When does a receipt become income?

Introductory remarks

1. It is really a joy to cherish when you, as a professional, come across a well-written order which had been passed after considering almost all the precedents on the issue especially when the appellant was absent and not represented before such judicial authority. The illuminating judgment (order) to which reference has been made here (earlier) was the one rendered by the Hon'ble Vice President, ITAT Mumbai, Bench sitting singly in the case of *Aditya Balkrishna Shroff* v. *ITO* [2021] 127 taxmann.com 343 (Mum. - Trib.) wherein the Hon'ble Vice President held that " where loan was given by the assessee to his cousin in Singapore under Liberalized Remittance Scheme (LRS) issued by the Reserve Bank of India in US Dollars, and the amount received back was also in US Dollars, gain received by the assessee owing to foreign exchange fluctuation was in the nature of capital receipt and hence not taxable in the hands of the assessee."

Before analysing this brilliant order, if one may be permitted to say so, and understanding the concept of income let us go through the provisions of the Income-tax Act (the Act) dealing with the term "income."

Emergence of various clauses of sub-section (24) of the Act

2. The provisions of section 2(24) of the Act, so far as they are relevant for our discussion, have been extracted below.

2.1 Section 2(24) of the Act

Income includes-

(*xiii*) any sum referred to in clause (*v*) of sub-section (2) of section 56; (effective from 1-09-2004/assessment year 2005-06)
(*xiv*) any sum referred to in clause (*vi*) of sub-section (2) of section 56; (effective from assessment year 2007-08)
(*xv*) any sum of money or value of property referred to in clause (*vii*) or clause (ia) of sub-section (2) of section 56; (clause (*vii*) w.e.f. 01-10-2009 and clause (via) w.e.f. 01-06-2010)
(*xvi*) any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (*viib*) of sub-section (2) of section 56; (effective from assessment year 2013-14)
(*xvii*) any sum of money referred to in clause (*ix*) of sub-section (2) of section 56; (effective from assessment year 2015-16)
(*xviia*) any sum of money or value of property referred to in clause (*x*) of sub-section (2) of section 56; (effective from assessment year 2017-18).

(*xviib*) any compensation or other payment referred to in clause (*xi*) of sub-section (2) of section 56; (Effective from assessment year 2019-20)

2.2 There were corresponding amendments to section 56 of the Act and we shall see briefly about these amendments.

2.2.1 The Finance (No.2) 2004 Act inserted a new clause expanding the definition of income and the purpose for which that new clause was inserted, was explained by the Memorandum relating to Direct Taxes accompanying the Finance (No.2) Bill, 2004 and the same ran as under-

Modification of the definition of income to include receipts in cash or credit otherwise than for consideration

"It is proposed to insert a new sub-clause in the definition of income so as to provide that any sum received on or after the 1st day of September, 2004, by an individual or a Hindu undivided family from any person, in cash or by way of credit, otherwise than by way of consideration of goods and services shall be included within the definition of income under section 2(24) of the Income-tax Act. It is also proposed to provide a general threshold limit of Rupees twenty-five thousand. In addition to this, in the case of an individual's marriage, the aggregate of gifts received up to Rupees one hundred thousand will not be charged to tax.
However, in order to avoid hardships in genuine cases, it is also proposed to exclude certain sums from the scope of the new definition of income under section 2(24). The sums which shall not be included in the income are: (*a*) the sum received by, or credited in the account of (*i*) any individual from a relative out of natural love and affection, or (*ii*) any individual or Hindu undivided family under a will or by way of inheritance, or (*iii*) any employee or the dependant of the deceased employee from an employer, by way of bonus, gratuity or pension or insurance or any such other sum solely in recognition of the services rendered by the employee, or (*b*) any sum received in contemplation of death of an individual or Karta or member of a Hindu undivided family, or (*c*) any income referred to in section 10 of the Income-tax Act or any other income which is exempt or not included in the total income under the Act, or (*d*) any sum received on account of transfers referred to in section 47 under this Act.
It is also proposed to define the expression "relative" for the purposes of the new provision as (*i*) spouse of the individual, (*ii*) brother or sister of the individual, (*iii*) brother or sister of the spouse of the individual, (*iv*) brother or sister of either of the parents of the individual, (*v*) any lineal ascendant or descendant of the individual, (*vi*) any lineal ascendant or descendant of the spouse of the individual, and (*vii*) spouse of a person referred to in items (*ii*) to (*vi*) mentioned above.
It is also proposed to amend section 56 so as to provide that the income referred to in the new sub-clause (*xiii*) of section 2(24) will be chargeable as "income from other sources".
This amendment will take effect from 1st April, 2005, and will, accordingly, apply in relation to the assessment year 2005-2006 and subsequent assessment years.
[Clauses 3, 5 and 12]"

The above insertion of clause (*v*) of sub-section (2) of section 56 of the Act was in tune with insertion of clause (*xiii*) of section 2(24) of the Act.

2.2.2 As provisions of sub- clause (*v*) of sub-section (2) of section 56 of the Act were applicable only till 31st March, 2006-*i.e.,* assessment year 2006-07, a new sub-clause (*vi*), almost on the same lines [one of the exceptions being, increasing the sum of money which can be received without consideration or adequate consideration from Rs. 25,000/- to Rs. 50,000/-] was inserted *vide* Taxation Laws (Amendment) Act, 2006 with effect from the assessment year 2007-08 *i.e.,* with effect from 1st April.2006 and the same was effective till 30th September, 2009.

The above insertion of clause (*vi*) of sub-section (2) of section 56 of the Act was in tune with insertion of clause (*xiv*) of section 2(24) of the Act.

2.2.3 Section 56(2)(*vii*) of the Act was inserted with effect from 1-10-2009 by the Finance (No.2) Act, 2009 providing more comprehensively for the inclusion of movable and immovable property exceeding Rs. 50,000/- in value received by an assessee being an individual or HUF, without consideration or without adequate consideration, as income under section 2(24)(*xv*) of the Act.

2.2.4 In order to prevent the practice of transferring unlisted shares at prices much below their fair market value, it was proposed to amend section 56 of the Act to also include within its ambit transactions undertaken involving transfer of shares of a company (not being a company in which public are substantially interested as defined in section 2(18) of the Act) either for inadequate consideration or without consideration where the recipient is a firm or a company (not being a company in which public are substantially interested) for the purpose of taxing them and these amendments, effective from 1-10-2010, were inserted by the Finance Act, 2010 in section 56(2)(via) of the Act -the corresponding section being section 2(24)(*xv*) of the Act. The provisions of Section 56(2)(via) of the Act were applicable till 31st March, 2017.

