In the High Court of Judicature at Madras

Reserved on : 12.8.2015 & Delivered on : 12-4-2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN
and
The Honourable Mr.Justice T.MATHIVANAN

W.P.Nos.17241 to 17243 & 17407 to 17412 of 2015
and all connected pending MPs

T.Rajkumar, rep. by power of
attorney holder Mr.P.Sivakumar ...Petitioner in
WP.Nos.17241 to
17243 of 2015

K.Dhanakumar, rep. by power of
attorney holder Mr.P.Sivakumar ...Petitioner in
WP.Nos.17407 to
17409 of 2015

T.K.Dhanashekar, rep. by power of
attorney holder Mr.P.Sivakumar ...Petitioner in
WP.Nos.17410 to
17412 of 2015

Vs

1.Union of India, Ministry of Finance,
Department of Revenue, rep.by its
Secretary, Room No.46, North Block,
New Delhi.

2.The Central Board of Direct Taxes
rep. by its Chairman, North Block,
New Delhi-110001.

3.The Income Tax Officer (International
Taxation) Coimbatore, 2nd Floor
Annexure Building, No.63, Race Course
Road, Coimbatore-641018. ...Respondents in
all the petitions

PETITIONS under Article 226 of The Constitution of India praying for the issuance of (i) a Writ of Declaration to declare Section 94A(1) of the Income Tax Act, 1961 (as amended) as ultra vires Articles 14, 19, 51, 253 and 265 read with Entry 82 of List 1 of VII Schedule of The Constitution of India and also being beyond the legislative competence of Parliament under Articles 246 and 248 read with Entry 10, 14, 82 and 97 of List 1 of VII Schedule of The Constitution of India (W.P.Nos. 17241, 17408 and 17410 of 2015); (ii) a Writ of Declaration to declare Notification No.86 dated November 1, 2013 issued by the 2nd respondent under Section 94A of the Income Tax Act, 1961 (as amended) as ultra vires Section 94A of Income Tax Act read with Articles 14, 19 and 265 of The Constitution of India (W.P.Nos.17242, 17409 and 17411 of 2015) and (iii) a Writ of Declaration to declare Press Release titled Concerning The Double Tax Treaty between Cyprus and India dated November 1, 2013 issued by the Ministry of Finance, Government of India as ultra vires Sections 4, 5, 94A(5) and 195 of the Income Tax Act, 1961 read with Articles 14 and 265 of The Constitution of India (W.P. Nos.17243, 17407, 17412 of 2015).

For Petitioners : Mr.Arvind P.Datar, SC for
Mr.P.Giridharan

For Respondents : Mr.Pramod Kumar Chopda
Standing Counsel

COMMON ORDER

V.RAMASUBRAMANIAN,J

Three persons have come up with these nine writ petitions, challenging respectively (i) the Constitutional validity of Section 94-A(1) of the Income Tax Act, 1961 (ii) the validity of a Notification bearing No.86/2013 dated 1.11.2013 issued by the Central Government in exercise of the powers

conferred under Section 94-A(1), specifying Cyprus as a notified jurisdictional area for the purposes of Section 94-A(1) and (iii) the validity of a press release dated 1.11.2013 issued by the Ministry of Finance.

2. We have heard Mr.Arvind P.Datar, learned Senior Counsel appearing for the petitioners and Mr.T.Pramod Kumar Chopda, learned Standing Counsel for the Income Tax Department.

3. Since there are three writ petitions challenging the Constitutional validity of Section 94-A(1), there are three writ petitions challenging the validity of the Notification bearing No.86/2013 and three writ petitions challenging the press release, we deem it fit to extract Section 94-A in entirety, the Notification dated 1.11.2013 as well as the press release in entirety before we proceed to consider the grounds of challenge.

4. Section 94-A of the Income Tax Act reads thus :

> *94-A. Special measures in respect of transactions with persons located in notified jurisdictional area.—*
>
> *(1) The Central Government may, having regard to the lack of effective exchange of information with any country or territory outside India, specify by notification in the Official Gazette such country or territory as a notified jurisdictional area in relation to transactions entered into by any assessee.*
>
> *(2) Notwithstanding anything to the contrary contained in this Act, if an assessee enters into a transaction where one of the parties to the transaction is a person located in a notified jurisdictional area, then—*
>
> *(i) all the parties to the transaction shall be*

deemed to be associated enterprises within the meaning of Section 92A;

(ii) any transaction in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, income, losses or assets of the assessee including a mutual Agreement or Arrangement for allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided by or to the assessee shall be deemed to be an international transaction within the meaning of Section 92B, and the provisions of Sections 92, 92A, 92B, 92C [except the second proviso to Sub-Section (2)], 92CA, 92CB, 92D, 92E and 92F apply accordingly.

(3) Notwithstanding anything to the contrary contained in this Act, no deduction,—

(a) in respect of any payment made to any financial institution located in a notified jurisdictional area shall be allowed under this Act, unless the assessee furnishes an authorisation in the prescribed form authorising the Board or any other income-tax authority acting on its behalf to seek relevant information from the said financial institution on behalf of such assessee; and

(b) in respect of any other expenditure or allowance (including depreciation) arising from the transaction with a person located in a notified jurisdictional area shall be allowed under any other provision of this Act, unless the assessee maintains such other documents and furnishes

such information as may be prescribed, in this behalf.

(4) Notwithstanding anything to the contrary contained in this Act, where, in any previous year, the assessee has received or credited any sum from any person located in a notified jurisdictional area and the assessee does not offer any explanation about the source of the said sum in the hands of such person or in the hands of the beneficial owner (if such person is not the beneficial owner of the said sum) or the explanation offered by the assessee, in the opinion of the Assessing Officer, is not satisfactory, then, such sum shall be deemed to be the income of the assessee for that previous year.

(5) Notwithstanding anything contained in any other provisions of this Act, where any person located in a notified jurisdictional area is entitled to receive any sum or income or amount on which tax is deductible under Chapter XVII-B, the tax shall be deducted at the highest of the following rates, namely:—

(a) at the rate or rates in force;

(b) at the rate specified in the relevant provisions of this Act;

(c) at the rate of thirty per cent.

(6) In this Section,—

(i) "person located in a notified jurisdictional area" shall include,—

(a) a person who is resident of the notified jurisdictional area;

(b) a person, not being an individual, which is established in the notified jurisdictional area; or

(c) a permanent establishment of a person not falling in Sub-Clause (a) or Sub-Clause (b), in the notified jurisdictional area;

(ii) "permanent establishment" shall have the same meaning as defined in Clause (iiia) of Section 92F."

5. The Notification dated 1.11.2013 reads as follows :

"Ministry of Finance
(Department of Revenue)
(Central Board of Direct Taxes)
Notification
New Delhi the 1st November 2013
No.86/2013
[Income Tax]

S.O.3307(E) - In exercise of the Powers conferred by Sub-Section (1) of Section 94-A of the Income Tax Act, 1961 (43 of 1996), the Central Government hereby specifies 'Cyprus' as the 'notified jurisdictional area' for the purpose of the said Section.

2. This Notification shall come into force with effect from the date of its publication in the Official Gazette.

[F.No.504/05/2(03-FTD-I]"

6. The press release reads as follows :

"Text of Press Release dated 1.11.2013 issued by the Ministry of Finance

Cyprus Notified as a notified Jurisdictional Area Under Section 94-A of the Income-Tax Act,1961 ; All Parties to the Transaction with a Person in Cyprus shall be treated as Associated Enterprises and the Transaction shall be treated as an International Transaction Resulting in Application of Transfer-Pricing Regulations Including Maintenance of Documentations

Section 94-A was introduced in the Income-tax Act, 1961, through the Finance Act, 2011, in respect of transactions with persons located in notified jurisdictional area as an anti-avoidance measure. As per Section 94-A, the Central Government may, having regard to the lack of effective exchange of information with any country or territory outside India, specify the said country or territory as a notified jurisdictional area in relation to transactions entered into by any assesse. The rules under Section 94-A were notified as Income-tax (8th Amendment) Rule, 2013, through S.O. 1856 (E) dated 26th June, 2013, by inserting Rule 21AC and Form 10FC in the Income-tax Rule, 1962.

India and Cyprus have entered into an Agreement for avoidance of double taxation of income and prevention of fiscal evasion which is in force since 21st December, 1994. Both the Contracting States under this Agreement have a legal obligation to exchange such information as is necessary for carrying out the provisions of the Agreement or of domestic laws of the Contracting States, in particular for the prevention of fraud or evasion of taxes.

Since Cyprus has not been providing the information requested by the Indian tax authorities under the exchange of information provisions of the Agreement, it has been decided to notify Cyprus as a notified jurisdictional area under Section 94-A of the Income-tax Act, 1961 through Notification No.86/2013 dated 1st November, 2013 published in Official Gazette through SO 4625 GI/13.

The implications of such a Notification are summarized as under:

– If an assessee enters into a transaction with a

person in Cyprus, then all the parties to the transaction shall be treated as associated enterprises and the transaction shall be treated as an international transaction resulting in application of transfer-pricing regulations including maintenance of documentations [Section 94-A(2)].

– No deduction in respect of any payment made to any financial institution in Cyrus shall be allowed unless the assessee furnishes an authorization allowing for seeking relevant information from the said financial institution [Section 94-A(3)(a) read with Rule 21AC and Form 10FC].

– No deduction in respect of any other expenditure or allowance arising from the transaction with a person located in Cyprus shall be allowed unless the assessee maintains and furnishes the prescribed information [Section 94-A(3)(b) read with Rule 21AC].

– If any sum is received from a person located in Cyprus, then the onus is on the assessee to satisfactorily explain the source of such money in the hands of such person or in the hands of the beneficial owner, and in case of his failure to do so, the amount shall be deemed to be the income of the assessee [Section 94-A(4)].

– Any payment made to a person located in Cyprus shall be liable for withholding tax at 30 per cent or a rate prescribed in Act, whichever is higher [Section 94-A(5)]."

Why this challenge by the petitioners:

7. Before we look into the grounds of challenge to the statutory provision, the Notification and the press release, a little background may be

essential to understand why this challenge.

