Expert’s Opinion on Tax Matters

Introductory Remarks

1.1 In this article it is proposed to discuss about the role of experts and the acceptance of the views of such experts either as part of business or from outside business by making use of such views by the judicial authorities in India and other countries for deciding the issues that arose before them.

1.2 Why expert's opinion is needed?

A legal document is construed according to its tenor. But the court may not be well equipped with the scientific or technical knowledge to comprehend their actual import or meaning. For that purpose, they have to lean upon the experts' opinion. Thus, where the technical terms used, or where the qualities of substance or operations mentioned or any similar data necessary to the comprehension of the language of the document are unknown to the court, the testimony of the experts may be received. Their opinion therefore becomes necessary as the judges cannot be expected to have always the requisite knowledge of the meaning of the terms of art or science used. They turn to experts to throw light relevant to the significance of such words and phrases. In respect of interpretation of a patent document it was observed by Court that expert's testimony is admitted on the nature of the various mechanisms or manufactures described in different patents produced, and as to identify or diversity between them. [see *Bischoff* v. *Wethered* 9 Wall 812 [1869]

Let us start the discussion with the relevance of expert opinion with the decision of the U.S. Supreme Court in the case of *Bischoff* (*supra*)

Decision of the U.S. Supreme Court in the case of *Bischoff* (*supra*)

2. Two issues were involved in this case; first, document interpretation and, second product identification. From the view point of the U.S. Supreme Court in this case the following points emerge-

"Construction of a patent is not only the construction of the instrument alone but also the character of the thing invented, which is in questions of identity and diversity of inventions. For identification of the product the Courts may rely upon experts' opinion. The Court is not obliged by that opinion. The actual interpretation of the patent the Court proceeds upon its own responsibility as an arbiter of the law, giving to the patent its true and final character and force."

Hon'ble Mr. Justice Bradley while delivering the opinion of the Court in the case of *Bischoff* (*supra*) made the following pertinent observations with regard to taking the

opinion of an **expert** in the appropriate situations in the course of legal proceedings before the Court-

"A case may sometimes be so clear that the Court may feel no need of an expert to explain the terms of art or the descriptions contained in the respective patents, and may, therefore, feel authorized to leave the question of identity to the jury, under such general instructions as the nature of the documents seems to require. And in such plain cases the Court would probably feel authorized to *set aside* a verdict unsatisfactory to itself, as against the weight of evidence.----------.
It may be objected to this view that it is the province of the Court, and not the jury, to construe the meaning of documentary evidence. This is true. But the specifications of patents for inventions are documents of a peculiar kind. They profess to describe mechanisms and complicated machinery, chemical compositions and other manufactured products, which have their existence *in pais*, outside of the documents themselves; and which are commonly described by terms of the art or mystery to which they respectively belong; and these descriptions and terms of art often require peculiar knowledge and education to understand them aright; and slight verbal variations, scarcely noticeable to a common reader, would be detected by an expert in the art, as indicating an important variation in the invention."

The phrase *"in pais*" as applied to a legal transaction, primarily means that it has taken place without legal proceedings *i.e.*, outside of Court; without legal proceedings.

As per Wikipedia a jury is a sworn body of people (the jurors) convened to render an impartial verdict(a finding of fact on a question) officially submitted to them by a Court, or to set a penalty or judgment. Juries developed in England during the Middle Ages, and are a hallmark of the Anglo common law legal system. They are still commonly used today in Great Britain, the United States, Canada, Australia, and other countries whose legal systems are descended from England's legal traditions.