2.2.5 In order to prevent closely-held companies from generating substantial receipts by issue of shares with huge premium not commensurate with the market value of such shares thereby avoiding payment of tax, a new section 56(viib) was inserted by the Finance Act, 2012 with effect from assessment year 2013-14 and the purpose with which this new clause (viib) was inserted, was explained in clause 21 in the Memorandum accompanying the Finance Bill 2012 under the head "Share premium in excess of the fair market value to be treated as income" as under-

"Section 56(2) provides for the specific category of incomes that shall be chargeable to income-tax under the head "Income from other sources".

It is proposed to insert a new clause in section 56(2). The new clause will apply where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares. In such a case if the consideration received for issue of shares exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income-tax under the head "Income from other sources". However, this provision shall not apply where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund.
Further, it is also proposed to provide the company an opportunity to substantiate its claim regarding the fair market value. Accordingly, it is proposed that the fair market value of the shares shall be the higher of the value—

(*i*) as may be determined in accordance with the method as may be prescribed; or

(*ii*) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value of its assets, including intangible assets, being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature.

This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years."

2.2.6 Clause (*ix*) of sub-section (2) of section 56 of the Act was inserted by the Finance (No.2) Act, 2014 and the purpose for which this clause was introduced, was explained *vide* clauses 3, 21 and 25 under the heading "Taxability of advance for transfer of a capital asset" by the Memorandum accompanying the Finance (No.2) Bill, 2014 as under-

"The existing provisions contained in section 56 of the Act provide that income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any other head of income.

Sub-section (2) provides for the specific category of incomes that shall be chargeable to income-tax under the head "Income from other sources".

It is proposed to insert a new clause (*ix*) in sub-section (2) of section 56 to provide for the taxability of any sum of money, received as an advance or otherwise in the course of negotiations for transfer of a capital asset. Such sum shall be chargeable to income-tax under the head 'income from other sources' if such sum is forfeited and the negotiations do not result in transfer of such capital asset. A consequential amendment in clause (24) of sub-section (2) is also being made to include such sum in the definition of the term 'income'.
The existing provisions of section 51 provide that any advance retained or received shall be reduced from the cost of acquisition of the asset or the written down value or the fair market value of the asset. In order to avoid double taxation of the advance received and retained, section 51 is also proposed to be amended to provide that where any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, has been

included in the total income of the assessee for any previous year, in accordance with the provisions of clause (*ix*) of sub-section (2) of section 56, such amount shall not be deducted from the cost for which the asset was acquired or the written down value or the fair market value, as the case may be, in computing the cost of acquisition.
These amendments will take effect from 1st April, 2015 and will, accordingly, apply in relation to the assessment year 2015-16 and subsequent years."

2.2.7 As clause (via) of sub-section (2) of section 56 of the Act was applicable only till 31st March, 2017 a clause (*x*) was inserted by the Finance Act 2017 wherein apart from the provisions contained in clause (via) some other important provisions were added in tune with the requirements of time. As these substituted provisions introduced by way of insertion are not relevant for our discussion they have not been considered further in this article.

2.2.8 The purpose for which clause (*xi*) of sub-section (2) of section 56 of the Act was introduced *vide* clauses 3.9 and 21 under the heading "Taxability of compensation in connection to business or employment" was explained by the Finance Bill 2018 as under-

"Under the existing provisions of the Act, certain types of compensation receipts are taxable as business income under section 28. However, the existing provisions of clause (*ii*) of section 28 is restrictive in its scope as far as taxation of compensation is concerned; a large segment of compensation receipts in connection with business and employment is out of the purview of taxation leading to base erosion and revenue loss.
Therefore, it is proposed to amend section 28 of the Act to provide that any compensation received or receivable, whether revenue or capital, in connection with the termination or the modification of the terms and conditions of any contract relating to its business shall be taxable as business income. It is further proposed that any compensation received or receivable, whether in the nature of revenue or capital, in connection with the termination or the modification of the terms and conditions of any contract relating to its employment shall be taxable under section 56 of the Act.
These amendments will take effect from 1st April, 2019 and will, accordingly, apply in relation to assessment year 2019-20 and subsequent assessment years."

As these provisions are not relevant for our discussion they have not been considered further in this article.

From the detailed extract of the relevant provisions of section 2 (24) of the Act read with section 56(2) of the Act, it is clear that the Legislature has covered almost all the areas with regard to taxing income received by an assessee from various sources by way of insertion/amendments from time to time but in spite of these efforts there are certain receipts which are outside the tax domain as these receipts do not fall into "income" category.

Let us start our discussion with a few case laws wherein the subtle difference between "income" and "capital" has been clearly spelt out, though in the opinion of the author, most of these issues

fall on the borderline and it is more like the area/side (income or capital) in which the tossed-up coin falls.

Difference between "income" and "capital" as explained by various judicial authorities

3.1 Finlay J. made the following pertinent observations bringing out the difference between income and capital in the case of Trustees of the Will of *H.K. Brodie (deceased)* v. *Commissioners of Inland Revenue* [1933] 17 TC 432, 439 (KB):

"But, I think, the governing consideration is this: the question being, was the sum received as income, one has to consider what was the source from which it was received and what were the circumstances in which it was received. If the capital belonged to the person receiving the sums if he or she was beneficially entitled not only to the income but to the capital then I should think that, when the payments were made, they ought to be regarded, and would be regarded, as payments out of capital, but where there is a right to the income, but the capital belongs to somebody else, then, if payments out of capital are made and made in such a form that they come into the hands of the beneficiaries as income, it seems to me that they are income and nonetheless income, because the source from which they come was in the hands, not of the person receiving them, but in the hands of somebody else capital."

It is interesting to note that Finlay J opined that it was impossible to hold that the Crown was, in the circumstances, bound by the statements made by those officials when the Inspector of Taxes in a letter addressed to the assessee observed that no income-tax would be claimed in respect of certain sums. The plea of estoppel was repelled by Finlay, J., and one of the grounds upon which the learned Judge rested his decision was that it was no part of the duty of the officials of the Inland Revenue to make contracts or to make declarations.

3.2 The observations of *Finlay. J* (*supra*) were quoted with approval by the Supreme Court in the case of *CIT* v. *Kamal Behari Lal Singha* [1971] 82 ITR 460 (SC) wherein the facts were that the assessee was a shareholder in the company. The assessee and other shareholders were beneficially entitled to the capital of the company. The amount about which there had been income-tax dispute in this case was received by the company as salamis and as compensation for the acquisition of the lands of the company. It was not something earned by the company in the course of its business and undoubtedly, it was a capital receipt in the hands of the company but that by itself was not sufficient. The assessee had a beneficial interest in that sum when it was in the hands of the company. Therefore, when that sum was distributed amongst the shareholders of the company, each of the shareholders took a share of the capital asset in which they were beneficially entitled. The Supreme Court agreeing with the decision of the High Court while dismissing the appeal of the Revenue held that "the receipt must also be considered as capital receipt. The fact that those sums were distributed as 'dividends' did not change the true nature of the receipt. A receipt is what it is and not what it is called."