8. It appears that a tripartite Agreement dated 16.10.2014 was entered into by and between (i) an Indian company by name New Kovai Real Estate Private Limited (ii) a company incorporated in the country of and under the laws of Cyprus by name Skyngelor Limited and (iii) the three petitioners herein. By the said Agreement, the Cyprus company, which was holding about 15,200 equity shares of the face value of INR 10 each and about 21,39,200 compulsorily convertible debentures of the face value of INR 100 in Kovai Real Estate Private Limited, agreed and undertook to sell all those shares and debentures to the writ petitioners herein. Under Clause 3 of the Agreement, the payment of the purchase consideration was agreed to be done in 4 tranches, in the following manner :

(i) In the first tranche, an amount of INR 14,63,97,888 was to be paid by the buyers to the Cyprus company on the first closing date, towards the purchase of 15,200 equity shares and 17,86,000 debentures

(ii) In the second tranche, an amount of INR 99,99,990 was to be paid by the buyers to the Cyprus company on the second closing date, towards the purchase of 1,22,100 debentures

(iii) In the third tranche, an amount of INR 62,27,676 was to be paid by the buyers to the Cyprus company on the third closing date, towards the purchase of 76,040 debentures and

(iv) In the fourth tranche, an amount of INR 1,26,99,414 was to be paid by the buyers to the Cyprus company on the fourth closing date,

towards the purchase of 1,55,060 debentures.

9. After three months of the execution of the aforesaid Securities Purchase Agreement, the petitioners received independent but identical show cause notices dated 29.1.2015, inviting their attention to Section 94-A(1) of the Income Tax Act, 1961 and the Notification No.86/2013 dated 1.11.2013 and calling upon them to show cause as to why each one of them should not be treated as an assessee in default, warranting the initiation of proceedings under Section 201(1)/201(1A) of the Income Tax Act.

10. In response to the show cause notices, the petitioners appeared before the Assessing Officer through their authorised representative and filed written submissions along with a legal opinion that they claimed to have obtained on 16.10.2014, the date on which, they entered into the Securities Purchase Agreement.

11. The main contention of the writ petitioners before the Income Tax Officer was that they would have had an obligation to deduct tax at source, only if there was chargeability of a payment under Section 195. The petitioners claimed that they had in fact purchased the securities at a rate below their face value and that the Cyprus company had in fact suffered a loss.

12. But, overruling the objections, the Income Tax Officer passed three separate orders dated 27.4.2015 under Section 201(1)/201(1A), directing the petitioners to pay tax and interest, as determined. A notice of demand under Section 156 was also issued.

13. It appears that the petitioners immediately filed statutory appeals under Section 246A of the Act before the Commissioner of Income Tax (Appeals). Simultaneously, the petitioners have come up with the above writ petitions challenging the validity of Section 94-A(1), the Notification dated 1.11.2013 and the press release dated 1.11.2013, in view of the fact that so long as these are in force, their claim on the merits may prove to be very weak.

14. It appears that thereafter, the petitioners also filed three more writ petitions in W.P.Nos.18026, 18034 and 18035 of 2015 challenging the demand notices and the orders passed under Section 201(1)/201(1A). It is stated across the bar that a learned Judge has ordered notices in those three writ petitions, but there is no interim order of protection.

15. Keeping this screenplay in mind, let us now consider the grounds of challenge.

A. Grounds of challenge to the Constitutional validity of Section 94-A:

16. The petitioners challenge Section 94-A(1), on the short ground that it has conferred sweeping powers upon the Central Government to specify any country as a notified jurisdictional area in relation to transactions entered into by any assessee, irrespective of whether such country is one, with whom a bilateral Treaty has already been entered into or not. The contention of the petitioners is that the State has an obligation under Article 51(c) of The Constitution, which is part of the Directive Principles of the State

Policy, to foster respect for Treaty obligations in the dealings of organized people with one another. The Treaty entered into by the Government is virtually a law under Article 253 of The Constitution and hence, neither the Parliament can make any law that would go contrary to the Treaty nor the Government can take any executive action to annul the effect of the Treaty so long as the Treaty is in force.

17. It is contended by Mr.Arvind P.Datar, learned Senior Counsel for the petitioners that the power of the Parliament to make laws conferred under Article 245(1), is made subject the provisions of The Constitution and hence, the said power is subordinate to Article 253, which confers power upon the Parliament to make laws for implementing any Treaty, Agreement or Convention with any other country. That the power under Article 245(1) is subordinate to the power under Article 253 is also made clear by a non-obstante clause contained in Article 253.

18. Admittedly, India has entered into an '***Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital***', with the Republic of Cyprus in December 1994. The Agreement entered into force on 21.12.1994 and the Central Government also issued a notification bearing No.G.S.R. 805(E) dated 26.12.1995 in exercise of the powers conferred by Section 90 of the Income Tax Act, 1961. The Agreement also contains a provision in Article 28 for 'Exchange of Information' and a provision in Article 27 prescribing a 'Mutual Agreement Procedure' to address any difficulties or

doubts arising as to the interpretation or application of the Agreement.

19. Therefore, the contention of Mr.Arvind P.Datar, learned Senior Counsel appearing for the petitioners is that once India has entered into a Treaty with another country and such Treaty has also been notified under Section 90 of the Income Tax Act, 1961, the Treaty becomes a law under Article 253. Therefore, the Parliament is not competent to enact any law by invoking Article 245(1), as the power under Article 245(1) is subordinate to the power under Article 253.

20. In other words, the contention of Mr.Arvind P.Datar, learned Senior Counsel appearing for the petitioners is that Section 94-A(1), in as much as it confers a power upon the Central Government to specify by notification, any country as a notified jurisdictional area, without reference to the existence of a Treaty with that country, is violative of Articles 14, 19(1)(g), 51, 245, 253 and 269 of The Constitution.

21. Placing strong reliance upon the decision of the Supreme Court in ***Union of India Vs. Azadi Bachao Andolan [2004 (10) SCC 1],*** Mr.Arvind P.Datar contended that Section 90 of the Income Tax Act is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement and that when it happens, ***the provisions of such an Agreement would operate, even if inconsistent with the provisions of the Income Tax Act***.

22. According to the petitioners, since India has entered into a Double

Taxation Avoidance Agreement (hereinafter referred to as DTAA for the purpose of brevity) with the Republic of Cyprus and also since the said Agreement includes a provision for exchange of information and the Agreement is also notified under Section 90, the power conferred upon the Central Government by Section 94-A(1) to specify any country as a notified jurisdictional area, is clearly unconstitutional and also suffers from the vice of excessive delegation.

23. We have carefully considered these submissions.

CONSTITUTIONAL SCHEME

24. Since this contention revolves around Articles 51(c), 245(1) and 253, apart from a few entries in the 7th Schedule, it would be appropriate to take note of these provisions, before we deal with this contention.

25. It is no doubt true that Article 51(c), which is part of the Directive Principles of State Policy, obliges the State to endeavour to foster respect for International Law and Treaty obligations. It is also true that under Article 245(1), the Parliament is empowered to make laws for the whole or any part of the territory of India and the Legislature of a State is empowered to make laws for the whole or any part of the State, ***subject to the provisions of The Constitution.*** This is primarily due to the fact that the legislative powers are distributed between the Parliament and the State Legislatures, in terms of Lists I, II and III of the 7th Schedule.

26. The scheme of Chapter I of Part XI of The Constitution, contained in Articles 245 to 255, (excluding those relating to repugnancy and the one

relating to Article 253) can be best understood in simple terms as follows :

(i) Parliament has exclusive power to make laws with respect to matters enumerated in List I of the Seventh Schedule.

(ii) Parliament also has the exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(iii) Both Parliament as well as the State Legislature would have power to make laws with respect to any of the matters enumerated in List III.

(iv) The Legislature of a State will have the exclusive power to make laws for the State, with respect to any of the matters enumerated in List II.

(v) The Parliament would also have the power to legislate with respect to a matter enumerated in the State List, subject to the fulfillment of certain conditions stipulated in Article 249. The Parliament would have a similar power whenever a Proclamation of Emergency is in operation.

27. Keeping in mind the scheme of Chapter I of Part XI, let us have a look at Article 253, which reads as follows :

> *"Legislation for giving effect to international Agreements.—*
>
> *Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing Treaty, Agreement or Convention with any other country or countries or any decision made at any international conference, association or other body."*

28. As could be seen from the language employed, Article 253 is an enabling provision that empowers the Parliament to make any law for the

whole or any part of the territory of the country for implementing any Treaty, Agreement or Convention with any other country. It is true that the power conferred upon the Parliament under Article 253 is '***notwithstanding anything contained in the foregoing provisions of this Chapter'.***

29. But, ***the effect of the non-obstante clause in Article 253 is that when Parliament desires to make a law for implementing a bilateral or international Treaty or Convention, the fetters placed upon the Parliament by Articles 246(3), 249, 250, etc., and the fetters placed in the form of the Lists contained in the Seventh Schedule, would stand removed***. It will be interesting to note that Chapter I of Part XI speaks of only two types of inconsistencies, one under Article 251 and another under Article 254. Both types of inconsistencies relate to the law made by the Parliament vis-a-vis the law made by the State Legislature.

30. ***Neither Chapter I of Part XI nor any other provision of The Constitution deals with an inconsistency either between two sets of laws made by the Parliament itself or between a bilateral or international Treaty or Convention on the one hand and a law made by the Parliament on the other hand***. This is due to the fact that a Treaty entered into by the country with another country is actually in the realm of executive action in terms of Article 73. ***The Treaty entered into in exercise of the power conferred by Article 73, is also treated as law, only on account of the seal of authority affixed to the same under***

Sub-Clauses (a) and (b) of Clause (1) of Article 73. Article 73(1) reads as follows :

> *73. "Extent of executive power of the Union— (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—*
>
> *(a) to the matters with respect to which Parliament has power to make laws; and*
>
> *(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any Treaty or Agreement:*
>
> *Provided that the executive power referred to in Sub-Clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws."*

31. The law making power of the Parliament in relation to international Treaties, Agreements and Conventions can be traced to Entries 10, 12, 13 and 14 of List I of the 7th Schedule to The Constitution. Entry 10 relates to foreign affairs and all matters, which bring the Union into relation with any foreign country. Entry 12 deals with United Nations Organisation. Entry 13 relates to participation in international conferences, associations and other bodies and implementing of decisions made there at. Entry 14 relates to 'entering into Treaties and Agreements with foreign countries and implementing of Treaties, Agreements and Conventions with foreign countries'.

32. Hence, Article 253 of The Constitution, empowering the Parliament

to make any law for implementing any Treaty, Agreement or Convention with another country or countries or any decision made at in international conference, association or other body, has to be read in conjunction with Entries 10, 12, 13 and 14 of List 1 of the 7th Schedule.