Emergence of concept of experts' opinion in India in full earnest

3. The Supreme Court in the case of *CIT* v. *Bharti Cellular Ltd.* [2010] 193 Taxman 97/[2011] 330 ITR 239 (SC) while considering the issue whether TDS was deductible by the assessee, a cellular service provider on interconnect/access/port charges paid to BSNL/MTNL, held that in absence of any ***expert*** evidence from department to show how mutual intervention was involved in technical operations by which the assessee was given facility by BSNL/MTNL for interconnection, the matter could not be decided and directed the Revenue by emphasising on the need to rely upon the opinion from technical experts in cases involving complex technical matters in the following words at para.11 of its judgment-

"Before concluding, we are directing the Central Board of Direct Taxes to issue directions to all its officers that in such cases, the Department need not proceed only by the contracts placed before the officers. With the emergence of our country as one of the BRIC countries and with technological advancement, matters such as present one will keep on recurring and hence time has come when the Department should examine technical **experts** so that the matter could be disposed of expeditiously and further it would enable the appellate forums, including this Court, to decide legal issues based on the factual foundation. We do not know the constraints of the Department but the time has come when the Department should understand that when the case involves revenue running into crores, technical evidence would help the Tribunals and Courts to decide matters expeditiously based on factual foundation. The learned Attorney General, who is present in the Court, has assured us that our directions to the Central Board of Direct Taxes would be carried out at the earliest."

This direction of the Supreme Court propelled the Central Board of Direct Taxes (CBDT) to issue Instruction No. 5/2011 [F.NO. 225/61/2011-IT(A-II)], Dated 30-3-2011 wherein after extracting the above quoted para. from the decision of the Supreme Court in the case of *Bharti Cellular Ltd* (*supra*), the CBDT issued directions as under-

"2. The above directions of the Supreme Court may be brought to the notice of all the officers in your region. In view of these directions in all cases that are taken up for scrutiny, the Assessing Officers/Transfer Pricing Officers should frame assessments only after bringing on record appropriate technical evidence that may be required in a case. The process of identification of such cases and initiation of the proceedings to obtain the technical evidence should be taken up well in advance before the date of limitation. The Officer concerned shall bring such cases to the notice of the CCIT/DGIT concerned, who will look into the complexities of the technical issues and monitor the progress of the case and if required assist in obtaining the opinion of the technical experts in the relevant field of expertise and endeavour to arrange for the opinion of the concerned technical **expert** well within time. Further, the evidence so gathered shall be made available to the assessee and reasonable opportunity provided before the assessment order is passed."

The CBDT also prescribed a simple format in which details have to be forwarded to it through Member (IT).

Cases wherein opinion of expert was recognized

4.1 The Supreme Court in the case of *Dilip N. Shroff* v. *Jt CIT* [2007] 161 Taxman 218/161 Taxman 218 held that "though a duty may be enjoined on the assessee to make a correct disclosure of income but if such disclosure is based on opinion of an expert, who is otherwise also a registered valuer having been appointed in terms of a statutory scheme, only because his opinion is not accepted or some other expert gives another opinion, same

by itself may not be sufficient for arriving at conclusion that assessee has furnished inaccurate particulars warranting penalty under section 271(1)(*c*) of the Act."

Though this decision on the principle of *mens rea* was overruled in the case of *Union of India* v. *Dharmendra Textiles Processors* [2008] 174Taxman 571/306 ITR 277 (SC) [a Bench consisting of 3 Hon'ble Judges],the subsequent Supreme Court decision in the case of *CIT* v. *Reliance Petroproducts (P.) Ltd*. [2010] 189 Taxman 322 ITR 158[a Bench consisting of 2 Hon'ble Judges] explained that "it must be pointed out that in *Dharamendra Textile Processors* (*supra*), no fault was found with the reasoning in the decision of *Dilip N. Shroff* (*supra*), where the Court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in *Dilip N. Shroff* (*supra*) to the effect that *mens rea* was an essential ingredient for the penalty under section 271(1)(*c*) that the decision in *Dilip N. Shroff* (*supra*) was overruled."

So, the observations made by the Supreme Court in the case of *Dilip N. Shroff* (*supra*) with regard to opinion of experts are very much relevant.