3.3 The following observations made by Hon'ble Justice Shri. V.S. Desai in the case of *Vijayakuverba Saheb of Morvi (Maharani)* v. *CIT* [1963] 49 ITR 594 (Bom.) which were approved by the Supreme Court in the case of *Padmaraje R. Kadambande* v.*CIT* [1992] 62 Taxman 0456/195 ITR 877 are worth noticing-

"There is no doubt that under the Indian Income-tax Act even payments, which are voluntarily made, may constitute 'income' of the person receiving them. It is not necessary that in order that the payments may constitute 'income' they must proceed from a legal source; in that if the payments are not made the enforcement of the payments could be sought by the payee in a court of law. It does not, however, mean that every voluntary payment will constitute 'income'. Thus, voluntary and gratuitous payments, which are connected with the office, profession, vocation or occupation may constitute 'income' although if the payments were not made, the enforcement thereof cannot be insisted upon. These payments constitute 'income' because they are referable to a definite source, which is the office, profession, vocation or occupation. It could, therefore, be said that such a voluntary payment is taxable as having an origin in the office, profession or vocation of the payee, which constitutes a definite source for the income. What is taxed under the Indian Income-tax Act is income from every source (barring the exceptions provided in the Act itself) and even a voluntary payment, which can be regarded as having an origin, which a practical man can regard as a real source of income, will fall in the category of 'income', which is taxable under the Act. Where, however, a voluntary payment is made entirely without consideration and is not traceable to any source, which a practical man may regard as a real source of his income, but depends entirely on the whim of the donor, cannot fall in the category of 'income'"

3.4 The Supreme Court in the case of *P.H. Divecha* v. *CIT* [1963] 48 ITR 222 [a Benching consisting of 5 Hon'ble Judges] explained that the quality of the payment is the decisive of the character of the payment and not the method of the payment or its measure in the following words-

"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 of 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, there 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 is not the motive of the person who pays that is relevant. More relevance attaches to the nature of the receipt in the hands of the person who receives it though in trying to find out the quality of the receipt one may have to examine the motive out of which the payment was 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. These general principles have been settled firmly by this court in a large number of cases:
see, for example, *CIT* v. *Vazir Sultan & Sons* [1959] 36 ITR 175 (SC), *Godrej & Co.* v. *CIT* [1959] 37 ITR 381 (SC), *CIT* v. *Jairam Valji* [1959] 35 ITR 148 (SC) and *Senairam Doongarmall* v. *CIT* [1961] 42 ITR 392 (SC)."

3.5 The facts of the case which arose before the Supreme Court in *Padmaraje R. Kadambande* (*supra*) were that the assessee was entitled to monthly payment under the order of ruler of the native state and on merger of the native state with the then Bombay state the payment was abolished but the statute provided for compensation by way of compassionate payment at discretion of state government, if applied for. The payments were sanctioned on compassionate grounds.

Reversing the decision of the High Court, the Supreme Court held that "the amounts received by the assessee during the financial years in question have to be regarded as capital receipts and, therefore, are not income within the meaning of section 2(24) of the Act."

The Supreme Court made a detailed analysis of various decisions cited at the Bar

The following observations made in the Supreme Court judgment are pertinent-

"The mere fact that after the order was made, it became an enforceable right was neither here nor there. The marginal heading of section 15 is 'compensation'. The fact that under clauses (*i*), (*ii*) and (*iii*) of section 15C(1), the compensation was paid as of right and in cases falling under clause (*d*) of the proviso, it was a discretionary payment, would not stamp the payment with a character of revenue. The marginal heading to a section could not control the interpretation of the words of the section, particularly where the meaning of the section was clear and unambiguous. Further, there was no compulsion on the part of the Government to make the payment since it was purely discretionary. The payment made by the Government was undoubtedly voluntary. However, it had no origin in what might be called the real source of income. No doubt, clause (*d*) of proviso to section 15C(1) enabled the applicant to seek payment but that was far from saying that it was a source. Therefore, it could not afford any foundation for such a source. Further, it was compassionate payment, for such length of period as the Government may, in its discretion, order."

The reference to the Act was to the provisions of "Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955."

3.6 *Emil Webber* v. *CIT* [1993] 67 Taxman 532/200 ITR 483 (SC)

B company entered into agreements with K, a French concern, for the purchase of certain machinery and equipment and K also undertook to provide services of certain personnel. K in turn, entered into an agreement with a Swiss concern and services of E, being the assessee, were provided by the Swiss concern to K. According to the agreement between B and K the former undertook to pay salaries free of any Indian tax to personnel provided by K. For the assessment years 1974-75 and 1975-76 certain amounts were paid by B to the assessee-appellant. B company also paid the tax on the amount paid by it to B as salary for the two assessment years. The Assessing Officer treated the tax amount as perquisites and added it to the salary amount received by the assessee. On appeal, the First Appellate Authority affirmed the order of the Assessing Officer. On second appeal, the Tribunal also affirmed the order of both these authorities.

On appeal to the Supreme Court, the assessee contended that the amount paid by B by way of tax could not be treated as income of the assessee at all and that the assessee did not receive the said amount and as such it could not constitute his income.

The Supreme Court held as under- (headnote of Taxman)

"The definition of 'income' in clause (24) of section 2 is an inclusive definition. It adds several artificial categories to the concept of income but on that account the expression 'income' does not lose its natural connotation. Indeed, it is repeatedly said that it is difficult to define the expression 'income' in precise terms. Anything which can properly be described as income is taxable under the Act unless, of course, it is exempted under one or the other provision of the Act.
It was from the said angle that one has to examine whether the amount paid by way of tax on the salary amount received by the assessee could be treated as the income of the assessee. In the instant case, it could not be overlooked that the said amount was nothing but a tax upon the salary received by the assessee. By virtue of the obligation undertaken by B to pay tax on the salary received by the assessee, it paid the said tax. The said payment was, therefore, for and on behalf of the assessee. It was not a gratuitous payment. But for the said agreement and but for the said payment, the said tax amount would have been paid by the assessee himself. He could not have received the salary which he did but for the said payment of tax. It would be unrealistic to say that the said payment had no integral connection with the salary received by the assessee. Thus, the said tax amount was liable to be included in the income of the assessee during the said two assessment years and inasmuch as the assessee was not an employee of B which made the payment, it could not be brought within purview of section 17. It must necessarily be placed under section 56(1), and taxed as income from other sources."

It is to be noted as per law as on date "the tax paid by the employer on behalf of the employee is a perquisite under section 17(2)(*iv*) of the Act *i.e.,* a non-monetary perquisite."