33. As we have already seen, Article 73 makes it clear that the executive power of the Union shall extend to the matters, with respect to which, Parliament has power to make laws. Interestingly, ***the executive power of the Union under Article 73(1) falls under two categories. They are (i) matters, with respect to which, Parliament has power to make laws and (ii) the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any Treaty or Agreement. While Clause (a) relates to law making power, Clause (b) relates to the exercise of rights under any Treaty or Agreement***.

34. ***The extent of executive power of the Union, recognized by Sub-Clauses (a) and (b) of Clause (1) of Article 73, is actually vested in the President by virtue of Article 53(1)***. Article 53(1) states that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with The Constitution. Therefore, one may really have to read Articles 246 and 253 together with Articles 73 and 53 in the same order, in the backdrop of Entries 10, 12, 13 and 14 of List 1 of the 7th Schedule. If so done, it would be clear that ***the law making power with respect to***

the Entries in List I of the 7th Schedule, vests both with the Parliament and with the executive power of the Union and the executive power of the Union is, in turn, vested with the President.

DIFFERENT TYPES OF TREATIES & PRE-LIBERALISATION ERA

35. Until perhaps the advent of the liberalisation regime, the courts were confronted only with one type of Treaties namely those of the United Nations Organisation, ratified by India. It was perhaps after the advent of liberalisation and after India became a Member of the World Trade Organisation, obliging it to enter into one-to-one Treaties with one or more countries, that ***a fine distinction came to be drawn between (i) international Conventions or Treaties generally ratified by India and (ii) Treaties or Agreements entered into by the country with one or more countries on one-to-one basis***.

36. ***Unless the distinction between (i) an international Treaty or Convention ratified by India and (ii) a bilateral or multilateral Treaty or Agreement entered into by India with one or more specific countries on one-to-one basis is understood clearly, the legal implications of these two types of Treaties cannot be understood***. This point can be well understood, if we have a look at the case law that has developed on the question of enforcement of the rights arising out of Conventions or Treaties ratified by India.

37. In ***Jolly George Varghese Vs. The Bank of Cochin [AIR 1980 SC 470],*** the Supreme Court held that the executive power of the

Government of India to enter into international Treaties does not mean that international law, ipso facto, is enforceable upon ratification. The Supreme Court observed that the ***Indian Constitution followed the 'dualistic' doctrine with respect to international law.*** Consequently, the Court held that ***international Treaties do not automatically form part of international law, unless incorporated into the legal system by a legislation made by the Parliament***. In that case, the Court was actually dealing with Article 11 of the International Covenant on Civil and Political Rights, ratified by India. The Convention was taken note of by the Supreme Court for the purpose of giving an enlarged meaning to Article 21 of The Constitution.

TWO THEORIES OF INTERNATIONAL LAW

38. Since the Supreme Court observed in *Jolly George Varghese* that India followed the dualistic doctrine, it may be necessary, before we proceed further to know that like the Philosophical Concepts of Dvaitha (dualism) and Advaitha (monism), ***the principles of international law also contain two theories namely (i) monism and (ii) dualism***. Monism is the idea that assumes that international law and national law are nothing but two components of a single legal system or body of knowledge. Both are different parts of a single legal structure. Both emanate from a single grundnorm. Hans Kelsen, an Austrian Jurist was the chief exponent of monism school of thought. Persons, who follow this school of thought propagate superiority of international law over the national law in cases of conflicts.

39. In contrast, dualistic theory assumes that international law and internal law of States are two separate and distinct legal systems. Persons, who follow the dualistic theory argue that the rule of international law apply within a State only as a result of their adoption by the local law of the State. In other words, the principles of international law apply not as such, but as part of the municipal law. ***The chief exponents of dualism namely Treipel and Anzilotti opine that there are two essential distinctions between the national and international law. They are (i) the subjects of national law are individuals, while the subjects of international law are the States and (ii) the juridical origins of the two legal systems are different, in the sense that while the source of national law, is the will of the State itself, the source of international law is the common will (Gemeinwille) of States***.

40. But, since the Supreme Court has held in *Jolly George Varghese* that Indian Constitution follows dualistic doctrine with respect to international law, it must be taken that an international Treaty, can be enforced only so long as it is not in conflict with the municipal laws of the State.

41. The position taken by the Supreme Court in *Jolly George Varghese* was not wholly new. In ***Kesavanandhabharathi Vs. State of Kerala [1973 Supp. SCR 1],*** Sikri,C.J., stated: *"It seems to me that in view of Article 51 of the Directive Principles, this Court must interpret the Constitution, if not intractable, which is after all, an intractable law, in the light of the United Nations Charter and the solemn declaration subscribed to*

by India." In ***A.D.M., Jabalpur Vs. Shivakant Shukla [AIR 1976 SC 1207],*** the Supreme Court referred to Articles 862 and 963 of the Universal Declaration of Human Rights, for projecting the scope of Article 21.

42. In ***M.V.Elizabeth Vs. Harwan Investment & Trading Private Limited [1993 Supp. (2) SCC 433],*** the Supreme Court was concerned with a very tricky situation relating to the Admiralty Jurisdiction of a High Court. Though several international Conventions were relied upon, some of them had not even been ratified by India. But, ***the Supreme Court pointed out that such international Conventions contained the unified rules of law drawn from different legal systems and that they embody the principles of law recognized by States. As a consequence, those Conventions were held by the Supreme Court to be regarded as part of the common law***. Nevertheless, the Supreme Court pointed out that a specialised body of legal and technical experts should facilitate adoption of internationally unified rules by national legislation. It was further held as follows :

> *"India has also not adopted the International Convention relating to the Arrest of Sea-going Ships, Brussels, 1952. Nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision; nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages. India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various Conventions intended to facilitate international trade.*

> *Although these Conventions have not been adopted by legislation, the principles incorporated in the Conventions are themselves derived from the common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships."*

43. But, the Supreme Court was able to apply the principles behind those international Conventions, in *M.V.Elizabeth,* only due to the absence of a domestic law. If there had been a domestic law clearly demarcating the Admiralty Jurisdiction of a High Court and clearly indicating the distinction between a maritime lien and maritime claim, it is doubtful if the Supreme Court could have invoked in *M.V.Elizabeth* the international Conventions.

44. While invoking the "*precautionary principle" and the "polluter pays principle",* for enforcing the environmental law, the Supreme Court held in ***Vellore Citizens Welfare Forum Vs. Union of India [AIR 1996 SC 2715]*** that ***"the rules of Customary International Law, which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law."***

45. In ***Vishaka Vs. State of Rajasthan [AIR 1997 SC 3011],*** the Supreme Court looked into the Convention for Elimination of Discrimination against Women (CEDAW) to deal with issues relating to sexual harassment of women in work places and held that *"in the absence of domestic law*

occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of international Conventions and norms are significant for the purpose of interpretation of guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of The Constitution." The Court further held that "***any international Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof to promote the object of the Constitutional guarantee."***

46. In ***Pratap Singh Vs. State of Jharkhand [2005 (3) SCC 551],*** the Supreme Court reiterated that "*the Courts can refer to and follow international Treaties, Covenants and Conventions, to which, India is a party, although they may not be part of our municipal law*." In this case, the Court held that the Juvenile Justice (Care and Protection of Children) Act, 2000 should be interpreted in the light of the Universal Declaration of Human Rights as well as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules).

47. In ***Entertainment Network (I) Ltd. Vs. Super Cassette Industries [2008 (9) Scale 69],*** the Court once again affirmed that international Covenants can be pressed into service for interpreting domestic legislation, if the domestic law will not be breached as a result. The Court also held that ***in case of any inconsistency, the domestic legislation will prevail***. The Court evolved six different purposes for which, it could

make use of the international law. They are (i) as a means of interpretation (ii) justification or fortification of a stance taken ***(iii) to fulfill the spirit of international obligations, which India has entered into, when they are not in conflict with the existing domestic law*** (iv) to reflect international changes and reflect the wider civilisation (v) to provide a relief contained in a Covenant, but not in a national law and (vi) to fill up the gaps in law.

48. Therefore, it is clear that an International Treaty or Convention, to which, India is a party, can be invoked for the purpose of understanding the scope of and interpreting the Constitutional guarantees, so long as the provisions of such Treaty or Convention are not in conflict with the municipal law. Even those Conventions or Treaties, to which, India is not a party, can be looked into, if the principles upon which, such Conventions or Treaties are founded, could be traced to the common law (as held in *M.V.Elizabeth).*

Decision in Azadi Bachao Andolan

49. Despite the fact that in the past 65 years after the adoption of The Constitution, the Supreme Court has been consistent in the application of the principles enunciated in the preceding paragraph, a slight deviation from the beaten track appears to have emerged in ***Union of India Vs. Azadi Bachao Andolan****.* Since the decision in *Azadi Bachao Andolan* forms the sheet anchor of the case of the petitioners, it is necessary to deal with the said decision in greater detail.

50. The Government of India entered into an Agreement titled as *Indo*

Mauritius Double Taxation Avoidance Agreement with the Government of Mauritius on 1.4.1983. The Agreement was brought into force by a Notification dated 6.12.1983 issued in exercise of the powers conferred upon the Government of India under Section 90 of the Income Tax Act read with Section 24A of the Companies (Profits) Surtax Act, 1964.

51. In accordance with the said Agreement and in exercise of the powers conferred under Section 90 of the Income Tax Act, the Central Board of Direct Taxes issued a circular bearing No.682 dated 30.3.1994 clarifying that capital gains of any resident of Mauritius by alienation of shares of an Indian company shall be taxable only in Mauritius according to the tax laws of that country. This resulted in a large number of foreign institutional investors, resident in Mauritius, investing large amounts of capital in Indian companies. But, after finding that most of those companies incorporated in Mauritius happened to be mere shell companies, the Income Tax Authorities started issuing show cause notices for taxing the profits and dividends accrued to them in India. When the Mauritius companies retaliated by withdrawing their investments, political compulsions made the Central Board of Direct Taxes to issue a clarificatory circular bearing No.789 dated 13.4.2000.

52. The above circular was challenged before the High Court of Delhi, by a non governmental organisation by name *Azadi Bachao Andolan,* by way of a public interest litigation. In a second writ petition, they also prayed among other things, for declaring and delimiting the powers of the Central

Government under Section 90 of the Income Tax Act, in the matter of entering into an Agreement with the Government of any country outside India.

