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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8945 OF 2019
(Arising out of Special Leave Petition (Civil) No.20728 of 2019)

GENPACT INDIA PRIVATE LIMITED …Appellant

VERSUS

DEPUTY COMMISSIONER OF
INCOME TAX & ANR. …Respondents

J U D G M E N T

Uday Umesh Lalit, J.

1. Leave granted.

2. This appeal arises out of the final judgment and order dated 19.08.2019 passed by the High Court of Delhi at New Delhi in Writ Petition No.686 of 2017.

3. The facts leading to the filing of the present appeal, in brief, are as under:

(a) Out of opening share capital of 25,68,700 shares held by its sole shareholder and holding company Genpact India Investment, Mauritius,

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the appellant bought back 2,50,000 shares in May 2013 at the rate of Rs.32,000/- per share for a total consideration of Rs.800 crores.

(b) On 10.05.2013, Chapter XIIDA consisting of Sections 115QA, 115QB and 115QC was inserted in the Income Tax Act, 1961 (hereinafter referred to as 'the Act') by the Finance Act, 2013 which came into effect from 01.06.2013. Section 115QA as it stood prior to the amendment which came into effect on 01.06.2016 was to the following effect:

> "**Section 115QA**: **Tax on distributed income to shareholders –**
> (1) Notwithstanding anything contained in any other provision of this Act, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount of distributed income by the company on buy-back of shares (not being shares listed on a recognised stock exchange) from a shareholder shall be charged to tax and such company shall be liable to pay additional income-tax at the rate of twenty per cent on the distributed income.
> *Explanation*.—For the purposes of this section,—
>
> (i) "buy-back" means purchase by a company of its own shares in accordance with the provisions of section 77A of the Companies Act, 1956 (1 of 1956);
>
> (*ii*) "distributed income" means the consideration paid by the company on buy-back of shares as reduced by the amount which was received by the company for issue of such shares.
>
> (2) Notwithstanding that no income-tax is payable by a domestic company on its total income computed in accordance with the provisions of this Act, the tax on the distributed income under sub-section (1) shall be payable by such company.

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> (3) The principal officer of the domestic company and the company shall be liable to pay the tax to the credit of the Central Government within fourteen days from the date of payment of any consideration to the shareholder on buy-back of shares referred to in sub-section (1).
>
> (4) The tax on the distributed income by the company shall be treated as the final payment of tax in respect of the said income and no further credit therefor shall be claimed by the company or by any other person in respect of the amount of tax so paid.
>
> (5) No deduction under any other provision of this Act shall be allowed to the company or a shareholder in respect of the income which has been charged to tax under sub-section (1) or the tax thereon."

The Explanation in relation to "buy back" was, however, amended and with effect from 01.06.2016, it reads as:-

> "(i) "buy-back" means purchase by a company of its own shares in accordance with the provisions of any law for the time being in force relating to companies;"

(c) On 10.09.2013, a scheme for arrangement was approved by the High Court of Delhi in Company Petition No.349 of 2013. Pursuant thereto, the appellant bought back another tranche of 7,50,000 shares at the rate of Rs.35,000 per share for a total consideration of Rs.2,625 crores from said Genpact India Investment, Mauritius.

(d) In the income tax return filed on 28.11.2014 by the appellant for the assessment year 2014-15, "Details of tax on distributed profits of

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domestic companies and its payment" were given in "Schedule DDT" where the details of aforesaid transactions were given but the liability to pay any tax was denied. A notice under Section 143(2) of the Act was issued to the appellant on 03.09.2015 seeking further explanation, pursuant to which requisite details were furnished.

(e) The matter was thereafter considered and an assessment order was passed by the first respondent on 31.12.2016. As many as 10 additions were made by the first respondent, one of them being in respect of liability under Section 115QA of the Act. Since we are concerned in this appeal only with the issue with regard to liability under Section 115QA, we need not deal with other issues.

f) As regards the issue in question, the submissions advanced on behalf of the appellant-assessee were noted as under:

> "Vide Letter dated 28.12.2016, the assessee has submitted that the buy back of shares has been done in pursuance of scheme of arrangement under Section 391 of the Companies Act, 1956 approved by Hon'ble High Court of Delhi and in such manner that the same is not a buy back in terms of the Section 115QA of the Act."

g) The matter was dealt with by the first respondent as under:

> "The submission of the assessee was considered but was not found acceptable as it has no substance. Before discussing the facts of the case and argument in support of the revenue it is also important to