4.2 In the case which arose before the Supreme Court in *Saraswati Industrial Syndicate Ltd*. v. *CIT* [1999] 103 Taxman 395/237 ITR 1 the facts were that the assessee claimed depreciation at higher rate on machinery used in manufacture of sugar on ground that it was machinery and plant coming into contact with corrosive chemicals as given in item 3(*ii*)B(7) of Para III of Part I of Appendix I to the Income-tax Rules 1962. The Assessing Officer did not consider experts' opinion filed by the assessee on ground that expert was not produced for cross-examination. The Assessing Officer concluded that sugarcane juice was not something which was obtained through a chemical process nor was it used for chemical effect. The Tribunal held that words 'corrosive chemicals' employed in entry (*ii*) B(7) would contemplate not only free chemicals but also non-free chemical of corrosive effect. The High Court held that filtered sugarcane juice coming into contact with machinery could not be said to be corrosive chemicals. The Supreme Court held that neither the Assessing Officer nor indeed, the High Court was entitled to make statement on technical matters for which no basis had been laid on record either by the revenue or the assessee and appropriate course was to require the Tribunal to take further evidence and draw up a supplemental statement of case and the issue was remanded to the Tribunal.

The Supreme Court, while reversing the decision of the Punjab & Haryana High Court in the case of *CIT* v. *Saraswati Industrial Syndicate Ltd*. [1981] 7 Taxman 83 [1982] 136 ITR 758 criticised the way the process was explained by the High Court disagreeing with the views of the Tribunal and the report of the expert by explaining as under at para.7 of its judgment-

"----------there appears to be some misunderstanding of what the said entry is intended to convey. Depreciation at a higher rate is allowed to machinery that comes into contact with corrosive chemicals. Corrosive chemicals corrode the machinery. They erode any, by reason of such erosion, the life of the machinery is truncated. To compensate, depreciation is allowed at a higher rate. It is not intended that the machinery must come into contact with a pure corrosive chemical. It is enough that what passes through the machinery contains chemicals which are corrosive and which, therefore, have the effect of wearing it down."

4.3 In the case which arose before the Supreme Court in *Morinda Co-operative Sugar Mills Ltd*. v. *CIT* [2012] 26 taxmann.com 71/210 Taxman 237/[2013] 354 ITR 230 the dispute between the assessee and the Revenue was with regard what is the definition of " manufacturing authority" as the assessee claimed that it was entitled to the benefit of section 80P(2)(*a*)(*iii*) of the Income-tax Act (the Act) in respect of sugarcane grown by its members by contending that it had not undertaken any manufacturing activity which would have disentitled the assessee from claiming the benefit under section 80P(2)(*a*)(*iii*) of the Act and that such claim was resisted by the Revenue.

The Supreme Court remitted these cases back to the Commissioner of Income-tax [Appeals] to re-examine the matter. The Supreme Court directed that the Commissioner of Income-tax (Appeals) would give an opportunity to the assessee(*s*) to put-forth the opinion of an independent expert who shall not be from the Society or Federation and that a copy of the written opinion should be given to the Department. The Supreme Court further directed that the Department would be free to engage its own expert who, in turn, would give his opinion with rights and liberty given to the parties to cross-examine the experts and that accordingly, the Commissioner of Income-tax (Appeals) would decide these cases and ascertain whether the operation undertaken by the assessee was or was not 'manufacture'

4.4 The Supreme Court in the case of *CIT* v. *Virtual Soft Systems Ltd* [2018] 92 taxmann.com 370/255 Taxman 352/404 ITR 409 (SC) held that "There being no express bar in Act regarding application of accounting standards prescribed by the ICAI, deduction on account of lease equalization charges from lease rental income could have been allowed under Act, on basis of these Accounting Standards."