53. The High Court of Delhi allowed the writ petitions and quashed the circular holding among other things (i) that "Treaty shopping" by which, the resident of a third country takes advantage of the provisions of the bilateral Agreement, is illegal and necessarily forbidden (ii) that political expediency cannot be a ground for not fulfilling the Constitutional obligations reflected in Section 90 of the Income Tax Act and hence, any purpose other than the one contemplated by Section 90, however bona fide it is, would be ultra vires the provisions of the Act and (iii) that though political expediency may have a role to play in terms of Article 75 of The Constitution, the same is not true when a Treaty is entered into under a statutory provision such as Section 90 of the Income Tax Act.

54. When the matter was taken to the Supreme Court by the Union of India, the Supreme Court analysed the Constitutional provisions that deal with the power of the Executive to enter into Treaties and the interplay of the Treaty Obligations and the provisions of the domestic law. On the power of the State to enter into a Treaty, the Supreme Court pointed out in paragraph 18 of its decision in *Azadi Bachao Andolan,* that such a power is an inherent part of the sovereign power of the State. In continuation, the Supreme Court said something in paragraph 18, which is of significance. The Court said "***our Constitution makes no provision making legislation a condition for***

the entry into an International Treaty in times either of war or peace." Having said that, the Court also added in paragraph 18 that ***"the obligations arising under the Agreement or Treaties are not by their own force, binding upon Indian nationals."***

55. In *Azadi Bachao Andolan,* ***the Supreme Court made a distinction between two types of Treaties, one requiring legislation and another not requiring legislation***, so as to have a binding force. The relevant portion of paragraph 18 of the decision in *Azadi Bachao Andolan* reads as follows :

> *"The power to legislate in respect of Treaties lies in Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But, making of law under that authority is necessary, when the Treaty or Agreement operates to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others, which are justiciable, are not affected, no legislative measure is needed to give effect to the Agreement or Treaty."*

56. In other words, the Court opined that ***Treaties could be of two types, one restricting the rights of citizens or modifying the law of the State and the other not affecting the rights of citizens***. Treaties, which fall under the first type, require legislation, to have binding force upon the citizens and those, which fall under the second type, do not require any legislation.

57. Having identified two types of Treaties and the essential difference

between them, the Supreme Court held in paragraph 19 that ***though in the United States, a Treaty becomes part of the municipal law upon ratification by the Senate and though in the United Kingdom, such a Treaty would have to be endorsed by an order made by the Queen-in-Council, the position in India is that such a Treaty would have to be made into an Act of Parliament***. The Court also held in paragraph 19 of the report in *Azadi Bachao Andolan* that since the procedure of translating a Treaty into an Act of Parliament would be time consuming and cumbersome, a special procedure was evolved by enacting Section 90 of the Income Tax Act.

58. But, ***the difficulty in reconciling the opinion contained in paragraph 18 with the opinion contained in paragraph 19 of the report in Azadi Bachao Andolan is that if no legislative measure is needed to give effect to a Treaty that does not affect the rights of citizens or others (as indicated in paragraph 18), then a Treaty entered into by India, need not always be translated into an Act of Parliament (as reflected in paragraph 19)***.

59. In *Azadi Bachao Andolan,* the Supreme Court traced the legislative history of Section 90 of the Income Tax Act from paragraph 20 onwards. The Court pointed out that Section 49A of the Income Tax Act, 1922 enabled the then Government of India to enter into an agreement with the Government of any country outside India for granting relief in respect of income tax, on which, both income tax under the Act and income tax in that country and the

corresponding law in force in that country had been paid. After Independence, the 1922 Act was replaced by the Income Tax Act, 1961 and Section 90 was incorporated in the new Act, as a reproduction of Section 49A of the 1922 Act. The Finance Act, 1972 modified Section 90 and brought it into force with effect from 1972. The object and scope of the new provision was to empower the Central Government to enter into an agreement with foreign countries, not only for the purpose of avoidance of double taxation of income, but also for enabling the Tax Authorities to exchange information for the prevention of evasion or avoidance of taxes.

60. In 1991, Section 90 was revamped and a new Sub-Section (2) was inserted by Finance Act, 1991 with retrospective effect from 1972. The purpose of insertion of Sub-Section (2) was explained by CBDT Circular No. 621 dated 19.12.1991 as follows :

> *"Taxation of foreign companies and other non-resident taxpayers -*
>
> *43. Tax Treaties generally contain a provision to the effect that the laws of the two contracting States will govern the taxation of income in the respective State except when express provision to the contrary is made in the Treaty. It may so happen that the tax Treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to the position under the Indian law existing at that point of time. However, the Indian law may subsequently be amended, reducing the*

> *incidence of tax to a level lower than what has been provided in the tax Treaty.*
>
> *43.1. Since the tax Treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage vis-à-vis other taxpayers, Section 90 of the Income-tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision in the tax Treaty is less beneficial."*

61. In paragraphs 21 and 22 of its decision in *Azadi Bachao Andolan,* the Supreme Court indicated that the provisions of Sections 4 and 5 of the Income Tax Act, are expressly made subject to the provisions of the Act. As a consequence, they are subject to Section 90 and by necessary implication, they are also subject to the terms of Double Taxation Avoidance Agreement. After having pointed out the same, the Supreme Court held in paragraphs 28 and 29 as follows :

> *"A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that* ***Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an Agreement, with respect to cases to which where they apply, would operate even if inconsistent with the***

provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. *If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of the DTAs which would automatically override the provisions of the Income- tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC.*

The contention of the respondents, which weighed with the High Court viz. that the impugned circular No.789 is inconsistent with the provisions of the Act, is a total non-sequitur. As we have pointed out, Circular No.789 is a circular within the meaning of Section 90; therefore, it must have the legal consequences contemplated by Sub-Section (2) of Section 90. In other words, the circular shall prevail even if inconsistent with the provisions of Income Tax Act, 1961 in so far as assessees covered by the provisions of the DTAC are concerned."

62. The observations made by the Supreme Court in paragraphs 28 and 29 of its decision in *Azadi Bachao Andolan* are obviously the sheet anchor of the case of the writ petitioners. Since the Supreme Court pointed out therein that Section 90 is specifically intended to enable and empower the Central Government to issue a Notification for the implementation of a Double Taxation Avoidance Agreement and hence, as a consequence, the provisions of such an agreement would operate even if inconsistent with the provisions of the Income Tax Act, it is contended by Mr.Arvind P.Datar, learned Senior Counsel that statutory provisions must give way for the agreement, whose implementation is made pursuant to the Notification issued by the Central Government under Section 90.

63. For testing the correctness of the above contention, let us take a look at Section 90 of the Income Tax Act. It reads as follows :

> *"90. (1) The Central Government may enter into an Agreement with the Government of any country outside India or specified territory outside India,—*
>
> *(a) for the granting of relief in respect of—*
>
> *(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or*
>
> *(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and*

investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the Agreement.

(2) Where the Central Government has entered into an Agreement with the Government of any country outside India or specified territory outside India, as the case may be, under Sub-Section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such Agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(2A) Notwithstanding anything contained in Sub-Section (2), the provisions of Chapter X-A of

the Act shall apply to the assessee even if such provisions are not beneficial to him."

64. It may be noted that Sub-Section (2A) was inserted under the Finance Act, 2012 with effect from 1.4.2013, but was omitted by Finance Act, 2013, due to the controversies it created. However, there was a proposal to implement it with effect from 1.4.2016.

65. But, a careful look at Section 90 would show that the interpretation given to the same by the Supreme Court in *Azadi Bachao Andolan,* cannot be taken advantage of by the petitioners. The scheme of Section 90 is actually as follows :

(i) Sub-Section (1) of Section 90 empowers the Central Government to enter into an agreement with the Government of any country outside India for four specified purposes namely -

A) for the grant of relief in respect of income on which, tax has been paid in both countries or income tax chargeable under the laws of both countries

B) for the avoidance of double taxation of income

C) for the exchange of information for the prevention of evasion or avoidance and

D) for the recovery of income tax.

(ii) Sub-Section (2) of Section 90 confers a benefit upon the assessee, in relation to whom, an agreement of the nature indicated in Sub-Section (1) has been entered into, would apply. The benefit so conferred is that the provisions of the Income Tax Act would apply to such an assessee, to the

extent they are more beneficial to him.

66. Thus, Sub-Section (1) of Section 90 is an enabling provision, that empowers the Central Government to enter into an agreement in the nature of a Double Taxation Avoidance Agreement. Once such an agreement is entered into, an assessee, to whom such an agreement applies, would have the benefit of the application of the other provisions of the Income Tax Act, to the extent they are more beneficial to him.

67. In other words, the Parliament empowered the Central Government under Sub-Section (1) to enter into an agreement and simultaneously it conferred a benefit upon the assessee under Sub-Section (2). This ***Section 90 did not say either expressly or by necessary implication, that the law made by Parliament would stand eclipsed or excluded, to the extent it is inconsistent with the terms of the Agreement***.

68. As a matter of fact, the observation made by the Supreme Court in paragraph 28 (shown by us in bold letters in the extract given in para 61 above) that ***the provisions of such an Agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income Tax Act,*** cannot be viewed in isolation. If viewed in isolation, it would result in mutually inconsistent results. This can be demonstrated in the following paragraph.

69. First of all, Section 90(2) does not use a non obstante clause to say that the provisions of an agreement entered into by the Central

Government under Section 90(1) would prevail over the other provisions of the Act. Secondly, Sub-Section (2) of Section 90, instead of ousting the application of the other provisions of the Act, simply directs attention to what is more beneficial to the assessee. If the provisions of the Income Tax Act are more beneficial to the assessee, to whom an agreement of the nature specified in Section 90(1) applies, those provisions would apply to him. If an option is given to choose between two alternatives, it cannot be said that one alternative is inconsistent with the other. Section 90(2) merely speaks about two options, one of which is more beneficial than the other to the assessee. This provision does not speak about any inconsistency between the provisions of the Income Tax Act and an Agreement entered into by the Central Government under Section 90(1).

70. It must be kept in mind that Section 90(1), which empowers the Central Government to enter into an Agreement with the Government of a foreign country and Section 94A (which is the subject matter of controversy herein), which empowers the Central Government to specify any country as a notified jurisdictional area, deal with delegation of powers. While Section 90(1) deals with the delegation of power to enter into an agreement, Section 94A(1) deals with the delegation of power to specify a country as a notified jurisdictional area. Therefore, even if a conflict is imagined to be in existence, it is not between a Treaty on the one hand and a Municipal Law on the other hand as sought to be projected on behalf of the petitioners. It could, at the most, be a conflict between the manner in which, the delegated power

conferred under one provision is exercised and a similar power under another provision is exercised.