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> understand the background of the Section 115QA. Section 115QA was inserted by Finance Act, 2013 to counter the tax avoidance practice mainly adopted by Indian subsidiaries to distribute income to shareholders to Mauritius based Holding company under the garb of Buyback of shares. Under Income Tax Act, buyback of shares is taxable u/s 46A in the hands of shareholders. However, taking the benefit of Article 13 of India-Mauritius DTAA, which provides for capital gain arising on transfer of shares of Mauritius resident taxable in that country and under Mauritius tax laws capital gain is totally exempt, entire transaction used to escape the tax net. Thus to plug this loop hole in the statute, Section 115QA is introduced to provide that where shares are bought back at a price higher than the price at which those shares were issued then, balance amount will be treated as distribution of income to shareholder and Tax@20% will be payable by the Company. Section 115QA is applicable only to domestic unlisted companies.
>
> The provisions of Section 115QA have been introduced as part of Chapter XIIA as an anti-avoidance measure as also with an intent to widen the tax base in India. The explanatory Memorandum made it clear that the object is to curb tax avoidant practice of unlisted companies resorting to buy-back of shares in lieu of payment of income to shareholders and which is taxable in India. Buy back tax is attracted on amounts distributed by the company on buy-back of its own shares.
>
> … … …
>
> Section 115QA overrides all the sections of the Act and it is a separate charging section which taxes amount distributed on buy back of shares."

Rejecting the submission advanced on behalf of the appellant, the first respondent thus held that over and above nine heads under which additions were made, the appellant-assessee was also liable to pay tax at

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the rate of 20% in terms of Section 115QA of the Act in respect of distributed income of Rs.2,625 crores.

h. It may be mentioned that insofar as those nine additions made by the aforesaid assessment order by the first respondent are concerned, an appeal was filed by the appellant. We have been apprised that the appeal was decided in favour of the appellant but further challenge at the instance of the Revenue is under consideration.

As regards the issue concerning tax under Section 115QA, the appellant filed Writ Petition (Civil) No.686 of 2017 in the High Court submitting, inter alia, that the order passed by the first respondent was without jurisdiction as buy back of shares in the instant case was in pursuance of the scheme of arrangement approved by the High Court.

i) The matter came up before the High Court on 25.01.2017 when a preliminary objection was raised that alternate and efficacious remedy of filing an appeal was available. While issuing notice it was observed by the High Court:

> "*Prima facie*, in this Court's opinion, the non-obstante clause in Section 115QA of the Act restricts the nature of the levy to the transactions defined by the provision itself. The transactions defined are those covered by Section 77A of the Companies Act. Significantly, the Parliamentary intent to cover all manners of share

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> acquisition by the Company of its own shares, is evident from a subsequent amendment to Section 115QA of the Act, when it explained the meaning of 'buy-back' in the First Explanation by not alluding merely to Section 77A of the Companies Act but all other provisions of law. That this provision was not given retrospective effect, in this Court's opinion, further strengthens the petitioner's submissions.
>
> In view of these *prima facie* reasons, the Court is of the opinion that the impugned demand to the tune it seeks to recover levy under Section 115QA of the Act should not be enforced till the next date of hearing. It is so directed.
>
> List on 28.03.2017."

j) The matter thereafter came up on 30.08.2017 when the interim order dated 25.01.2017 was made absolute.

k) When the matter was taken up after completion of pleadings, it was submitted on behalf of the Revenue that since the remedy of appeal was available to the appellant, the Writ Petition may not be entertained. On the other hand, it was submitted by the appellant that the demand raised under Section 115QA could not be considered as forming part of the assessment order passed by the first respondent and it must be something separate from the order of assessment. The submission was, however, rejected by the High Court observing as under:

> "At the outset, the Court would first like to deal with the submissions of Mr. Ganesh that the impugned

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> demand raised under Section 115QA of the Act should not be construed as forming part of the impugned assessment order and that it is something separate from it. While it is true that the demand under Section 115QA of the Act would be in addition to the total income, the fact of the matter is that in the present case it forms an integral part of the impugned assessment order under Section 143(3) of the Act. Reading the assessment order as a whole, it is plain to the Court that this demand under Section 115QA of the Act is in addition to demands under other issues, all of which form part of the impugned assessment order. In fact, paragraph 11 of the impugned assessment order, which gives the computation of the total taxable income, includes the demands raised under all heads and it includes the demand under Section 115QA of the Act. Therefore, it is not possible for this Court to read this part of the order separate from the rest of the assessment order."

l) On the issue whether the Writ Petition be entertained in the face of availability of an alternate remedy, the High Court considered relevant case law touching upon the issue and observed:

> "23. The question regarding the interpretation of Section 115QA of the Act, as it stood at the relevant time, can definitely be gone into by the CIT (A). Further, this Court has in fact not expressed any view yet on the maintainability of the petition, although as rightly pointed out the matter was heard on this aspect earlier as well. The fact remains that the Respondent raised the objection at the first available opportunity. Due to reasons noted hereinbefore, the issue could not be decided till now. It would, however, not be correct to state that this Court has impliedly overruled such an objection and decided to hear the petition on merits.
>
> 24. The Court also notes in this context that the Assessee has in fact succeeded in its appeal before the

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> CIT (A) on other issues arising out of the same impugned assessement order and it is the Revenue which is now in appeal before the ITAT. There is no reason why this one other issue arising from the impugned assessment order cannot also be examined by the CIT (A)."

m) The High Court also recorded certain concessions made on behalf of the Revenue and disposed of the Writ Petition by its Judgment and Order dated 19.08.2019 with following directions:

> "(i) The Court declines to entertain this writ petition under Article 226 of the Constitution against the impugned demand raised by the Revenue by way of the impugned assessment order under Section 115QA of the Act against the Assessee.
>
> (ii) The Assessee is granted an opportunity to file an appeal under Section 246-A of the Act before the CIT (A) to challenge the impugned assessment order only insofar as it creates a demand under Section 115QA of the Act.
>
> (iii) If such an appeal is filed within ten days from today, it will be considered on its own merits and a reasoned order disposing of the appeal will be passed by the CIT (A) on all issues raised by the Assessee, not limited to the issues raised in the present petition as well as on the response thereto by the Revenue in accordance with law.
>
> (iv) The reasoned order shall be passed by the CIT (A) not later than 31st October, 2019. It will be communicated to the Petitioner within ten days thereafter. For a period of two weeks after the date of such communication of order, the demand under the impugned assessment order, if it is affirmed by the CIT (A) in appeal, will not be enforced against the Assessee.

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> (v) The Court places on record the statement of the Revenue that it will not raise any objection before the CIT (A) as to the maintainability of such an appeal and as to the appeal being barred by limitation. The Court also takes on record the statement of the Revenue that it will not enforce the demand in terms of the impugned assessment order till the disposal of the above appeal. All of the above is subject to the Assessee filing the appeal before the CIT (A) within ten days from today.
>
> (vi) It is made clear that this Court has not expressed any view whatsoever on the contentions of either party on the merits of the case."

4. Challenge to the aforesaid view taken by the High Court was raised by way of Special Leave Petition No.20728 of 2019 filed in this Court on 26.08.2019. Within the time limit of 10 days as afforded by the High Court, an appeal was also preferred by the appellant "without prejudice" on 30.08.2019 against the "demand raised/order passed under Section 115QA". The aforesaid Special Leave Petition came up before this Court on 06.09.2019, whereafter the matter was adjourned on few occasions and then taken up for final disposal.

5. We heard Mr. Mukul Rohatgi and Mr. S. Ganesh, learned Senior Advocates for the appellant and Mr. Zoheb Hossain, learned Advocate for the respondents.

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It was submitted by the appellant that in relation to an order passed under Section 115QA of the Act, no right of appeal would be available under the provisions of the Act and as such the premise on which the High Court proceeded was wrong; in any case plea of existence of any alternate and efficacious remedy would be considered at the threshold when a writ petition is taken up for preliminary hearing; since the preliminary objection was taken and despite such objection, discretion was exercised by the High Court which is evident from orders dated 25.01.2017 and 30.08.2017, the very same issue ought not to have weighed with the High Court; that the scheme of amalgamation was approved by the High Court and any buy back of shares in pursuance thereof would not be covered by the provisions of Section 115QA of the Act.

On the other hand it was submitted by the Revenue that any order determining the liability to pay tax under Section 115QA would be appealable; any other view would entail tremendous prejudice to the concerned assessees; the concessions given on behalf of the Revenue which were recorded in the directions passed by the High Court, would completely take care of any inconvenience and prejudice that could possibly arise in the matter.

