Co. Ltd. vs Broome (1972) 1 All Er 801 , wherein the House of Lords disapproved the judgment of the Court of Appeal treating an earlier judgment of the House of Lords as per incuriam. Lord Hailsham observed (at page 809) : ***" It is not open to the Court of***	"6. We have minutely gone through the decision of the Hon'ble High Court of M.P. in Premier Industries (P) Ltd. (supra). The parties did not bring to the notice of the Hon'ble High Court that retrospective amendment w.e.f. 1st April, 1989, has been brought about by the Finance Act, 1993 by which cl. (a) in sub-s. (1A) of s. 143 has been substituted and Explanation thereunder has been omitted retrospectively w.e.f. 1st March, 1989. In Modi Cement Ltd. (supra) and Indo Gulf Fertilizers (supra), their Lordships of Delhi and Allahabad High Courts had held that the provisions of s. 143(1 A) of the Act as these were worded, were not applicable in loss cases. The amended provisions as contained in s. 143(lA)(a)(ii)(B) provide that where the loss declared in the return is reduced or is converted into income as a result of prima facie adjustment, the AO shall calculate additional income-tax equal to 20 per cent of the tax that would have been chargeable on the amount of the adjustments as if it had been the total income of the assessee. In view of the amended provisions	High Court does not really alter this position...." **PER MUMBAI ITAT IN 20 SOT 129:** "In our view, the judgment of the Hon'ble Madras High Court should be preferred over the order of the Special Bench of the Tribunal located at Madras firstly for the reason that that a decision of the Tribunal overruled by its own jurisdictional High Court stands substituted by the decision of the High Court and secondly for the reason that the decision of a Special Bench of this Tribunal overruled by a High Court, whether jurisdictional or not, ceases to have the value of a precedent so as to bind the other Benches of this Tribunal. 10. In taking the aforesaid view, we are supported by several judgments and orders. In Asstt. Collector of Central Excise v. Dunlop India Ltd. [1985] 154 ITR 172 (SC), it has been held that the better wisdom of the Court below must yield to the higher wisdom of the Court above. It cannot be in dispute that the High Court is a Court above the Special Bench or any Bench of this Tribunal. Similar is the view taken in CIT v. G.M.	Consequently, the same is revenue receipt chargeable to tax. On the other hand the Hon'ble High Courts of Andhra Pradesh, Calcutta, Kerala and Patna have held that mesne profit is in the nature of damages for deprivation for use and occupation of the property and therefore capital receipt not chargeable to tax. There is no judgment of the jurisdictional High Court on this issue. In our view, such conflict can be resolved only by the Hon'ble Supreme Court in some appropriate case. In the absence of the judgment of the highest court of land or of the jurisdictional High Court, the legal position is that, ***where there are two views then the view favourable to the subject should be preferred***. Reference can be made to various judgements of

Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way. " It is recognised that the rule of per incuriam is of limited application and will be applicable **only in the rarest of rare cases**. ***Therefore, when a learned single judge or a Division Bench doubts the correctness of an otherwise binding precedent, the appropriate course would be to refer the case to a Division Bench or Full Bench, as the case may be, for an authoritative pronouncement on the question involved as indicated above***. The above-said two questions are answered as indicated above." Unquote From above three things emerge: a) controversy in aforesaid case pre-dominantly centered around bindingness of a co-ordinate bench decision over another co-ordinate bench decision (OF SAME COURT/AUTHORITY)-	retrospectively w.e.f. 1st April, 1989, the decision of the CIT(A) is not sustainable. We, therefore, set aside his order and restore the order of the AO imposing the additional income-tax." (Emphasis, italicized in print, supplied)" ***"19. In the light of aforesaid pronouncement of law laid down by Supreme Court and High Court and explained by Salmond in his book as to what should be the approach of Courts/Tribunals when any decision of Supreme Court or and High Court i.e., superior Court is cited before them, it is clear that all Courts/Tribunals functioning in a State are bound by law laid down by the State High Court. It is neither permissible nor legal for any Court and Tribunal to comment upon the decision of Supreme Court/High Court. Similarly, it is also not permissible for the Tribunal to comment upon the manner in which a particular decision was rendered by Supreme Court/High Court. It is also not permissible for Tribunal to sidetrack or/and ignore the decision of High Court on the ground that it did not take into***	Mittal Stainless Steel [2005] 142 Taxman 349 (MP) and CIT v. Abhishek Industries Ltd. [2006] 286 ITR 1 (Punj. and Har.) in which it has been held: 'It is the duty of the Tribunal to decide the cases on the basis of the law laid down by the Supreme Court/High Court and not what the Tribunal decides on the particular issue. Every effort must be made by the Tribunal to decide the issue by taking help from the decisions of the Supreme Court and if there is no direct authority of the Supreme Court on the point then of the jurisdictional High Court and lastly of any other High Court'. In view of these decisions, it is difficult for us to hold that the order of the Special Bench at Chennai in Kwality Milk Foods Ltd.'s case (supra) will prevail over the order of Madras High Court in whose jurisdiction the Special Bench at Chennai is located. Besides, the judgment of the Hon'ble Madras High Court is the solitary judgment dealing with the effect of omission of the second proviso to section 43B and consequently with the issue whether amended proviso effective from 1-4-2004 has retrospective effect so as to nullify the effect of the second proviso in the years when second proviso	the Apex court: CIT vs. Vegetable Products, 88 ITR 192 (SC), CIT vs. Naga Hills Tea Co. Ltd., 89 ITR 236 (SC), CIT vs. Madho Prasad Jatia, 105 ITR 179 (SC), CIT vs. J.K. Hosiery Factory 159 ITR 85, Shashi Gupta vs. LIC, 84 Comp. Cases 436. Therefore, following the same, it has to be held that mesne profit received for deprivation of use and occupation of property would be capital receipt not chargeable to tax. We hold accordingly. Consequently, the decision of the Special Bench of the Tribunal in the case of Sushil Kumar and Co. (supra), holding to the extent that mesne profit is taxable as revenue receipt is overruled." IN ITC : "The above second proviso has been omitted by the Finance Act, 2003 with