The following observations made by the Supreme Court in this decision are worth noticing-

"The ICAI is an **expert** body, created by the Parliament under the Chartered Accountants Act, 1949. The ICAI's publication on the subject indicates that the Guidance Note on Accounting for Leases was issued by it for the first time in 1988 which was later on revised in 1995. The Guidance Note reflects the best practices adopted by the accountants throughout the world. The ICAI is a recognized body vested with the authority to

recommend Accounting Standards for ultimate prescription by the Central Government in consultation with the National Advisory Committee of Accounting Standards for the presentation of true and fair financial statements. [Para 8]

The purpose behind the amendment in section 211 of the Companies Act, 1956 was to give clear sight that the Accounting Standards, as prescribed by the ICAI, shall prevail until the Accounting Standards are prescribed by the Central Government under this sub-section. The purpose behind the Accounting Standards was to arrive at a computation of real income after adjusting the permissible depreciation. It is not disputed that these Accounting Standards are made by the body of experts after extensive study and research. [Para 10]"

4.5 The Supreme Court in the case of *CIT* v. *Emptee Poly-Yarn (P.) Ltd*. [2010] 188 Taxman 188/320 ITR 665 (SC) while dismissing appeal of the Revenue gave credence to the opinion of the experts and held that "Partially Oriented Yarn (POY) is a semi-finished yarn not capable of being put in warp or weft. It can only be used for making a texturized yarn, which, in turn, can be used in the manufacture of fabric. In other words, POY cannot be used directly to manufacture fabric. According to the experts, crimps, bulkiness, etc., are introduced by a process called as thermo-mechanical process into POY which converts POY into a texturized yarn. If one examines this thermo- mechanical process in detail, it becomes clear that texturizing and twisting of yarn constitutes 'manufacture' in the context of conversion of POY into texturized yarn."

The Supreme Court, thus agreeing with the views of the High Court held that "the assessee was entitled to deduction under section 80-IA of the Act."

4.6 The Supreme Court in the case of *CIT* v. *Nirlon Synthetics Fibres & Chemicals Ltd*. [1981] 6 Taxman 27/130 ITR 14 endorsed the opinion of the Tribunal relying on the views of the ***experts*** in arriving at the conclusion by holding as under-

"The basis on which the Tribunal rested its conclusion consisted of a large volume of documentary material drawn from general dictionaries, chemical dictionaries, technical, commercial and Government publications, the documentary testimony of ***experts*** in the fields, the classification set forth in related statutory enactments and the object with which the relevant rebate and relief were intended by the Parliament. There was nothing to show that the finding of the Tribunal proceeded on a misapplication of any rule of law or was based on no evidence or was based on inadmissible evidence or had ignored material evidence or, on the evidentiary material, was perverse. Therefore, no question of law arose from the Tribunal's order and the High Court was right in rejecting the appellant's application under section 256(2) of the Act."

The issue was "Whether a question of law arose from the tribunal's finding that Nylon-6 manufactured from caprolactam was a "petrochemical"?"

4.7 The Calcutta High Court in the case of *CIT* v. *Turner Morrison & Co. (P.) Ltd*. [1968] 68 ITR 147, recognised the expert knowledge of the directors *vis-à-vis* remuneration paid to them by dismissing the appeal of the Revenue after holding as under-

"It is now well settled that the expression 'expenditure laid out or expended wholly and exclusively for the purpose of such business' includes expenditure voluntarily incurred for commercial expediency and in order to indirectly facilitate business. It is immaterial if a third party also benefits thereby. It is further well settled that an expenditure incurred in maintaining the efficiency of the manpower from time to time utilised in a business is also expenditure wholly or exclusively laid cut for the purpose of such business. It is also well settled that the employment of, say a director, at a reasonable extra remuneration to supervise a particular business of the company, regard being had to his **expert** knowledge in that particular line of business, is expenditure within the meaning of section 10(2)(*xv*) and the revenue authorities are not justified in reducing such remuneration. The expression 'commercial expediency' is an expression of wide import and expenditure in commercial expediency includes such expenditure as a prudent man may incur for the purposes of business. An expenditure which is entirely gratuitous and has no connection with the business does not come within the meaning of section 10(2)(*xv*) of the Act."

These observations of the Calcutta High Court were noticed and approved by the Supreme Court in the case of *J.K. Cotton Manufacturers Ltd*. v. *CIT* [1975] 101 ITR 221 at pages 228 and 229 of ITR.