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6. In its written submissions, the appellant submitted:-

> I. No statutory appeal has been provided against an order under section 115QA after it was introduced into the statute book with effect from 01.06.2013. A section 115QA order cannot possibly be equated with an assessment order passed under section 143(3) against which an appeal lies under section 246A. An order under section 143(3) only makes an assessment of the "total income" of the assessee, as defined in section 2(45) of the IT Act. The tax payable under section 115QA by the company making a buy-back is a tax payable on the payment made by the company and not the tax payable on its "total income" and, therefore, section 115QA does not at all speak of an "assessment", which is a term of art in the Income Tax Act, confined to the determination of the "total income of the assessee." The "denial of the assessee's liability to be assessed" in section 246A is also confined to his liability to be assessed under section 143(3) and the same has nothing to do with an assessee's liability to pay tax under section 115QA.
>
> … … …
>
> II. The Division Bench which admitted the matter and granted interim relief had unequivocally exercised its discretion in case of the Petitioner to entertain the Writ Petition despite the argument of alternative remedy. Further, another Division Bench also similarly exercised it's discretion again in favour of the Petitioner on 26.07.2017 and 30.08.2017. It was therefore not open for another Division Bench, which heard the matter on 19.08.2019 to exercise it's discretion in a fundamentally different way, as compared to the two earlier Division Benches….
>
> ….the objection of alternative remedy can only be raised at the admission stage and not at the stage of final hearing, after the completion of the pleadings…"

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7. Two issues arise for consideration, one regarding availability of appellate remedy and the other concerning refusal to exercise Jurisdiction under Article 226 because of availability of an alternate efficacious remedy. In essence, the matter revolves around the question whether there is in fact an appellate remedy available, in case any determination is made under Section 115QA of the Act that the Company is liable to pay "additional income tax at the rate of 20% on the distributed income". For the purpose of considering whether there is any such appellate remedy, we must note the concerned Sections in the Act dealing with appellate remedy and provisions touching upon exercise of such right of appeal. Sections 246(1) and 246A(1) being relevant for the present purposes are extracted hereunder:-

> "246. Appealable orders - (1) Subject to the provisions of sub-section (2), any assessee aggrieved by any of the following orders of an Assessing Officer other than the Joint Commissioner may appeal to the Deputy Commissioner (Appeals) before the 1st day of June, 2000 against such order–
>
> (a) an order against the assessee, where the assessee denies his liability to be assessed under this Act, or an intimation under sub-section (1) or sub-section (IB) of section 143, where the assessee objects to the making of adjustments, or any order of assessment under sub-section (3) of section 143 or section 144, where the assesse objects to the amount of income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed;

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(b) an order of assessment, reassessment or recomputation under section 147 or section 150;

(c) an order under section 154 or section 155 having the effect of enhancing the assessment or reducing a refund or an order refusing to allow the claim made by the assesssee under either of the said sections;

(d) an order made under section 163 treating the assessee as the agent of a non-resident;

(e) an order under sub-section (2) or sub-section (3) of section 170;

(f) an order under section 171;

(g) any order under clause (b) of sub-section (1) or under sub-section (2) or sub-section (3) or sub-section (5) of section 185 in respect of any assessment for the assessment year commencing on or before the 1st day of April, 1992;

(h) any order cancelling the registration of a firm under sub-section (1) or under sub-section (2) of section 186 in respect of any assessment for the assessment year commencing on or before the 1st day of April, 1992;

(i) an order under section 201;

(j) an order under section 216 in respect of any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year;

(k) an order under section 237;

(l) an order imposing a penalty under-

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(i) section 221, or

(ii) section 271, section 271A, section 271B, section 272A, section 272AA or section 272BB;

(iii) section 272, section 272B or section 273, as they stood immediately before the 1st day of April, 1989, in respect of any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment years.

246A. Appealable orders before Commissioner (Appeals).– (1) Any assessee or any deductor or any collector aggrieved by any of the following orders (whether made before or after the appointed day) may appeal to the Commissioner (Appeals) against–

(a) an order passed by a Joint Commissioner under clause (ii) of sub-section (3) of section 115VP or an order against the assessee where the assessee denies his liability to be assessed under this Act or an intimation under sub-section (1) or sub-section (1B) of section 143 or sub-section (1) of section 200A or sub-section (1) of section 206CB, where the assessee or the deductor or the collector objects to the making of adjustments, or any order of assessment under sub-section (3) of section 143 except an order passed in pursuance of directions of the Dispute Resolution Panel or an order referred to in sub-section (12) of section 144BA or section 144, to the income assessed, or to the amount of tax determined, or to the amount of loss computed, or to the status under which he is assessed;

(aa) an order of assessment under sub-section (3) of section 115WE or section 115WF, where the assessee, being an employer objects to the value of fringe benefits assessed;

(ab) an order of assessment or reassessment under section 115WG;

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(b) an order of assessment, reassessment or recomputation under section 147 except an order passed in pursuance of directions of the Dispute Resolution Panel or an order referred to in sub-section (12) of section 144BA or section 150;