71. Let us assume for a minute that there is a conflict between a Treaty entered into by the Executive and the provisions of a statute enacted by Parliament. The question as to how the conflict has to be resolved, may have to be examined with reference to the principles developed in public international law.

72. It appears that on the academic side, there are two views, one held by ***Basu***, to the effect that no Treaty, which has not been translated into legislation in terms of Article 253 of The Constitution, is binding on the municipal courts. The second view is that of ***Alexandrowicz***, according to whom, only those Treaties affecting private rights, require legislation to become enforceable.

73. The followers of *Alexandrowicz* propound that the following Treaties may have to be translated into legislation, so as to have binding force :

> *"(a) Treaties involving cession of territory;*
>
> *(b) Treaties, whose implementation requires addition to, or alteration of, the existing law;*
>
> *(c) Human rights Covenants and other instruments*
>
> *(d) If the Treaty calls for any legislation to facilitate its implementation within the country or any specific allocation of financial resources;*
>
> *(e) Treaties affecting private rights*
>
> *(f) Further, where the Constitution expressly*

mandates that a particular act can be done by legislation only, the Executive cannot transgress upon that competence of the legislature;

(g) Also, the Executive cannot act contrary to the provisions of the law or cause prejudice to a person except by some legislative authority."

74. It is needless to point out that the Executive cannot acquire new rights against citizens merely by concluding Treaties. No new offences can be created merely by concluding a Treaty, without statutory sanction. Though few jurists are of the opinion that the views of *Alexandrowicz* has come to prevail over the views of *Basu,* there is no unanimity of opinion.

75. The fact that our country has followed the dualistic model, as indicated by the Supreme Court in ***Jolly George Varghese,*** was reiterated by the Supreme Court in ***State of West Bengal Vs. Kesoram Industries Ltd. [2004 (10) SCC 201].*** In paragraph 490 of the SCC report in *Kesoram,* the Supreme Court pointed out that the doctrine of "Monism" as prevailing in the European countries, does not prevail in India and that the doctrine of dualism is applicable. In paragraph 490, the Court pointed out that ***"a Treaty entered into by India cannot become law of the land and it cannot be implemented unless Parliament passes a law as required under Article 253."*** The Supreme Court also drew a distinction in paragraph 494 of the report in *Kesoram* between the interpretation of a legislation in conformity with international principles and the giving effect to of a Treaty provision in the absence of Municipal Laws.

76. Once it is stated that India has followed the dualistic model and once it is found that the Courts have drawn inspiration from Treaties, whenever the Municipal Law was silent, it is impossible to think that the supremacy of the Parliament could be compromised by the Executive entering into a Treaty. The very fact that Article 253 confers power upon the Parliament to make any law for implementing any Treaty, coupled with the fact that Section 90(1) of the Income Tax Act enables the Central Government to enter into an agreement, would show that the Parliament is supreme. ***The collective will and the collective conscience of the people, which the Parliament is supposed to reflect, cannot be subordinated to the power of the Executive***.

77. It is true that the principles enunciated in *Azadi Bachao Andolan,* were reiterated by the Supreme Court in ***CIT Vs. P.V.A.L.Kulandagan Chettiar [2004 (6) SCC 235].*** In paragraphs 6 and 7 of the said decision, the Supreme Court pointed out that the traditional view with regard to the concept of double taxation, underwent a considerable change, in the light of Section 90 of the Income Tax Act. In paragraph 8, the Court held that the provisions of Sections 4 and 5 of the Act are subject to the provisions of an agreement entered into between the Central Government and the Government of a foreign country for avoidance of double taxation, as envisaged under Section 90. The Court further held that if a tax liability is imposed by the Act, the agreement may be resorted to either for reducing the tax liability or for altogether avoiding the liability.

78. There cannot be a quarrel with the proposition of law laid down in paragraph 8 of *Kulandagan Chettiar.* But, as we have indicated earlier, Section 90(2) does not deal with the question of conflict between a Treaty and the provisions of a statute. It merely deals with the option given to an assessee, to whom an agreement referred to in Section 90(1) applies, to choose either the provisions of the Treaty or the provisions of the Act, whichever is more beneficial to him.

79. ***No question arose directly either in Azadi Bachao Andolan or in Kulandagan Chettiar as to whether or not the Parliament has the power to make a law in respect of a matter covered by a Treaty. Therefore, the observations found in these two decisions, to the effect that the provisions of the Treaty will have effect even if they are in conflict with the provisions of the statute, cannot be stretched too far to conclude that the Parliament does not have the power to make a law in respect of a matter covered by a Treaty***.

80. It will be useful at this juncture to quote what the "National Commission to Review the Working of the Constitution" said about the role of the Judiciary, when it comes to the question of interpretation of Treaties :

> *"Judiciary has no specific role in Treaty making as such, but if and when a question arises whether a Treaty concluded by the Union violates any of the Constitutional provisions, Judiciary come into the picture. It needs no emphasis that whether it is the Union Executive or the Parliament, they cannot enter into any Treaty or take any*

action towards its implementation, which transgresses any of the Constitutional limitations."

81. Therefore, it is impossible to think that once a Treaty is entered into, the Parliament loses the power conferred by the Constitution, to make a law even in respect of a matter included in List I of the 7th Schedule. The Constitution imposes only two limitations upon the power of the Parliament to make a law. They are (i) that such a law cannot infringe any of the Fundamental Rights or erode the basic structure of the Constitution and (ii) that it must be within its legislative competence. To say that there is one more limitation on the power of the Parliament, in the form of a Treaty entered into by the Executive, is to recognise a limitation not imposed by the Constitution.

82. In ***Magan Bhai Patel Vs. Union of India [AIR 1969 SC 783]***, the Supreme Court pointed out that whenever a Treaty operates to restrict the rights of citizens or others or modifies the laws of the State, it is necessary for the Parliament to make a law under Entries 10 and 14 of List I of the 7th Schedule. But, if the rights of citizens, which are justiciable, are not affected, no legislative measure is needed to make the Treaty, a law.

83. The law as propounded in the above decision would go to show that the object behind Section 90(1) of the Income Tax Act, 1961 is to enable the Parliament, which is entitled to make a law by itself, to delegate the said power to the Executive, so that the Executive can enter into an agreement, that would confer certain benefits upon persons to whom such an agreement

would apply. Therefore, the contention that the Parliamentary law would give way to a Treaty, goes contrary to the Constitutional scheme.

84. In ***Tractor Export Vs. Tarapore & Co. [AIR 1970 SC 1168],*** the Supreme Court pointed out that if the terms of the legislative enactment do not suffer from any ambiguity, they must be given effect to, even if they do not carry out the Treaty obligations.

85. As pointed out by the Supreme Court in *Azadi Bachao Andolan,* Section 90 of the Income Tax Act, 1961 (as it was originally adopted) was a reproduction of Section 49A of the 1922 Act. The 1922 Act was a colonial Act. Therefore, it would be useful to look at the views of the Privy Council, as propounded in ***Attorney General of Canada Vs. Attorney General of Ontario [AIR 1937 P.C. 82]***, which read as follows :

> *"Within the British Empire, there is a well established rule that the making of a Treaty is an Executive act while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a Treaty duly ratified, do not within the Empire, by virtue of the Treaty alone, have the force of law. If the National Executive, the Government of the day decide to incur the obligations of a Treaty, which involve alteration of law, they have to run the risk of obtaining the assent of the Parliament to the necessary statute or statutes. Parliament no doubt, has a Constitutional control over the Executive, but it cannot be disputed that the creation of the obligations undertaken in Treaties and*

> *the assent to their form and quality are the function of the Executive alone.* ***Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so, leave the State in default.****"*

Argument based on Vienna Convention :

86. The ***Vienna Convention on the Law of Treaties,*** which entered into force on 27.1.1980, obliges the Member States to treat every Treaty in force, as binding upon the parties thereto. Articles 26 and 27 of the Vienna Convention contain the doctrine of '***Pacta Sunt Servanda***'. It lays down that every Treaty in force is binding upon the parties to it and must be performed in good faith and a party may not invoke the provisions of its internal law as a justification for its failure to perform a Treaty. Therefore, an argument was advanced on the basis of this Convention that the Union of India cannot invoke the provisions of the Internal Law namely Section 94A as a justification to annul a bilateral Treaty.

87. But, at the outset, it should be pointed out that India has not ratified the Vienna Convention, though a reference to the same, has been made in a few decisions of the Courts. In ***Ram Jethmalani Vs. Union of India [2011 (8) SCC 1],*** the Supreme Court referred to Article 31 of the Vienna Convention and pointed out that though India is not a party to the Convention, it contains many principles of customary international law. Since the principles of customary international law, could always be invoked, the Courts have drawn inspiration from the said Convention, whenever it was

necessitated.

88. But, even if we invoke the rule of *Pacta Sunt Servanda* contained in Article 26 of the Vienna Convention, on the basis that the same was part of the customary international law, the petitioners would not be better off. This is for the reason that Article 26 of the Vienna Convention obliges both the contracting parties to perform their obligations in good faith. As pointed out earlier, one of the four purposes for which, an agreement could be entered into by the Central Government under Section 90(1), is for the exchange of information. If one of the parties to the Treaty fails to provide necessary information, then such a party is in breach of the obligation under Article 26 of the Vienna Convention. The beneficiary of such a breach of obligation by one of the contracting parties (like the assessee herein) cannot invoke the Vienna Convention to prevent the other contracting party (India in this case) from taking recourse to internal law, to address the issue.

89. It will be of interest to note that in *Ram Jethmalani,* the Supreme Court took note of the Vienna Convention as well as the decision in *Azadi Bachao Andolan* and came to a conclusion towards the end of paragraph 70 of the SCC report, which reads as follows :

> ***"The Government cannot bind India in a manner that derogates from the Constitutional provisions, values and imperatives."***

The above observation, in our considered view, is a complete answer to the challenge of the petitioners to the power of the Parliament to enact Section

94A, despite the existence of an agreement entered into under Section 90(1).

90. Therefore, we are of the considered view that the challenge to the Constitutional validity of Section 94A(1) is without any merit. The argument that Section 90(1)(c) cannot be diluted by Section 94A(1) overlooks the fundamental fact that if the purpose of the Central Government entering into an agreement under Section 90(1) is defeated by the lack of effective exchange of information, then Section 90(1)(c) is actually diluted by one of the contracting parties and not by Section 94A(1). Similarly, nothing turns on the absence of a non obstante clause in Sub-Section (1) of Section 94A in contrast to the inclusion of a non obstante clause in Sub-Sections (2) to (5) of Section 94A. As we have indicated earlier, any agreement entered into by the Central Government by virtue of the power conferred by Section 90(1) is in exercise of a delegated power. Similarly, any Notification issued under Section 94A(1) is also in exercise of another delegated power. Therefore, there is no necessity to incorporate a non obstante clause in Sub-Section (1) of Section 94A.