4.8 The Supreme Court in the case of *CIT* v. *Ajax Products Ltd*. [1965] 55 ITR 741 (SC) while affirming the decision of the Madras High Court in the case of *Ajax Products Ltd*. v. *CIT* [1961] 42 ITR 141 approvingly referred to the following observations made by the Madras High Court at pages 147 and 148 of its judgment-

"There was however no basis for the finding of the Tribunal that the assessee should have made a profit of Rs. 1,25,000 by the sale of the building. The position was that the Tribunal did not reject the genuineness of the valuation made by the **experts**, and it had no material either for the estimate it purported to make, the estimate either of the sale value or of the profits realised by the sale of the buildings."

The High Court went to observe at page 148 of its judgment that "As we said, the value fixed by the **experts** represented the real markets value of the buildings as also that of the machinery. There was no evidence contra."

These 2 judgments indicate the importance of valuation made by experts and the valuation made by experts can be relied upon while arriving at a conclusion favourable to the assessee so long as there is no bias or evidence to the contrary to this valuation done by experts.

Cases wherein opinion of expert could not be accepted and why?

5.1 The facts of the case which arose before the Supreme Court in *Guzdar Kajora Coal Mines Ltd*. v. *CIT* [1972] 85 ITR 599 were that the valuation assigned to the assets transferred were found to be fictitious by the Assessing Officer even though the value assigned to the assets was supported by the valuation made by an **expert** and thus the Assessing Officer restricted depreciation on the written down value as per the assessment record of the vendor-company after examining the **expert**.

The Supreme Court recorded the following arguments made on behalf of the assessee at 604 of ITR as under-

"Learned counsel for the assessee has assailed the decision of the High Court on a number of grounds. It has been urged, *inter alia*, that the High Court had not kept in view the general and well-established principle that the statement with regard to valuation contained in a formal document should be, *prima facie*, accepted as correct. There can be no justification, it has been pointed out, for any court or Tribunal "to rip up a transaction not impeached as dishonest and not proved to be such, merely because the company may have paid an extravagant price for their property. A great deal of emphasis has been laid on behalf of the assessee on the report submitted by the experts justifying the evaluation given in the deed of conveyance. In the absence of fraud, collusion, inflation or false transaction made with an ulterior purpose the income-tax authorities, it is said, were precluded from going behind the agreement of purchase in determining the purchase price fixing their own valuation."

The Supreme Court did not agree with these submissions and finally held as under-

"Keeping in view the facts of the present case, we may make it clear that, if circumstances exist for going behind the valuation as also the allocation given in the deed of conveyance, it was and is open to the income-tax authorities to determine the valuation as well as the allocation between depreciable and non-depreciable assets."

5.2 The Supreme Court in the case of *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd*. v. *Asstt. CST* [1974] 94 ITR 204 (SC) [a Bench consisting of 5 Hon'ble Judges) referred to the decision of the Supreme Court in the case of *Municipal Corpn. of Delhi* v. *Birla Cotton Spg and Wvg Mills* AIR 1968 SC 1232 a Bench consisting of 7 Hon'ble Judges] and particularly the views expressed by Hon'ble Justice Mr.J.C. Shah, (as his Lordship then was), speaking for himself and Hon'ble Justice Mr.C.A. Vaidialingam, regarding the limitation on the powers of experts *vis-à-vis* powers of legislature which were in the following words-

"The Constitution entrusts the legislative functions to the legislative branch of the State, and directs that the functions shall be performed by that body to which the Constitution has entrusted and not by someone else to whom the legislature at a given time thinks it proper to delegate the function entrusted to it. A body of **experts** in a particular branch of

undoubted integrity or special competence may probably be in a better position to exercise the power of legislation in that branch, but the Constitution has chosen to invest the elected representatives of the people to exercise the power of legislation, and not to such bodies of **experts**. ***Any attempt on the part of the experts to usurp, or of the representatives of the people to abdicate the functions vested in the legislative branch is inconsistent with the constitutional scheme. Power to make subordinate or ancillary legislation may undoubtedly be conferred upon a delegate, but the legislature must in conferring that power disclose the policy, principles or standards which are to govern the delegate in the exercise of that power so as to set out a guidance.*** Any delegation which transgresses this limit infringes the constitutional scheme"

The issue was whether section 8(2)(*b*) of the Central Sales Tax Act 1956 did suffer from the vice of abdication or excessive delegation of legislative power. The Supreme Court firmly said "NO."