3.7 *CIT* v. *G.R. Karthikeyan* [1993] 68 Taxman 145/201 ITR 866 (SC)

During the assessment year 1974-75, the assessee participated in a motor rally. The rally was designed to test endurance driving and reliability of the automobiles. A competitor had to drive his vehicle observing traffic regulations as well as the regulations of the rally committee. The method of ascertaining the first prize winner was based on a system of penalty points for various violations, and the competitor with the least penalty points was adjudged the winner of the first prize. The assessee won the first prize. The Assessing Officer included the prize money in the income of the assessee relying upon the definition of 'income' in section 2(24) of the Act. On appeal,

the Tribunal found that (*i*) the rally was not a race; it was predominantly a test of skill and endurance as well as of reliability of the vehicle; (*ii*) the rally was not a "game" within the meaning of section 2(24)(*ix*) of the Act; and (*iii*) the receipt was casual in the nature and not an income receipt; and held that the amount was not taxable.

The High Court, on a reference, upheld the decision of the Tribunal holding that the rally was not a race and that the receipt did not represent "winnings" which had acquired the meaning of money won by gambling or betting, and that section 2(24)(*ix*) of the Act could not take in the amount received by the assessee in a race which involved skill in driving.

On appeal to the Supreme Court, reversing the decision of the Madras High Court, the Supreme Court held as under-

"(*i*) that since the definition of income in section 2(24) was an inclusive one, its ambit should be the same as that of the word "income" in entry 82 of List I of Schedule VII to the Constitution of India

(*ii*) that the words "other games of any sort", in section 2(24)(*ix*) were of wide amplitude and their meaning was not confined to games of a gambling nature alone, and, therefore, section 2(24)(*ix*) was not confined to mere gambling or betting activities

(*iii*) that assuming that the expression "winnings" had acquired a particular meaning, *viz.*, receipts from activities of a gambling or betting nature only, it did not follow that monies received from non-gambling or non-betting activities were not included within the ambit of "income"

(*iv*) that the definition of "income" in section 2(24) was inclusive, the purpose of the definition was not to limit the meaning of "income" but to widen its net, and the several clauses therein were not exhaustive of the meaning of income; even if a receipt did not fall within the ambit of any of those clauses, it might still be income if it partook of the nature of income

(*v*) that the rally was a contest, if not a race and the respondent entered the contest to win it. What he got was a return for his skill and endurance. It was "income" construed in its widest sense. Though, it was casual in nature, it was nevertheless income. The receipt constituted "income" as defined in section 2(24) and could be brought to tax

> The word "income" is of the widest amplitude and it must be given its natural and grammatical meaning."

3.8 The Allahabad High Court in the case of *Wing Commander K. P. K. Ghose* v. *CIT* [2004] 140 Taxman 437/268 ITR 260 held that "the prize money received by the assessee on winning a contest of caption writing was result of his efforts and skill, and, therefore, the said amount was to be assessed as his 'income' and since organiser was under stipulated contract to make payment to winner, payment could not be in nature of casual and non-recurring."

In this case the assessee participated in a contest of caption writing and was adjudged for a prize and the assessee claimed the prize amount as exempt.

The following observations made by the High Court in this case are quite interesting and quite important in understanding the words "casual" and "non-recurring" [From ITR headnote]

"The words "casual" and "non-recurring" have not been defined in the Act and they must, therefore, receive their plain and ordinary meaning. In the Oxford Universal Dictionary, the word "casual" has been defined as meaning: "(*i*) subject to or produced by chance; accidental, fortuitous; (*ii*) coming at uncertain times; not to be calculated on; unsettled. . ." In the context of the statute, "unsettled" seems to be the apt meaning to be applied in such cases. Starting from the plain dictionary meaning, judicial decisions have attempted to delineate the true significance and scope of these terms. Each case has, however, ultimately turned on its own facts. But the aspect which has been most stressed as providing an important guiding factor is the absence of any contract, stipulation on understanding, obliging the giver to make the payment."

3.9 *Universal Radiators* v. *CIT* [1993] 68 Taxman 45/201 ITR 800 (SC)

The assessee entered into a contract with an American company for the purchase of copper bars for rerolling them into strips and sheets. The assessee opened a letter of credit in a bank in favour of the foreign seller. The ship in which the goods were sent was seized by the Pakistan Government due to hostilities between India and Pakistan. The assessee and its clearing agents took up the matter with the insurance company in America which ultimately accepted the liability and paid the amount in American dollars. Due to devaluation of the Indian rupee, the assessee got a higher amount in Indian rupees than what it had paid. The Assessing Officer treated the surplus as liable to tax as trading profit. The First Appellate Authority confirmed this view. The Tribunal, however, held that when the vessel was impounded by the Pakistan authorities, the character of the goods changed and then became sterilized and ceased to be the stock-in-trade of the assessee and hence the amount was a capital receipt. The Tribunal also held that the profit on account of devaluation did not arise directly from the assessee's normal business and hence the profit was not a business profit.

The High Court [*CIT* v. *Universal Radiators* [1979] 2 Taxman 574/120 ITR 906 (Mad.)] held as under-

"The law is now well settled that the profit or loss arising to an assessee on account of revaluation or devaluation of foreign currency held by it would ordinarily be trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset, and that the same would be of capital nature if the foreign currency is held as capital asset.
In the instant case, the assessee received the foreign currency, as a result of acceptance of its claim by an insurance company, in respect of its goods in transit seized by an enemy power during hostilities. There is no capital element in the transaction which was with respect to raw materials. The seizure of goods by the enemy is of the same nature as loss of goods in transit. The assessee had already paid for the goods and the entire transaction is part and parcel of the normal business carried on by the assessee.
Consequently, the devaluation surplus earned by the assessee is taxable as a revenue receipt as arising in the course of carrying on, or incidental to, the business."

The Supreme Court reversing the decision of the Madras High Court held as under-

(*i*) That the assessee carried on business in manufacturing radiators and not ingots. The ingots were imported to be converted into strips and sheets at Bombay. The link which could create direct relationship between the finished goods and the ingots was snapped even before the ingots reached Bombay. Payment made for loss of the ingots did not bear any nexus with the appellant's business. So long as the ingots did not reach Bombay and were converted into strips and sheets, the connection with the appellant's business was remote and any payment made in respect of the loss of the ingots could not be said to accrue from business. Thus, any devaluation surplus was a casual and non-recurring receipt and could not be treated as income from business of the assessee

(*ii*) That the assessee did not carry on the business of buying and selling ingots. The compensation paid by the insurer to the assessee was not for any trading or business activity, but a just equivalent in money of the goods lost by the assessee which it was prevented from using. Since the excess arose on such payment due to fortuitous circumstances and not due to any business or trading activity, the amount could not be brought to tax and

(*iii*) That, the ingots were not stock-in-trade; even if the ingots were assumed to be stock-in-trade, they were blocked and sterilised due to hostilities between India and Pakistan and, therefore, they ceased to be stock-in-trade and any surplus arising due to devaluation of the Indian rupee was a capital receipt only

The Supreme Court made the following observations (From ITR)-

"(*i*) Exigible to tax is not the same as liability to pay tax. The former depends on the charge created by the Act and the latter on computation in accordance with the provisions in the Act and the rules.