91. Before we wind up our discussion on the challenge to Section 94A, we should point out the circumstances stated by the Union of India in paragraph 10 of the counter affidavit filed by them, which triggered the insertion of Section 94A. It appears that many countries suffered evasion or avoidance of tax, by unscrupulous persons exploiting noble theories of public international law. Therefore, certain resolutions were adopted by the leaders

of G20 Nations, in a Summit held at London on 2.4.2009. At the end of the Summit, a statement titled as 'Global Leaders Statement' was issued, which reads as follows :

> *"1. We, the Leaders of the Group of Twenty, met in London on 2 April 2009.*
>
> *2. We face the greatest challenge to the world economy in modern times; a crisis which has deepened since we last met, which affects the lives of women, men, and children in every country, and which all countries must join together to resolve. A global crisis requires a global solution.*
>
> *3. We start from the belief that prosperity is indivisible; that growth, to be sustained, has to be shared; and that our global plan for recovery must have at its heart the needs and jobs of hard-working families, not just in developed countries but in emerging markets and the poorest countries of the world too; and must reflect the interests, not just of today's population, but of future generations too. We believe that the only sure foundation for sustainable globalisation and rising prosperity for all is an open world economy based on market principles, effective regulation, and strong global institutions.*
>
> *4. We have today therefore pledged to do whatever is necessary to:*
>
> *. restore confidence, growth, and jobs; . repair the financial system to restore lending;*
>
> *. strengthen financial regulation to rebuild trust;*
>
> *. fund and reform our international financial institutions to overcome this crisis and prevent future*

ones;

. promote global trade and investment and reject protectionism, to underpin prosperity; and

. build an inclusive, green, and sustainable recovery. By acting together to fulfil these pledges we will bring the world economy out of recession and prevent a crisis like this from recurring in the future.

5. The Agreements we have reached today, to treble resources available to the IMF to $750 billion, to support a new SDR allocation of $250 billion, to support at least $100 billion of additional lending by the MDBs, to ensure $250 billion of support for trade finance, and to use the additional resources from agreed IMF gold sales for concessional finance for the poorest countries, constitute an additional $1.1 trillion programme of support to restore credit, growth and jobs in the world economy. Together with the measures we have each taken nationally, this constitutes a global plan for recovery on an unprecedented scale.

Restoring growth and jobs :

6. We are undertaking an unprecedented and concerted fiscal expansion, which will save or create millions of jobs which would otherwise have been destroyed, and that will, by the end of next year, amount to $5 trillion, raise output by 4 per cent, and accelerate the transition to a green economy. We are committed to deliver the scale of sustained fiscal effort necessary to restore growth.

7. Our central banks have also taken exceptional action. Interest rates have been cut aggressively in most

countries, and our central banks have pledged to maintain expansionary policies for as long as needed and to use the full range of monetary policy instruments, including unconventional instruments, consistent with price stability.

8. Our actions to restore growth cannot be effective until we restore domestic lending and international capital flows. We have provided significant and comprehensive support to our banking systems to provide liquidity, recapitalise financial institutions, and address decisively the problem of impaired assets. We are committed to take all necessary actions to restore the normal flow of credit through the financial system and ensure the soundness of systemically important institutions, implementing our policies in line with the agreed G20 framework for restoring lending and repairing the financial sector.

9. Taken together, these actions will constitute the largest fiscal and monetary stimulus and the most comprehensive support programme for the financial sector in modern times. Acting together strengthens the impact and the exceptional policy actions announced so far must be implemented without delay. Today, we have further agreed over $1 trillion of additional resources for the world economy through our international financial institutions and trade finance.

10. Last month the IMF estimated that world growth in real terms would resume and rise to over 2 percent by the end of 2010. We are confident that the actions we have agreed today, and our unshakeable commitment to work together to restore growth and jobs, while preserving long-term fiscal sustainability, will accelerate the return to trend

growth. We commit today to taking whatever action is necessary to secure that outcome, and we call on the IMF to assess regularly the actions taken and the global actions required.

11. We are resolved to ensure long-term fiscal sustainability and price stability and will put in place credible exit strategies from the measures that need to be taken now to support the financial sector and restore global demand. We are convinced that by implementing our agreed policies we will limit the longer-term costs to our economies, thereby reducing the scale of the fiscal consolidation necessary over the longer term.

12. We will conduct all our economic policies cooperatively and responsibly with regard to the impact on other countries and will refrain from competitive devaluation of our currencies and promote a stable and well-functioning international monetary system. We will support, now and in the future, to candid, even-handed, and independent IMF surveillance of our economies and financial sectors, of the impact of our policies on others, and of risks facing the global economy.

Strengthening financial supervision and regulation:

13. Major failures in the financial sector and in financial regulation and supervision were fundamental causes of the crisis. Confidence will not be restored until we rebuild trust in our financial system. We will take action to build a stronger, more globally consistent, supervisory and regulatory framework for the future financial sector, which will support sustainable global growth and serve the needs of business and citizens.

14. We each agree to ensure our domestic regulatory systems are strong. But we also agree to establish the much greater consistency and systematic cooperation between countries, and the framework of internationally agreed high standards, that a global financial system requires. Strengthened regulation and supervision must promote propriety, integrity and transparency; guard against risk across the financial system; dampen rather than amplify the financial and economic cycle; reduce reliance on inappropriately risky sources of financing; and discourage excessive risk-taking. Regulators and supervisors must protect consumers and investors, support market discipline, avoid adverse impacts on other countries, reduce the scope for regulatory arbitrage, support competition and dynamism, and keep pace with innovation in the marketplace.

15. To this end we are implementing the Action Plan agreed at our last meeting, as set out in the attached progress report. We have today also issued a Declaration, Strengthening the Financial System. In particular we agree:

. to establish a new Financial Stability Board (FSB) with a strengthened mandate, as a successor to the Financial Stability Forum (FSF), including all G20 countries, FSF members, Spain, and the European Commission;

. that the FSB should collaborate with the IMF to provide early warning of macroeconomic and financial risks and the actions needed to address them;

. to reshape our regulatory systems so that our authorities are able to identify and take account of macro-

prudential risks;

. to extend regulation and oversight to all systemically important financial institutions, instruments and markets. This will include, for the first time, systemically important hedge funds;

. to endorse and implement the FSF's tough new principles on pay and compensation and to support sustainable compensation schemes and the corporate social responsibility of all firms;

. to take action, once recovery is assured, to improve the quality, quantity, and international consistency of capital in the banking system. In future, regulation must prevent excessive leverage and require buffers of resources to be built up in good times;

. ***to take action against non cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by Global Forum against the international standard for exchange of tax information****.*

. to call on the accounting standard setters to work urgently with supervisors and regulators to improve standards on valuation and provisioning and achieve a single set of high quality global accounting standards; and

. to extend regulatory oversight and registration of Credit Rating Agencies to ensure they meet the international code of good practice, particularly to prevent unacceptable conflicts of interest.

> *16.* ***We instruct our Finance Ministers to complete the implementation of these decisions in line with the timetable set out in the Action Plan.*** *We have asked the FSB and the IMF to monitor progress, working with the Financial Action Taskforce and other relevant bodies, and to provide a report to the next meeting of our Finance Ministers in Scotland in November."*

92. The portion of the above statement, highlighted in bold letters, would show that there was sufficient justification for the Parliament to insert Section 94A. In doing so, the Parliament did not show disrespect to any Treaty. The resolution passed by the G20 Nations, ***to take action against non cooperative jurisdictions, including tax havens,*** is what is sought to be given effect to, by the insertion of Section 94A.

93. The above position can be cross verified from the relevant portion of the Explanatory Notes to the provisions of the Finance Act, 2011. They are extracted as follows :

"Circular No.02/2012 [F.No.142101/2012.SO (TPL), dated 22.5.2012
Explanatory notes to the provisions of the Finance Act, 2011

> *"15. Tool box of counter measures in respect of transactions with persons located in a non-cooperative jurisdiction.*
> *In order to discourage transactions by a resident assessee with persons located in any country or jurisdiction, which does not effectively exchange information with India, a set of anti-avoidance measures have been provided.*

A new Section 94-A has been inserted in the Act to specifically apply to transactions undertaken with persons located in such country or area. The section provides-

(i) an enabling power to the Central Government to notify any country or territory outside India. having regard to the lack of effective exchange of information by it with India, as a notified jurisdictional area;

(ii) that if an assessee enters into a transaction, where one of the parties to the transaction is a person located in a notified jurisdictional area, then all the parties to the transaction shall be deemed to be associated enterprises and the transaction shall be deemed to be an international transaction and accordingly, transfer pricing regulations shall apply to such transactions;

(iii) that no deduction in respect of any payment made to any financial institution shall be allowed unless the assessee furnishes an authorization, in the prescribed form, authorizing the Board or any other Income-tax authority acting on its behalf, to seek relevant information from the said financial institution;

(iv) that no deduction in respect of any other expenditure or allowance (including depreciation) arising from the transaction with a person located in a notified jurisdictional area shall be allowed under any provision of the Act unless the assessee maintains such other documents and furnishes the information as may be prescribed:

(v) that if any sum is received from a person located in the notified jurisdictional area, then, the onus is on the assessee to satisfactorily explain the source of such money in the hands of such person or in the hands of the

> *beneficial owner, and in case of his failure to do so, the amount shall be deemed to be the income of the assessee;*
> *(vi) that any payment made to a person located in such area shall be liable to deduction of tax at the higher of the rates specified in the relevant provision of the Act or rate or rates in force or a rate of 30 per cent.*
> ***Applicability** - These amendments have been made effective from 1st June, 2011."*

Therefore, in the light of the foregoing, we find no merit in the challenge to the Constitutional validity of Section 94A(1).