Other relevant decisions of the Supreme Court

6.1 The Supreme Court in the case of *Institute of Chartered Financial Analysts of India* v. *Council of the Institute of Chartered Accountants of India* [2007] 161 Taxman 142 held at para.30 as under-

"Interpretation of law is the job of the Superior Court. An opinion of an expert is not beyond the pale of judicial review. It would certainly not be so when the statutory authority transgresses its jurisdiction. A decision taken in excess of jurisdiction would render the same a nullity. [See *Vasu Dev Singh* v. *Union of India* [2006] 11 SCALE 108]."

6.2 Striking down the constitutional validity of the National Tax Tribunal Act 2005[NTT], the Constitution Bench of the Supreme Court in the case of *Madras Bar Association* v. *Union of India* [2014] 49 taxmann.com 515/227 Taxman 151 (Mag.)/368 ITR 42 while considering as one of the issues regarding the appointment of a Technical Member *vis-à-vis* qualifications of such a member held as under-

"A "technical member" presupposes an experience in the field to which the Tribunal relates. A member of the Indian Company Law Service who has worked with Accounts Branch or officers in other departments who might have incidentally dealt with some aspect of company law ***cannot be considered as"an expert"*** qualified to be appointed as a technical member. Therefore clauses (*a*) and (*b*) of sub-section (3) of NTT are not valid."

This case has been digested to understand that only the qualified expert in that particular field is competent to render expert opinion with regard to that particular field or occupy a position meant for a technical member possessing required qualification in that area of expertise.

6.3 The Supreme Court in the case of *CBDT* v. *Oberoi Hotels (India) (P.) Ltd* [1998] 97 Taxman 453/238 ITR 148 extracted para.27 from the decision of the Supreme Court in the case of *Continental Construction Ltd*. v. *CIT* [1992] 60 Taxman 429/195 ITR 81 at para.23.2 which are worth noticing-

"Where a person employs an architect or an engineer to construct a house or some other complicated type of structure such as a theatre, scientific laboratory or the like for him, it will not be incorrect to say that the engineer, in putting up the structure, rendering him technical services even though the actual construction and even the design thereof may be done by the staff and labour employed by the engineer or architect. Where a person consults a lawyer and seeks opinion from him on some issue, the advice provided by the lawyer would be a piece of technical service provided by him even though he may have got the opinion drafted by a junior of his or procured from another expert in the particular branch of the law."

From the above-extracted observations it is clear that the expert while preparing his opinion can take the help of another competent expert but when he is subjected to cross examination, he should stand by his opinion and should be in a position to defend it with relevant facts.

Foreign cases on expert's opinion

7.1 The Federal Court of Australia in the case of *McDermott Industries (Aust) Pty Ltd*. v. *Commissioner of Taxation of Commonwealth of Australia* [2012] 18 taxmann.com 52 (FC-Australia) observed at para.52 of its judgment that "Of course, decisions of Boards of Review are not binding upon this Court. They, like decisions of the successor to the Boards, the Administrative Appeals Tribunal, are decisions of an administrative Tribunal. Nevertheless, they are decisions of an **expert** Tribunal learned in taxation law and entitled to at least the same respect as would today be given to decisions of the Administrative Appeals Tribunal as well as commentaries of learned text book writers."