(*ii*) In order that a receipt may not be taxable in view of section 10(3) of the Income-tax Act, 1961, the receipt should not only have been casual and non-recurring but it should not have been a "receipt arising from business". To put it the other way, if an income arose in the usual course of business, then it would not have been liable for exclusion even if it was casual and non-recurring in nature

(*iii*) The word "from" means "out of". The income should have accrued out of the business carried on by the assessee and

(*iv*) Where payment is made to compensate for loss of the use of any goods in which the assessee does not carry on any business or the payment is a just equivalent of the cost incurred by the assessee, but excess accrues due to fortuitous circumstances or is a windfall, then the accrual may be a receipt, but it would not be income arising from business, and, therefore, not taxable under the Act."

3.10 *Dr. K. GeorgeThomas* v. *CIT* [1985] 23 Taxman 46/156 ITR 412 (SC)

From this decision-

"From a number of decisions, two facts emerge:

(*i*) that the burden is on the revenue to establish that the receipt is of a revenue character and once receipt is found to be of a revenue character whether it comes under exemption or not, is for the assessee to establish, and

(*ii*) that the facts must be found by the Tribunal and the High Court must proceed on the basis of the facts found by the Tribunal.

The High Court cannot afresh go to the facts overruling the facts found by the Tribunal unless there is a question to that effect challenging the facts found by the Tribunal. These principles are well settled and in the present case, in the decision of the High Court, it could not be said that these principles had been breached. It had been established that the assessee was carrying on a vocation. The vocation of preaching of the Christian Gospel and helping anti-atheism was the vocation of his life. He was running a newspaper in aid of that and the donations received from USA were to help him for the said purpose. They arose out of his carrying on and continued so long as he carried on this. These receipts, therefore, arose out of his vocation. These were, therefore, his income and were not exempt under section 4(3)(*vii*) of the 1922 Act. In the premises, these were taxable. Therefore, there had not been an unwarranted interference by the High Court with the facts found by the Tribunal.

Accordingly, the High Court, in the instant case, was right in holding that the said amounts were assessable as the assessee's income".

3.11 The ITAT Mumbai Bench in the case of *Pooja Marketing* v. *Pr CIT* [2021] 62 CCH 0163 Mum Trib opined that in respect of a distributor of a lottery tickets, any winnings from unsold lottery tickets were always chargeable to tax as business income and that amendments brought

in by the Finance Act, 1972 in section 2(24) and 56(2) of the Act were not meant for persons who were engaged in business of distribution of lottery tickets etc.

The Tribunal also observed as under-

"(*i*) That prior to Finance Act, 1972, income by way of winnings from lotteries were not chargeable to tax and, by fiction, scope of "income" under section 2(24)(*ix*) of the Act was expanded by the Finance Act, 1972 to include within its ambit, income by way of winnings from lotteries.

(*ii*) This fiction introduced under Act, was only for those assessees whose income was not chargeable to tax in the absence of such fiction and in respect of assessees who were carrying on business of distribution of lottery tickets, their income was already chargeable to tax as business income and no fiction was needed for such kind of persons.

(*iii*) Considering this mischief rule also, it could be safely concluded that prize winnings from lotteries would get taxed under section 2(24)(*ix*) read with section 56(2)(ib) of the Act in hands of a person (*i.e.* ultimate consumer) who is just holding lottery ticket and participates in draw and the said provisions, cannot be made applicable for a person who is a dealer in lottery tickets.

(*iv*) The Supreme Court in case of *State of Andhra Pradesh* v. *H Abdul Bakshi and Bros* reported in 15 STC 644 (SC) held that unsold lottery ticket lying with assessee, being a dealer in lottery tickets, had fetched some prize monies and those winnings from prize monies need to be construed only as business income and value of other tickets which did not qualify for prize money becomes NIL and that all unsold lottery tickets were consumed by the assessee dealer itself and one such lottery ticket held by it had fetched prize money, which would only be realization of cost of lottery tickets and thereby to mitigate loss arising on account of non-saleability of tickets."

The assessee's appeal was, thus, allowed.

The important question that arose before the Tribunal was-

"Whether the Principal CIT was justified in directing the Assessing Officer to compute the winnings from lottery not as business income but as income within the meaning of section 115BB of the Act in the facts and circumstances of the case?"

In this case the assessee was a dealer in lottery tickets and out of the unsold tickets lying with the assessee which had to be purchased by it as a result of the lottery scheme in vogue it won a prize and adjusted that lottery income against the purchase cost of unsold tickets which was questioned by the Principal CIT on revision under section 263 of the Act and the issue ultimately reached the Tribunal which was answered in favour of the assessee.

3.12 *Batliboi Ltd.* v. *Dy. CIT* [2021] 62 CCH 0160 (Mum - Trib)

The assessee-company, in this case, owned a constructed building on a plot of land in the city of Coimbatore situated in Tamil Nadu and the assessee-company proposed to sell the said land along with its super structure. The assessee-company therefore entered into negotiations with various parties and for this purpose the assessee-company engaged services of D to examine amendments in Development Control Regulations Rules (DCR) and to furnish a report giving fair market value of land, constructed building and additional Floor Space Index (FSI).The assessee-company entered into a memorandum of agreement with purchasers and subsequently executed a Deed of Sale. While filing return of income, the assessee-company excluded sum of Rs. 4,76, 25,000/- received towards additional FSI from its total income computed under normal provisions, treating the same as a capital receipt. However, while computing its book profit under section 115JB of the Act the said sum was included in book profit which amount the Assessing Officer brought to tax under the head "long term capital gain." The Assessing Officer while computing book profits under section 115JB of the Act included the sum of Rs. 4,76, 25,000/- as part of working results of the assessee company under section 115JB of the Act since it was already offered to tax voluntarily by the assessee-company in its return of income which was upheld by the Commissioner of Income-tax (Appeals).

The Tribunal, based on these facts, observed that the assessee-company was able to get additional FSI only pursuant to DCR in the city of Coimbatore undergoing a change which had admittedly conferred a benefit or by virtue of which assessee-company got vested with additional benefit of 0.8 by way of additional FSI and that the said land and building of the assessee-company was situated in the city of Coimbatore.

The Tribunal identified the issue as "when no cost was incurred by the assessee-company for obtaining any additional benefit of 0.8 by way of additional FSI, then, whether any sum received by the assessee-company pursuant to a sale of such additional FSI could be brought to tax under head "income from capital gains?"