94. The circumstances leading to the enactment of Section 94-A, are explained in paragraph 29 of the counter affidavit filed on behalf of the Union of India. It is indicated in the said paragraph that India is not the only country which took defensive measures, to prevent the abuse of the benefits conferred by treaties. Therefore, it would be useful to extract paragraph 29 of the counter affidavit, along with the tabular column furnished thereunder as follows:-

> *"29) I therefore submit that Section 94A having been enacted to enforce transparency in cross border remittances does not suffer from any of the infringements as alleged by the petitioner hence is constitutionally valid. Further the aspect of 'defensive measures' as contemplated under sec.94A is resounded not just in India but in many other nations as such a few of the same are tabulated below:*

Sl. No.	*Country*	*Measures*
1	Argentina	**Legislative** 1. The current taxation of domestic shareholders on (certain) income of a controlled foreign company. 2. Disallowing deductions or credits with respect to certain transactions. 3. Special withholding tax rules. 4. The application of transfer pricing rules to transactions between related parties/increased transfer pricing documentation requirements. 5. Increased information reporting requirements. **Non legislative** 6. Increased audit risk for tax payers who engage in transactions with "high risk"jurisdictions. 7. Increased substantiation requirements in respect of transactions involving certain jurisdictions.
2	Australia	**Legislative** 1. Special withholding tax rules. **Non legislative** 1. Adding question(s) on tax returns as to the ownership of foreign assets.
3	Belgium	**Legislative** 1. Disallowing deductions or credits with respect to certain transactions. 2. Increased information reporting requirements. **Non legislative** 3. Increased audit risk for tax payers who engage in transactions with certain "high risk" jurisdictions. 4. Increased substantial requirements in respect of transactions involving certain jurisdictions.
4	Brazil	**Legislative** 1. Disallowing deductions or credits with respect to certain transactions.

Sl. No.	*Country*	*Measures*
		2. Special withholding tax rules.
5	Colombia	**Legislative** 1. Disallowing deductions or credits with respect to certain transactions. 2. Special withholding tax rules. 3. The application of transfer pricing rules to transactions between unrelated parties/increased transfer pricing documentation requirements. 4. Increased information reporting requirements. 5. **Other measures -** Colombian citizens tax resident in a "tax haven" considered tax resident in Colombian, unless at least 50% of their income sourced or assets located in that jurisdiction.
6	Czech Republic	**Legislative** 1. Special withholding tax rules.
7	Denmark	**Legislative** 1. The current taxation of domestic shareholders on (certain) income of a controlled foreign company. 2. The denial of benefits on income/capital gains associated with shares in certain companies. 3. Disallowing deductions or credits with respect to certain transactions. **Non-legislative** 4. Increased audit risk for tax payers who engage in transactions with certain "high risk" jurisdictions.
8	France	**Legislative** 1. The current taxation of domestic shareholders on (certain) income of a controlled foreign company. 2. The denial of benefits on income/capital gains associated with shares in certain companies.

Sl. No.	*Country*	*Measures*
		3. Disallowing deductions or credits with respect to certain transactions. 4. Special withholding tax rules. 5. Increased information reporting requirements. **Non-legislative** 1. Increased audit risk for tax payers who engage in transactions with certain "high risk" jurisdictions.
9	Germany	**Legislative** 1. The denial of benefits on income/capital gains associated with shares in certain companies. 2. Disallowing deductions or credits with respect to certain transactions. 3. Increased information reporting requirements. **Non-legislative** 1. Increased substantial requirements in respect of transactions involving certain jurisdictions.
10	Italy	**Legislative** 1. The current taxation of domestic shareholders on (certain) income of a controlled foreign company. 2. The denial of benefits on income/capital gains associated with shares in certain companies. 3. Disallowing deductions or credits with respect to certain transactions. 4. Special withholding tax rules. 5. Increased information reporting requirements. **6. Other measures:** People claiming to no longer be resident in Italy but instead in a blacklisted jurisdiction are deemed resident in Italy. Trust (or entries similar to trusts) established in blacklisted jurisdictions where a settlor or beneficiary is resident in Italy.

Sl. No.	*Country*	*Measures*
		Specific measures in relation to associated companies with a registered office in blacklisted jurisdiction. Specific measures in relation to individuals with undeclared financial activities in a blacklisted jurisdiction.
11	Netherlands	**Legislative** 1. The denial of benefits on income/capital gains associated with shares in certain companies. **Non legislative** 2. Additional question(s) on tax returns to the ownership of foreign assets.
12	Norway	**Legislative** 1. Special withholding tax rules 2. The application of transfer pricing rules to transactions between unrelated parties/ increased transfer pricing documentation requirements. **Other** 3. Giving extra weight to an effective exchange relationship when designing bilateral aid programs.
13	Portugal	**Legislative** 1. The current taxation of domestic shareholders on (certain) income of a controlled foreign company. 2. Disallowing deductions or credits with respect to certain transactions. 3. Special withholding tax rules. 4. The application of transfer pricing rules to transactions between related parties/ increased transfer pricing documentation requirements. 5. Increased information reporting requirements. **Non-legislative** 6. Additional question(s) on tax returns as to the ownership of foreign assets.

Sl. No.	*Country*	*Measures*
		7. Increased substantial requirements in respect of transactions involving certain jurisdiction.
14	Spain	**Legislative** 1. The current taxation of domestic shareholders on (certain) income of a controlled foreign company. 2. The denial of benefits on income/ capital gains associated with shares in certain companies. 3. Special withholding tax rules. 4. The application of transfer pricing rules to transactions between unrelated parties/ increased transfer pricing documentation requirements. 5. Increased information reporting requirements. **Non-legislative** 1. Increased substantial requirements in respect of transactions involving certain jurisdictions.
15	UK	**Legislative** 1. Increased penalties for use of certain jurisdictions. **Non-legislative** 2. Increased substantial requirements in respect of transactions involving certain jurisdictions.

The above list is merely illustrative and not exhaustive.

For instance, in Finance defensive measures were applied to jurisdictions categorized as 'non-cooperative' i.e., British Virgin Islands, Jersey & Bermuda resulting in taxation of domestic shareholders on certain income of controlled foreign company, denial of benefits of income/capital gains associated with shares in certain companies, disallowing deductions or credits, levy of special withholding tax rules, increased information

reporting requirements etc., it is to be noted that with all the 3 countries noted above, France had a Tax Information Exchange Agreement (TIEA) and despite that defensive measures as stated supra were taken as no information as sought for by the French tax authorities was forthcoming from the non-cooperative jurisdictions. It is further submitted that similarly Spain & Russian had also notified (blacklisted) Cyprus and in view of the above, Cyprus has started cooperating with those countries for exchange of information. Due to positive development on the part of Cyprus, Spain & Russia have subsequently withdrawn their notification in 2012 & 2015 respectively. Therefore, these are a few examples which show the resolve of the transparent countries to take action against those who promote tax evasion by not providing the requisite tax information."

95. Therefore, it would be clear from the above that many countries have become guarded in their approach towards Double Taxation Avoidance Agreements. In such circumstances, we cannot accept a contention that would surrender the Legislative power of the Parliament to the will of the Executive. Hence, the writ petitions challenging the validity of Section 94-A are liable to be dismissed.

B. Vires of the Notification dated 1.11.2013 :

96. As an alternative to the challenge to Section 94A(1), the petitioners have also challenged the Notification No.86 dated 1.11.2013. This Notification reads as follows :

> *"S.O.3307 (E).-In exercise of the powers conferred by Sub-Section (1) of Section 94A of the Income Tax Act, 1961 (43 of 1961), the Central Government hereby specifies 'Cyprus' as the 'notified jurisdictional area' for the purposes of the said Section."*

97. The first ground of challenge to the above Notification is that it is ultra vires Section 94A(1).

98. But, we have already extracted Section 94A(1). This provision empowers the Central Government to specify by Notification in the official gazette, any country or territory outside India, as a notified jurisdictional area, in relation to transactions entered into by any assessee. This exercise may be done, by the Central Government, having regard to the lack of effective exchange of information with such a country or territory outside India.

99. The plain language of Sub-Section (1) of Section 94A leaves no room for any doubt that the Central Government has the power to issue a Notification, of the type impugned in these writ petitions. The power conferred by the Section cannot also be said to be uncontrolled and unbridled, as the Central Government has to exercise the power only in circumstances where there is lack of effective exchange of information.

100. In paragraph 9 of the counter affidavit filed on behalf of the Union of India, it is stated that the provisions of DTAA entered into by India with Cyprus on 21.12.1994, contain an obligation for the exchange of information,

under Article 28. According to the Union of India, they have been making a number of requests to Cyprus for providing relevant information such as details of the beneficial ownership of the persons making huge investments in India and the source of such funding. It is further stated in paragraph 8 of the counter as follows :

> *"There is reasonable apprehension with the Indian Tax Authorities that the funds flowing into India from Cyprus represent the unaccounted money of Indian nationals and hence, to check tax evasion, a number of requests on specific cases was made to Cyprus. In spite of the existence of DTAA, no information sought for was forthcoming from Cyprus, which prompted the impugned Notification...."*

101. As we have pointed out earlier, both contracting parties are obliged to perform their obligations under the Treaty in good faith. When one of the parties commits a default by failing to provide information, it is not open to the beneficiary of such a default to contend that the other contracting party should honour their obligations.

102. Article 28 of the DTAA dated 21.12.1994, which provides for exchange of information, reads as follows :

> *"1. The competent authorities of the Contracting States shall exchange such information (including documents) as is necessary for carrying out the provisions of the Agreement or of the domestic laws of the Contracting States concerning*

taxes covered by the Agreement, insofar as the taxation thereunder is not contrary to the Agreement, in particular for the prevention of fraud or evasion of such taxes. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which such exchange of information shall be made, including, where appropriate, exchange of information regarding tax avoidance.

2. The exchange of information or documents shall be either on a routine basis or on request with reference to particular cases or both. The competent authorities of the Contracting States shall agree from time to time on the list of the information or documents which shall be furnished on a routine basis.

3. In no case shall the provisions of paragraph 1

be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measure at variance with the laws or administrative practice of that or of the other Contracting State;

(b) to supply information or documents which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; and

(c) to supply information or documents which would disclose any trade, business, industrial, commercial or professional secret or trade process or information the disclosure of which would be contrary to public policy."

103. On the basis of para 3(b) of Article 28, it was contended that certain types of information are excluded from the purview of Article 28 and that therefore, the said provision cannot be annulled by a statutory provision and a Notification issued thereunder.

104. But, we do not think that the lack of exchange of information by Cyprus, which led to the Notification dated 1.11.2013 would fall under any of the two categories indicated in para 3(b) of Article 28 of the DTAA. The information relating to evasion of tax cannot fall under the category of information, which is not obtainable under the laws or in the normal course of administration.