The Federal Court referred to a case decided by the Board of Review against the appellant at paras.50 and 51 of its judgment. Incidentally this case was also decided by the Federal Court against the appellant by holding that "'Ordinary' equipment lease is to be differentiated from 'substantial' equipment lease which falls within Article 10 of Australia-Singapore Treaty. PE is deemed to arise in Australia when substantial equipments are used in Australia."

This ruling by the Federal Court goes to show that though the decisions rendered by Board of Review and administrative Tribunal do not have any binding nature but they do have persuasive value in the sense that they act as suggestion to the judicial authorities who refer to them,

The paras.50 and 51, referred to above, are extracted below-

"50. The Board of Review No 3 decided Case H 106 in 1957. That case concerned an American company which licensed an English company to manufacture a product as the sole independent contractor for the American company and to use trade names of the American company relating to the product. The American company also lent to the English company the necessary equipment to manufacture the product. It was held that the American company had a permanent establishment in Australia. While it would seem that the American company in any event carried on business in Australia, the case appears to have been decided on the basis that there was a permanent establishment by virtue of the American company making available the necessary equipment which was found to be "substantial". The Chairman, Mr Fletcher said at 486:
"In my opinion, the fact that all the machinery used belonged to the American company is sufficient to find that the American company was a 'United States enterprise' engaged in trade or business in Australia through a permanent establishment in Australia."
51. Both Mr McCaffrey and Mr Antcliffe, members of the Board of Review, appear to have taken a similar view."

7.2 In *Federal Commissioner of Taxation* v. *White (No. 2)* [2010] 80 ATR 373 ("White No 2") "the taxpayer relied upon an expert financial advisor in relation to the subject tax arrangement, and although the return was filed by a tax agent there was no evidence that he relied upon his tax agent for advice in regard to the arrangement. The taxpayer did not give evidence about the instructions he gave the tax agent or the enquiries she made of him at the time she prepared and filed his tax returns. Gordon J found at [15] to [20] that it was necessary to call the tax agent to give evidence. Her Honour found that the taxpayer failed to discharge the onus of establishing that the tax agent was not reckless and imposed a 50% administrative penalty accordingly."

[Source- *Eduard Sent* v. *Commissioner of Taxation* [2012] 20 taxmann.com 523 (FC - Australia) [Federal Courtof Australia] Para. 181]

The above referred observations go to show that the opinion of the expert has a definite say in taxation matters and probably the case was decided against the appellant on account of the fact that the tax agent was not produced for tendering evidence.

7.3 Lord Walker agreeing with the majority in the case of *R (on the application of Davies*) v. *Commissioners for Her Majesty's Revenue and Customs* [2011] 16 taxmann.com 187 (SC)(UK)[a Bench consisting of 5 Lords presided over by Lord Hope Hon'ble Deputy President]- Supreme Court, UKobserved at para.67 as under-

"67. The appellants had **expert** professional advisers, and it was well known to them that a large amount of tax was at stake. The guidance in IR 20 [dealing with"Residents and non-residents - Liability to tax in the United Kingdom"] is far from clear, as Lord Wilson

explains. Yet there is no suggestion that any attempt was made to seek clarification from an office of the Inland Revenue, still less that any specific guidance or assurance was given on the particular course of action proposed by the appellants. It seems possible that the preferred strategy was to let sleeping dogs lie, despite the obscurity of parts of IR 20. But whether that is right or not, the appeals must be dismissed for the reasons given by Lord Wilson, which are essentially the same as those given by Moses LJ in the Court of Appeal."

In the earlier para *viz.@* 66 Lord Walker opined that "The preface to the relevant edition of IR 20 made clear that it gave general guidance only, and that whether the guidance was appropriate in a particular case would depend on all the facts of the case. In the event of difficulty taxpayers were invited to consult an Inland Revenue tax office."

From the above observations it is clear that like Authority for Advance Rulings (AAR) in India there are provisions in UK to consult the jurisdictional Inland Revenue Tax Office in case any clarifications are required.