The Tribunal after observing that the assessee-company could not have pre-empted any change in DCR in the city of Coimbatore at the time of purchase or before sale and admittedly no cost was incurred by the assessee-company for getting such benefit by way of additional FSI held that it could be safely concluded that additional benefit derived by the assessee-company by way of getting vested with additional FSI on land and building owned by the assessee-company was only a windfall gain by the operation of law, and which had not cost any money to the assessee.

The Tribunal also held that the entire issue in dispute was squarely covered by the decision of the Jurisdictional (Bombay) High Court in the case of *CIT* v. *Kailash Jyoti No. 2 CHS Ltd.* [IT Appeal No. 1607 of 2013 dated 24-4-2015] wherein it was held that only that capital asset which was capable of acquisition at a cost would be included within the provisions pertaining to head "Capital gains" as opposed to assets in acquisition of which there was no cost at all and

in that case, as in present case, situation was that FSI/TDR was generated by plot itself and that there was no cost of acquisition in any of the appeals.

The Bombay High Court in the case of *Kailash Jyoti No. 2 CHS Ltd.* (*supra*) followed its earlier decision in the case of *CIT* v. *Sambhaji Nagar Co-operative Housing Society Ltd.* [2015] 54 taxmann.com 77/229 Taxman 0226/370 ITR 325 (Bom.) and the earlier decision referred to the decision of the Bombay High Court in the case of *Cadell Wvg. Mill Co. (P.) Ltd.* v. *CIT* [2001] 116 Taxman 77/249 ITR 265 (Bom.) wherein it was held that if the tenancy right which is a capital asset had no cost the receipt could not be brought to tax on the basis of the principle laid down in *CIT* v. *B.C. Srinivasa Setty* [1981] 5 Taxman 1/128 Taxman 294 (SC) which decision[reference is to *Cadell Weaving Mill Co. (P.) Ltd.'s* case (*supra*)] was approved by the Supreme Court in the case of *D.P. Sandu Bros. Chembur (P.) Ltd.* (*supra*).

The Supreme Court in the case of *D.P. Sandu Bros. Chembur (P.) Ltd.* (*supra*) made the following observations at para.17 of its judgment-

"Furthermore, it would be illogical and against the language of section 56 to hold that everything that is exempted from capital gains by the statute could be taxed as a casual or non-recurring receipt under section 10(3) read with section 56. We are fortified in our view by a similar argument being rejected in *Nalinikant Ambalal Mody* v. *S.A.L. Narayan Row, CIT* [1966] 61 ITR 428 (SC)."

Author- But it is submitted, with respect, that the law is different now as with effect from the assessment year 2013-14 section 50D of the Act had been introduced wherein under the heading "Fair market value deemed to be full value of consideration in certain cases" the following provisions appear-

"Where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer."

The assessment year concerned in the case of *Batliboi Ltd.* (*supra*) was 2013-14 when the provisions of section 50D of the Act have come into vogue. Why were not the provisions of section 50D of the Act brought to the notice of the Hon'ble Members who adored the Bench?

Emergence of section 115BB of the Act

4. Section 115BB of the Act was inserted by the Finance Act 1986 and the purpose for which this section was inserted, was explained by the Memorandum in clause 26 of the Finance Bill 1986 as under-

Provision of flat rate of tax on winnings from lotteries, crossword puzzles, races including horse races, etc.

"Under the existing provisions of section 56 of the Income-tax Act, any income by way of winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any nature whatsoever is chargeable to tax under the head " Income from other sources " along with the other incomes of an assessee. It has been found that in several cases, lotteries have provided a medium to the assessees to camouflage their unaccounted income/wealth. Further, with a view to reducing the liability to tax, very often it has been contended that the winnings belong to several co-owners. Similarly, in the case of winnings from horse races, fictitious losses are set off against the winnings resulting in claims for refund of tax deducted at source. To curb these malpractices, the Finance Bill seeks to insert a new section 115BB to provide that gross winnings from lotteries, crossword puzzles, races including horse races (other than income from the activity of owning and maintaining race horses), card games and other games of any sort or from gambling or betting of any nature whatsoever shall be chargeable to income-tax at a flat rate of 40 per cent, on the gross winnings.
This new provision will take effect from 1st April, 1987, and will, accordingly, apply in relation to the assessment year 1987-88 and subsequent years."

Circular 461 dated 9th July,1986 explained that "By inserting a new section 115BB in the Income-tax Act, it has been provided that any income of a casual and non-recurring nature of the type referred to above, shall be charged to income-tax at a flat rate of 40 per cent. This provision will, however, not apply to income from the activity of owning and maintaining race horses. -------------------- What has to be borne in mind is that apart from the general exemption of Rs. 5,000 under section 10(3), no further allowances or deductions are admissible against the gross winnings except in cases where there is a diversion by overriding title as in the case of certain lotteries where a certain percentage has to be foregone to the Government/agency conducting the lotteries."

It is to be stated that section 10(3) of the Act was omitted by the Finance Act, 2002 with effect from 1st April, 2003.

It is further to be stated that the rate of tax chargeable under section 115BB of the Act has been reduced to 30% with effect from assessment year 2002-03 as per Finance Act 2001 "as a measure of rationalization."-refer clause 60.2 of Circular No. 14/2001 dated 9th November, 2001 explaining the amendments made by the Finance Act, 2001.

Analysis of the order passed by the ITAT Mumbai Bench in the case of *Aditya Balkrishna Shroff* (*supra*)

5. The facts of the case were that the assessee, A, had extended a personal interest free loan of US $ 2,00,000 on 29th March 2010 to his cousin S in Singapore through remittance made under the LRS issued by the Reserve Bank of India. The prevailing exchange rate for purchase of one US $ then was Rs. 45.14, and, therefore, the assessee had to pay Rs. 90,30,758/- for this remittance of US $ 2,00,000. The borrower S, paid back this amount of US $ 2,00,000 to the assessee on 24th May 2012 when the exchange rate for purchase of one US $ then was Rs. 56.18. Accordingly, the amount credited to the assessee's account was Rs. 1,12,35,326/-. The excess amount thus received by the assessee as a result of these series of transactions was Rs. 22,04,568/-. The Assessing Officer brought this difference to tax as income rejecting the contention of the assessee that what was entered into was on personal account not involving any business transaction and thus there was no motive of economic gains in this transaction. The assessee had also explained that loan transaction was in terms of the LRS of the Reserve Bank of India inasmuch as it was a permitted transaction, and specifically on capital account.

Though the Assessing Officer did not find any infirmity in the loan advanced by the assessee yet was of the view that "the gain on realization of loan would partake character of an income under the head income from other sources".