105. Yet another argument is advanced on the basis of para 3 of Article 27 of the DTAA, which prescribes a "Mutual Agreement Procedure", in

case of disputes. This paragraph 3 reads as follows :

> "*The Competent Authorities of the contracting State shall endeavour to resolve by mutual agreement. Any difficulties or doubts arising as to the interpretation or application of the agreement. They may also consult together for the elimination of double taxation in cases not provided for in the agreement.*"

106. On the basis of the above paragraph, it is contended by Mr.Arvind P.Datar, learned Senior Counsel that when the DTAA itself provides a procedure for dispute resolution, the Government of India could not have taken recourse to Section 94A(1).

107. But, we are unable to sustain the above contention. Paragraph 3 of Article 27 deals only with difficulties or doubts arising as to the interpretation or application of the DTAA. It does not deal with the failure of one of the contracting parties to honour its commitment under the DTAA. In any case, a clause relating to Mutual Agreement Procedure, contained in an agreement, cannot oust the jurisdiction of the Parliament to enact a law and the Executive to issue a Notification in exercise of the power conferred by such a law.

108. Mr.Arvind P.Datar, learned Senior Counsel appearing for the petitioners contended that since Sub-Section (1) of Section 94-A does not contain a non-obstante clause, the same should be read in such a manner as to understand the power conferred thereunder, as one excluding those

countries with which the Central Government had entered into an Agreement under Section 90(1). In other words, his contention is that Section 94-A(1) confers power upon the Central Government to notify any country, other than those with whom an Agreement is already entered into under Section 90(1), to be a notified jurisdictional area.

109. But the aforesaid contention loses sight of the express language of Section 94-A(1). It uses the phrase "***any country or territory***". We cannot read the said phrase to mean "***any country or territory other than those covered by Section 90(1).***" In a taxing statute, we are not entitled to add or delete any expression. We are not also entitled to re-phrase the provision. Therefore, the challenge to the Notification dated 1.11.2013 is also bound to fail.

C. Vires of the Press Release dated 1.11.2013

110. Following the Notification dated 1.11.2013, the Ministry of Finance issued a Press Release dated 1.11.2013. This Press Release actually contains four paragraphs (unnumbered). In the first paragraph, the Press Release speaks about the introduction of Section 94-A and the issue of the Rules thereunder. In the second paragraph, the Press Release speaks about the Agreement entered into with Cyprus. In the third paragraph the Press Release states that Cyprus has not been providing information sought for by the Indian authorities and that therefore, the Notification dated 1.11.2013 came to be issued.

111. In the fourth paragraph of the Press Release, the implications of

the Notification dated 1.11.2013 are summarized as follows:-

> *"If an assessee enters into a transaction with a person in Cyprus, then all the parties to the transaction shall be treated as associated enterprises and the transaction shall be treated as an international transaction resulting in application of transfer-pricing regulations including maintenance of documentations [Section 94A(2)].*
> *-No deduction in respect of any payment made to any financial institution in Cyprus shall be allowed unless the assessee furnishes an authorisation allowing for seeking relevant information from the said financial institution [Section 94A(3)(a) read with Rule 21AC and Form 10FC].*
> *-No deduction in respect of any other expenditure or allowance arising from the transaction with a person located in Cyprus shall be allowed unless the assessee maintains and furnishes the prescribed information [Section 94A(3)(b) read with Rule 21AC].*
> *-If any sum is received from a person located in Cyprus, then the onus is on the assessee to satisfactorily explain the source of such money in the hands of such person or in the hands of the beneficial owner, and in case of his failure to do so, the amount shall be deemed to be the income of the assessee [Section 94A(4)].*
> *-Any payment made to a person located in Cyprus shall be liable for withholding tax at 30 per cent or a rate prescribed in Act, whichever is higher [Section 94A(5)]."*

112. The challenge of the petitioners to the Press Release is that in the last paragraph, the Press Release makes "***any payment "*** made to a person located in Cyprus, to be liable for withholding of tax at 30% in terms of

Section 94-A(5). According to the petitioners, Section 94-A(5) uses the expressions "any sum", "income" and "amount".

113. The contention of Mr.Arvind P.Datar, learned Senior Counsel for the petitioners is that each of these expressions (1) sum (2) income (3) amount and (4) payment, has different connotations under the Income Tax Act and that instead of borrowing the very same language used in Section 94-A(5), the Press Release has used the expression "any payment". Therefore, it is his contention that the Press Release runs contrary to the statutory prescription and hence liable to be set aside.

114. In order to drive home the above point, the learned Senior Counsel drew our attention to various provisions of the Act in which any one of these expressions is used. They are as follows:-

Word Used	***Provision in Chapter XVII***
Sum	191 [Direct Payment] 194C [Payments to Contractors] 194IA [Transfer of Immovable Property] 194J [Fees for professional or technical services 194L [Acquisition of Capital Asset] 194LA [Acquisition of certain Immovable Property] 195 [Other Sums] 196 [Payable to Government, Reserve Bank or certain corporations]
Income	190, 193 [Interest on Securities] 194-I [Rent], 194A [Other Interest] 194B [Winnings from Lottery] 194BB [Winnings from Horse Race] 194D [Insurance Commission] 194DA [Payments for Life Insurance] 194E [Payment to non-resident sportsmen] 194G [Commission on Sale of Lottery Ticket] 194H [Commission /Brokerage] 194K [Income in respect of Units]

Word Used	*Provision in Chapter XVII*
	194LB [Interest from Infrastructure Debt Fund] 194LBA [Units of a business trust] 194LBB [Units of an Investment Fund] 194LC [Interest from an Indian Company] 194LD [Interest on Certain Bonds and Government Securities] 195 [Other Sums] 196A [Units of Non Residents] 196B [Units] 196C [Foreign Currency Bonds or shares of Indian company] 196D [FIIs from securities]
Amount	192(1) [Salary] 192A [Accumulated Balance to Employee] 194 [Dividends] 194EE [National Savings Scheme] 194F [Repurchase of Units by Mutual Fund or UTI]

115. We agree that from the point of view of linguistics, the words "sum" and "amount" are synonyms. But under the Income Tax Act, each of the words "sum", "amount", "income" and "payment" have different connotations. But the argument advanced on the basis of the same, to assail the Press Release dated 1.11.2013, doest not hold water.

116. Sub-Section (5) of Section 94-A uses the words "sum", "income" and "amount" with the disjunction "or" in between. But all these three words are preceded by the expression "any". While Sub-Section (5) of Section 94-A is worded from the point of view of the recipient of any sum, income or amount, the Press Release is worded from the point of view of the person making the payment. When we speak from the point of view of the recipient of an amount, the word "payment" will not normally be used. The Press Release is not a legal document, but a note intended for the benefit of the

common man. Therefore, the words and expressions used therein cannot be tested on the strength of Law Lexicons.

117. Moreover, as rightly pointed out by Mr.T.Pramod Kumar Chopda, learned Standing Counsel for the Department, the Supreme Court made it clear in para 44 of the report in *Azadi Bachao Andolan* that though the Circulars issued by CBDT under Section 119 of the Act, have statutory force, the Press Releases issued by CBDT for the information of the public, do not have the same force. Therefore, the question of assailing the Press Release does not arise.

118. Drawing our attention to Clause 6.4 of the Securities Purchase Agreement entered into by and between (1) New Kovai Real Estate Private Limited, Chennai (2) Skyngelor Limited, Cyprus and (3) the writ petitioners herein, it is contended by Mr.T.Pramod Kumar Chopda, learned Standing Counsel that the petitioners had entered into the transaction in question, with eyes wide open and hence their contentions lack merit.

119. Clause 6.4 of the Securities Purchase Agreement reads as follows:-

> *"6.4 Skyngelor represents, warrants and covenants that the First Tranche Securities are being transferred hereunder at a loss and, thus, there is no obligation on the Buyers to withhold any Tax on the First Tranche Consideration being remitted to Skyngelor for the transfer of the First Tranche Securities. If despite such representation, any tax should be levied, the same shall be borne and paid by Skyngelor."*

120. The above Clause in the Securities Purchase Agreement, exposes the frivolity of the contentions of the petitioners. After having taken care to indicate that if a tax is levied, it should be borne by the Cyprus company, the petitioners appear to have indulged in an adventure in making remittances in full. Actually the petitioners should have deducted tax at source in terms of Clause 6.4 of the Securities Purchase Agreement and thereafter fought a legal battle with the Department for refund. If the petitioners had taken a calculated risk by making the payments, they cannot later turn around and find fault with the statutory prescription and with the Notification and Press Release.

Conclusion:

121. Therefore, we are of the considered view that the challenges to Section 94-A (1), the Notification dated 1.11.2013 and the Press Release dated 1.11.2013 are not sustainable in law.

122. The ordinary dictionary meaning of the word "haven"is "harbour or anchorage". By extension, the word also denotes a place of safety, a refuge or sanctuary. In association with the word "tax", the word "haven" has assumed different connotations in the recent past and Panama appears to have followed Cyprus. Therefore, Section 94A was the need of the hour and we do not find the same to suffer from unconstitutionality. Hence, all the writ petitions are dismissed. However, there will be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

(V.R.S.J.) (T.M.J.)
Index : Yes 12-4-2016
Internet : Yes

To
1.The Secretary to Union of India, Ministry of Finance, Department of Revenue, Room No.46, North Block, New Delhi.
2.The Chairman, Central Board of Direct Taxes, North Block, New Delhi-110001.
3.The Income Tax Officer (International Taxation) Coimbatore, 2nd Floor Annexure Building, No.63, Race Course Road, Coimbatore-641018.

RS/gr/kpl

V.RAMASUBRAMANIAN,J
AND
T.MATHIVANAN,J

RS/gr/kpl

Common Order in
W.P.Nos.17241 to 17243 &
17407 to 17412 of 2015 and
all connected pending MPs

12-4-2016

W.P.Nos.17241 to 17243 & 17407 to 17412 of 2015

V.RAMASUBRAMANIAN,J,
and
T.MATHIVANAN,J

O R D E R
(Made by V.Ramasubramanian,J)

Immediately after we pronounced orders, Mr.P.Giridharan, learned counsel appearing for the petitioners made an oral request in terms of Article 134A(b) for the issue of a certificate for leave to appeal. But, we do not think that the parameters of Clause (1) of Article 132 are satisfied. Madras High Court is not the only High Court to take the view that we have taken. Therefore, the request is rejected.

(V.R.S.J.) (T.M.J.)
12.4.2016

ssk/kpl

V.RAMASUBRAMANIAN,J,
and
T.MATHIVANAN,J

ssk/kpl

W.P.Nos.17241 to 17243 &
17407 to 17412 of 2015.

12.4.2016