With regard to the responsibility of the Chartered Accountants in the discharge of their duties diligently, the wise advice rendered by Lord Wilson at para.57 while delivering the main judgment on behalf of the majority has been captured below-

"The Revenue's dialogue with the accountants culminated in its letter, dated July 2001, sent to the Institute of Chartered Accountants, the Chartered Association of Certified Accountants, the Chartered Institute of Taxation, the Confederation of British Industry, and the "big five" firms of accountants. It made clear that most mobile workers failed to become non-resident because they did not fall within paragraph 2.2 and because they had not "genuinely 'left' the UK in the residence sense". In the light of the wide circulation of the letter, it is hard to imagine that tax practitioners did not realise that the Revenue required that an individual who claimed to have become non-resident but who failed to fall within paragraph 2.2 should genuinely have "left" the UK, being a requirement reflective only of the ordinary law. Had there been a facility for cross-examination of the appellants' professional witnesses in the proceedings, no doubt their precise understanding of what was or was not required both in law and in practice - and their grounds for having it - would have been laid bare."

Two other judges Lord Hope, Deputy President and Lord Clarke also agreed with the reasons assigned by Lord Wilson while dismissing the appeal preferred by the appellant but the other judge on the Bench Lord Mance dissented from the views of the majority and allowed the appeal

Concluding Remarks

8.Though the CBDT issued Instruction No. 5/2011 [F.NO. 225/61/2011-IT(A-II)], Dated 30-3-2011 there is no proper guidance from CBDT with regard to treatment of expert evidence in income-tax matters

In United States of America, a Question-and-Answer guide to civil and criminal tax litigation in the United States has been prepared by Hope P Krebs and Thomas W Ostrander, Duane Morris LLP under the heading "Tax litigation in the United States: overview" which is very useful and the same is put on website and open for viewing and guidance.

A brief information about authors

Ms. Hope P. Krebs is an international tax partner and the co-chair of the firm's International Practice Group. Prior to joining Duane Morris, Ms. Krebs was a senior manager of International Tax Services for Ernst & Young LLP and, prior to that, was associated with the New York office of another major national law firm.

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Expert evidence

Expert reports in civil trials

Para 23. What are the rules concerning the introduction of expert reports in civil trials?

Rules 701 to 706 of the Federal Rules of Evidence govern the testimony of expert witnesses. Expert witnesses can be presented by either party to the proceedings in the Tax Court. The court can appoint an expert witness with the parties' permission or on its own initiative (rule 706, Federal Rules of Evidence).

The expert must prepare a written report containing their qualifications and opinions, supported by relevant facts and data (rule 143, Tax Court Rules). The report is intended to serve as the expert's direct testimony. The court also has discretion to admit additional testimony to clarify or emphasise matters in the report or provide information on relevant events following a report's preparation.

The Daubert Test is a method that the courts use to determine whether expert testimony is admissible. Federal Rule of Evidence 702 generally requires expert testimony to consist of scientific, technical or other specialised knowledge that legitimately will help the jury or judge understand the evidence or the issues in a case. The Daubert standard, which applies to both civil and criminal cases, is raised when a party believes that the other side is relying on unreliable expert evidence.

To challenge a potential expert witness's testimony, the opposing party brings a Daubert Motion. This forces the expert's party to prove that the expert is basing his or her opinion on legitimate scientific principles. During the Daubert Hearing, which is usually conducted before trial (a jury is not present), the court considers a variety of factors to determine whether the expert's testimony will be admissible, including:

- Whether the expert's theory has been tested.
- Whether the expert's theory has been subjected to peer review (the review of other experts in the field) or has been published.
- Whether there are standards that control the theory's operation.
- Whether the theory has a known or potential rate of error and what it is.
- To what degree the relevant scientific community has accepted the theory.

Has this kind of exercise been undertaken in India? Even, if undertaken, a questionnaire can be issued by CBDT on the subject of "expert's opinion" as done by it earlier when provisions of section 194I of the Act dealing with tax deductions on rent were inserted by the Finance Act 1994, with effect from 1st July,1994.

S. KRISHNAN

(Source: Taxmann.com)