The assessee, however, paid the tax on the difference of amount without prejudice to pursuing legal remedies available to him. The assessee's first appeal before the Commissioner of Income-tax (Appeals) did not meet with success though the assessee made elaborate submissions before him and relied upon number of judicial precedents on this issue. In support of his claim, the assessee also reproduced question number 4 (dealing with a resident individual making a rupee loan to an NRI/PIO who is a close relative of that resident individual, by way of crossed cheque/electronic transfer)from FAQs framed by the Reserve Bank of India in this regard. The Commissioner of Income-tax (Appeals), while dismissing the appeal, held that "As per provisions of the Income-tax Act if giving and taking loan is not the business of the assessee, then income arising out of the loan is treated as interest of the income or income from other sources. In view of these facts, I have no reason to interfere with the findings given by the Assessing Officer, therefore I confirm the addition of Rs. 22,04,568/- made by the Assessing Officer under the head income from other sources."

The assesseee filed an appeal before the Tribunal but was unrepresented.

The Learned Vice President before whom it came up for hearing considered the pleadings on record and with the assistance of the Departmental Representative took up the case for disposal. At the outset the Tribunal noted that "The issue in appeal is a neatly identified legal issue in a very narrow compass of material facts," The Departmental Representative relied on the orders

of lower authorities. The Tribunal observed at para.7 of its order that "When a receipt is in the capital field, even if that be a gain, it is in the nature of a capital gain, but then, as the definition of income, under section 2(24)(*vi*), stands, only such capital gains can be brought to tax as are permissible to be taxed under section 45. In other words, a capital gain, which is not taxable under the specific provisions of Section 45 or which is not specifically included in the definition of income, by way of a specific deeming fiction, is outside the ambit of taxable income."

The Tribunal after setting the facts of the case and after observing that "the accretion of money, in rupee terms, was on account of increase in the value of the US Dollars advanced per se, and these US Dollars advanced were in the field of a capital transaction" identified the question to be answered as under-

"Whether accretion of value in respect of an asset held in capital account, *i.e.,* foreign exchange denominated loan advanced, can be subjected to tax in the hands of the assessee?"

The Vice President referred to the earlier order passed in the case of *Shaw Wallace & Co. Ltd.* v. *Dy. CIT* [2001] 117 Taxman 192/[2002] 80 ITD 156 (Cal.) (Mag.) which was authored by him, little over two decades back, wherein the facts were that during the assessment year 1978-79 the compensation received by the assessee-company, which was induced to sell its entire shareholding in certain company at low price to company which was beneficiary of such shares at low price, was brought to tax as income in the assessment year in question. The Commissioner of Income-tax (Appeals) held that the amount received by the assessee was not a capital receipt but income in the hands of the assessee as it was in nature of casual or non-recurring receipt. The Tribunal held that in view of provisions of section 10(3) of the Act being non-charging provisions, there was no merit in revenue's stand that notwithstanding nature of receipt (capital or revenue), casual and non-recurring receipt was taxable save to the extent of being exempt under section 10(3) of the Act. The Tribunal further held that "although compensation might have been held to be not part of sale consideration of shares and, therefore, not exigible to tax as capital gains, it was definitely referable to shares which were held as investments by assessee and since it was received for injury inflicted on their realisable value, it was capital receipt in nature and since revenue had not effectively discharged its onus of demonstrating that receipt was revenue receipt, it was unjustified in bringing it to tax."

The Calcutta Bench of ITAT, in *Shaw Wallace's* case (*supra*), ultimately held that the addition to assessee's income had to be deleted.

The Calcutta Bench referred to the following decisions-

(*i*) *Padmaraje R. Kadambande* (*supra*)
(*ii*) *Kamal Behari Lal Singha* (*supra*)

(*iii*) *Emil Webber's* case (*supra*)

(*iv*) *G.R. Karthikeyan* (*supra*)

(*v*) *Dr. K. George Thomas* (*supra*)

(*vi*) *CIT* v. *Ashoka Mktg. Ltd.* [1986] 26 Taxman 215 [1987] 164 ITR 664 (Cal.) wherein it was held that certain sum received by the assessee from another party for non-performance of an agreement on which no cost of acquisition was incurred by assessee was neither capital gain nor revenue receipt and

(*vii*) *CIT* v. *Seshasayee Bros. (P.) Ltd.* [1996] 89 Taxman 13/222 ITR 818 (Mad.) wherein the Madras High Court, after elaborately surveying the legal precedents on the characteristics of capital receipts and revenue receipts, came to the conclusion that a combined reading of the judicial pronouncements would go to show that when a receipt is referable to fixed capital, it is not taxable, and it is taxable as a revenue item when it is referable to circulating capital or stock-in-trade.

The order passed by the Calcutta Bench in the case of *Shaw Wallace* (*supra*) was extracted in *extenso* in the order passed by the Mumbai Bench in the case of *Aditya Balkrishna Shroff* (*supra*) and adopted the same reasoning apropos the facts obtaining in the Bombay case.

The Tribunal at para.8 of its order opined that there was no dispute that " the receipt in question is in the capital field but the Assessing Officer has taxed it on the basis that "the gain on realization of loan would partake character of an income under the head income from other sources", and the Commissioner of Income-tax (Appeals) had justified such a taxation on the basis, which was altogether different *vis-à-vis* the reasoning adopted by the Assessing Officer, that the accretion in rupee terms was to be considered as interest, and was to be taxed as such by observing that "as per provision of the Income-tax Act if giving and taking loan is not the business of the assessee then income arising out of the loan is treated as interest of the income or income from other sources" and further observed that "None of these reasonings meet our approval."

The Tribunal found fault with the approach of the Assessing Officer by observing that before deciding whether the receipt was of income nature or not, he had mixed up the concept of 'income' with the concept of "gains." The Tribunal also noted that the Assessing Officer missed the crucial fact/test that "in terms of the provisions of the Income-tax Act, all 'gains' are not covered by the scope of 'income.'"

The Tribunal noted the crucial fact that "Once the statutory provision itself lays down the principle that only such capital gains are included in the scope of 'income' as are chargeable under section 45, it is only elementary that a capital gain, which is not chargeable to tax under section 45 of the Act, cannot be included in income. It is not even the case of the authorities below that the capital gains in question are taxable under section 45 of the Act" and also

observed that "Interestingly, this judicial precedent was repeatedly cited before the authorities below, but there was not even an effort to deal with this judicial precedent":

The following passages were extracted from the order of the ITAT Calcutta Bench in the case of *Shaw Wallace* (*supra*)-

"a capital receipt, in principle, is outside the scope of 'income' chargeable to tax and a receipt cannot be taxed as income unless it is in the nature of a revenue receipt or is specifically brought within ambit of 'income' by way of specific provisions of the Income-tax Act", and that "Howsoever liberal or narrow be the interpretation of expression 'income', it cannot alter character of a receipt *i.e.,* convert a capital receipt into a revenue receipt or vice versa. There is no warrant for inference that even the most liberal interpretation of 'income' can nullify or blur the all-important distinction between capital receipt or revenue receipt".