APPARENTLY APHC RULING CANNOT BE TAKEN HELP OF WHEN TWO COURTS ARE AT DIFFERENT TIERS RATHER IT SAYS BY REFERENCE TO HOUSE OF LORDS DECISION A LOWER COURT IS ALOWAYS BOUND BY HIGHER COURT b) APHC itself stated in aforesaid scenario also, if a co-ordinate bench observes another decision as per-incuriam, then it is required to refer the matter to LARGER/FULL BENCH (refer LATEST DHC in DLF 172 TAXMAN 107& GUJ HC IN 222 CTR 387) c) APHC itself stated doctrine of **"PER INCURIAM" needs to be applied in rarest of rare cases** (like capital punishment) ALSO REFER: ***The legal position on the point is made luculent by the Supreme Court in the case of Pradip Chandra Parija v. Pramod Chandra Patnaik [2002] 254 ITR 99 in the following terms (headnote) :***	***consideration a particular provision of law. If such approach is resorted to by subordinate Courts/Tribunals then it is held to be not in conformity with the law laid down by Supreme Court. It was deprecated by Supreme Court as being improper."*** "....It is for the High Court to decide as to whether it has laid down correct principle of law and if not, whether it needs to be overruled and if so, to what extent and on what grounds. The matter can then be referred to a Larger Bench of High Court as per procedure prescribed in High Court Rules and Orders for deciding the correctness of such decision. It is for the reason that a jurisdiction to declare any decision of High Court as laying down correct principle of law or is per incuriam vests only in Supreme Court of India, it being an appellate Court for the High Court under Art. 136 of Constitution as also being the highest Court in Indian judicial system and in the concerned High Court. As a matter of fact, a decision rendered by 'A' High Court cannot be overruled by 'B' High Court. In such circumstance. 'B' High Court	existed on the statute book and therefore it is required to be followed and this is more particularly so when we are also in respectful agreement with the aforesaid judgment. The view that we are taking in the matter is also supported by the decision of the Hon'ble Bombay High Court in CIT v. Smt. Godavaridevi Saraf [1978] 113 ITR 589. Simply because the judgment in Synergy Financial Exchange Ltd. (supra) has been rendered by a non-jurisdictional High Court, it does not mean that it is not entitled to any respect by the Tribunals located outside the jurisdiction of the said High Court or that its value in terms of precedent is less than the value attached to the orders of the Tribunal. We are well aware of the judgment in CIT v. Thana Electricity Supply Ltd. [1994] 206 ITR 727 (Bom.) in which it has been held: 'The decision of one High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside its territorial jurisdiction. . . . . In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect'. As stated earlier, we are greatly persuaded by the judgment of the Hon'ble Madras High Court in Synergy	effect from 1.04.2004 and the Special Bench, Chennai in the case of Kwality Food Products reported in 100 ITD 198 has held that such amendment by the Finance Act, 2003 is retrospective in nature. However, the Hon'ble Chennai High Court in the case of CIT -vs- Synergy Financial Exchange Ltd. (supra) has held that deletion of second proviso would not have any retrospective effect. Hon'ble Gauhati High Court in case of George William Sons reported in 284 ITR 619 has held that such amendment to second proviso to section 43B is retrospective in nature and therefore this will be applicable to earlier year also. Since there are two decisions one in favour of assessee and another against the assessee, in our considered opinion the view favourable to

(headnote) : ***"Judicial discipline and propriety demands that a Bench of two judges of the Supreme Court should follow a decision of a Bench of three judges. If the Bench of two judges concludes that an earlier judgment of a Bench of three judges is so very incorrect that in no circumstances can it be followed, the proper course for the Bench of two judges to adopt is to refer the matter before it to a Bench of three judges, setting out the reasons why it could not agree with the earlier judgment. If, then, the Bench of three judges also comes to the conclusion that the earlier judgment of a Bench of three judges is incorrect, reference to a Bench of five judges is justified."***	can only record their dissent with the view taken by 'A' High Court by assigning their own reasoning. In other words, a power to overrule any decision of High Court vests only with Supreme Court and with the Larger Bench of the same High Court. So long as decision is not overruled, it continues to hold the field and is, therefore, binding on Courts/Tribunals subordinate to such High Court." Unquote	Financial Exchange Ltd.'s case (supra) and therefore, we prefer to follow the said judgment to the orders of the Tribunal." Q.131 **When there is no contrary judgement, whether Tribunal has to follow decision of non-jurisdictional High Court?** **Ans.** Yes. Income-tax is a Central Act and therefore the Tribunal should follow the decision. In, *CIT vs. Highway Construction Co. (P) Ltd. (1996) 217 ITR 234 (240) (Gauh.),* the Court held that, when there is a decision of different High Court and there is no contrary decision, it will be just and proper for the Tribunal to follow the said decisions.	assessee should be taken as held by Hon'ble Supreme Court in case of CIT -vs- Vegetable Products Ltd. reported in 88 ITR 192. We therefore, respectfully following the same hold that employer's contribution are to be allowed, if paid, on or before the due date of filing of return as prescribed in the Income Tax Act."