The Tribunal also referred to the definition of interest -refer section 2(28A) of the Act-which runs as under-

"Interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized".

The Tribunal went on to observe that what had been refunded in this case was only principal amount without interest and so the Commissioner of Income-tax (Appeals) was not justified in treating the difference as income. With regard to the other limb of the observation made by the Commissioner of Income-tax (Appeals) that under LRS issued by the Reserve Bank of India only rupee loans were permissible to the non-resident close relatives, the Vice President observed that "it was not within the domain of income-tax authority to adjudicate on this issue" and after quoting the observation made by the Assessing Officer to the effect that "no infirmity is observed on the advancement of loan to S, (but)..the dispute is with respect to gains on foreign exchange fluctuation" held that " the limited question that was required to be answered by the Commissioner of Income-tax (Appeals) was whether the gains on foreign exchange fluctuations were required to be taxed in the hands of the assessee or not" and the tax authorities including the Tribunal had no domain to deal with the broader question as to whether or not such a transaction of foreign exchange denominated loan, as the assessee has indeed entered into, was permissible or not.

The Tribunal thus allowed the appeal preferred by the assessee by holding that "as the money advanced and the money received were denominated in terms of US Dollars, and whatever amount was advanced as loan was exactly the same as amount received back by the assessee, the accretion of money, in rupee terms, was on account of increase in the value of the US Dollars advanced per se, and these US Dollars advanced were in the field of a capital

transaction " and hence the excess of Rs. 22,04,568/-which arose on account of fluctuation in foreign exchange resulting in accretion to the amount credited in the bank account of the assessee was directed to be deleted.

Closing Remarks

6.Though it is normally seen there is no universal rule for treating a receipt as capital or income through the successive amendments made in the last 20 years or so and it leaves very little room for a receipt to be treated as a capital receipt, yet making effective representation before the judicial authorities with proper preparation after making a thorough study of relevant provisions of the Act will result in success as happened before the ITAT Mumbai Bench in the case of *Batliboi Ltd.* v. *Dy. CIT* [2021] 87 ITR (Trib.) 401 (Mum.)

From ITR Online

In the year ended September 30, 1980, the assessee-company established 33 irrevocable trusts to provide medical benefits, scholarships and educational assistance and for the general welfare of its employees. It made contributions of Rs. 12.50 lakhs and Rs. 10 lakhs in the previous years' relevant to assessment years 1982-83 and 1984-85, respectively, to the welfare trusts. The contributions received by the welfare trusts were partially invested in equity shares of listed and unlisted companies on which the trusts received dividends which were duly offered for tax, and so was the interest received on loans advanced to various parties out of the contributions so received. The Finance Act, 1984, with retrospective effect from April 1, 1980, inserted sub-sections (9), (10) and (11) to section 40A resulting in disallowance of the contributions of Rs. 12.50 lakhs and Rs. 10 lakhs made in assessment years 1982-83 and 1984-85, respectively. During the previous year relevant to assessment year 2011-12, the board of directors of the assessee-company passed a resolution to claim back the unutilised amounts lying with the welfare trusts, consequent to which the trusts withdrew the amounts given as loans to parties and sold the shares held by them and repaid the unutilised amounts of Rs. 4.27 crores to the assessee- company. The assessee-company claimed that the amount received back from the welfare trusts was never in contemplation of the assessee-company and, hence, was "windfall receipt". The Assessing Officer brought to tax the sum as income under normal provisions of the Act as well as while computing book profits under section 115JB of the Act, which was confirmed by the Commissioner of Income-tax (Appeals).

The Tribunal allowed the appeal of the assessee after making the following observations-

(*i*) The contributions made by the assessee-company to the welfare trusts were fully irrevocable.

(*ii*) Once the contributions to the welfare trusts were irrevocable and the assessee gained the eligibility to get back its contributions from the welfare trusts, being the

unutilised amount, pursuant to an amendment brought in section 40A(11) of the Act which was by operation of law, the act of the assessee could not be faulted.

(*iii*) No doubt, there was a considerable delay on the part of the assessee in claiming the unutilised amounts from welfare trusts from the years 1984 to 2010. This delay, however, would not change the character of the receipt per se.

(*iv*) Unless the assessee was in contemplation to receive a particular receipt from a definite source, it would not fall within the ambit of "income" under section 2(24) of the Act

(*v*) The eligibility to receive the money was never in contemplation of the assessee and the receipt would squarely fall within the ambit of the expression "windfall" and, hence, would not constitute income and

(*vi*) Since the welfare trusts had duly suffered taxes on the accretions to the contributions received in the form of dividends and interest on loans in its regular returns and these had been assessed as such, taxing them again in the hands of the assessee while getting back the unutilised portion would amount to double taxation.

Author- Section 40A(11) of the Act inserted by the Finance Act 1984 with retrospective effect from 1-04-1980 provided as under-

Where the assessee has, before the 1st day of March, 1984, paid any sum to any fund, trust, company, association of persons, body of individuals, society or other institution referred to in sub-section (9), then, notwithstanding anything contained in any other law or in any instrument, he shall be entitled—

(*i*) **to claim that so much of the amount paid by him as has not been laid out or expended by such fund, trust, company, association of persons, body of individuals, society or other institution (such amount being hereinafter referred to as the unutilised amount) be repaid to him, and where any claim is so made, the unutilised amount shall be repaid, as soon as may be, to him;**

(*ii*) **to claim that any asset, being land, building, machinery, plant or furniture acquired or constructed by the fund, trust, company, association of persons, body of individuals, society or other institution out of the sum paid by the assessee**

The Tribunal applied the proposition(s) obtaining from the following decisions cited on behalf of the assessee.

(*i*) *CIT* v. *Shaw Wallace and Co.* [1932] 2 Comp Cas 276 (PC)

(*ii*) *Mehboob Productions (P.) Ltd.* v. *CIT* [1977] 106 ITR 758 (Mad.)

(*iii*) *Cadell Weaving Mill Co. Ltd.* (*supra*) and affirmed in *D.P.Sandu Bros (Chembur) (P.) Ltd.* (*supra*) and

(*iv*) Decision of the Supreme Court in the case of *Universal Radiators* (*supra*)

So, from the detailed discussion as set out above, it becomes clear that law as on date has to be studied thoroughly *vis-à-vis* facts obtaining in the case before applying precedents as law may have changed or there may be slight change in facts obtaining in the case on hand when compared to facts in the case decided by the judicial authorities earlier.

S. KRISHNAN

(Source: Taxmann.com)