(ba) an order of assessment or reassessment under section 153A except an order passed in pursuance of directions of the Dispute Resolution Panel or an order referred to in sub-section (12) of section 144BA;

(bb) an order of assessment or reassessment under sub-section (3) of section 92CD;

(c) an order made under section 154 or section 155 having the effect of enhancing the assessment or reducing a refund or an order refusing to allow the claim made by the assessee under either of the said sections except of an order referred to in sub-section (12) of section 144BA;

(d) an order made under section 163 treating the assessee as the agent of a non-resident;

(e) an order made under sub-section (2) or sub-section (3) of section 170;

(f) an order made under section 171;

(g) an order made under clause (b) of sub-section (1) or under sub-section (2) or sub-section (3) or sub-section (5) of section 185 in respect of an assessment for the assessment year commencing on or before the 1st day of April, 1992;

(h) an order cancelling the registration of a firm under sub-section (1) or under sub-section (2) of section 186 in respect of any assessment for the assessment year commencing on or before the 1st day of April, 1992, or any earlier assessment year;

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(ha) an order made under section 201;

(hb) an order made under sub-section (6A) of section 206C;

(i) an order made under section 237;

(j) an order imposing a penalty under–

(A) section 221; or

(B) section 271, section 271A, 271AAA, 271AAB, section 271F, section 271FB, section 272AA or section 272BB;

(C) section 272, section 272B or section 273, as they stood immediately before the 1st day of April, 1989, in respect of any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment years;

(ja) an order of imposing or enhancing penalty under sub-section (1A) of section 275;

(k) an order of assessment made by an Assessing Officer under clause (c) of section 158BC, in respect of search initiated under Section 132 or books of account, other documents or any assets requisitioned under section 132A on or after the 1st day of January, 1997;

(l) an order imposing a penalty under sub-section (2) of section 158BFA;

(m) an order imposing a penalty under section 271B or section 271BB;

(n) an order made by a Deputy Commissioner imposing a penalty under section 271C, section 271CA, section 271D or section 271E;

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(o) an order made by Deputy Commissioner or a Deputy Director imposing a penalty under section 272A;

(p) an order made by a Deputy Commissioner imposing a penalty under section 272AA;

(q) an order imposing a penalty under Chapter XXI;

(r) an order made by an Assessing Officer other than a Deputy Commissioner under the provisions of this Act in the case of such person or class of persons, as the Board may, having regard to the nature of the cases, the complexities involved and other relevant considerations direct.

Explanation.– For the purposes of this sub-section, where on or after the 1st day of October, 1998, the post of Deputy Commissioner has been redesignated as Joint Commissioner and the post of Deputy Director has been redesignated as joint Director, the references in this sub-section for "Deputy Commissioner" and "Deputy Director" shall be substituted by "Joint Commissioner" and "Joint Director" respectively."

8. One of the key expressions appearing in Section 246(1)(a) as well as in Section 246A(1)(a) is "where the assessee denies his liability to be assessed under this Act."

9. Similar expression occurring in Section 30 of the Income Tax, 1922 came up for consideration before this Court in ***Commissioner of***

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Income Tax, U.P., Lucknow v***. Kanpur Coal Syndicate***[1]**.** The relevant part of Section 30(1) as quoted in the decision was:-

> "30.(1) Any assessee objecting to the amount of income assessed under Section 23 … or the amount of tax determined under Section 23 … or denying his liability to be assessed under this Act … may appeal to the Appellate Assistant Commissioner against the assessment or against such refusal or order:"

The contention raised by the assessee was considered as under:-

> "The Income Tax Officer may reject its contention and may assess the total income of the association as such and impose the tax on it. Under Section 30 an assessee objecting to the amount of income assessed under Section 23 or the amount of tax determined under the said section or denying his liability to be assessed under the Act can prefer an appeal against the order of the Income Tax to the Appellate Assistant Commissioner. It is said that an order made by the Income Tax Officer rejecting the plea of an association of persons that the members thereof shall be assessed individually does not fall under one or other of the three heads mentioned above. What is the substance of the objection of the assesses? The assessee denies his liability to be assessed under the Act in the circumstance of the case and pleads that the members of the association shall be assessed only individually. The expression "denial of liability" is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances. In either case the denial is a denial of liability to be assessed under the provisions of the Act. In one case the accessee says that he is not liable to be assessed to tax under the Act, and in the other case the assessee denies his liability to tax under the provisions of the Act if the option given to the appropriate officer under the provisions of the Act is judicially exercised. We, therefore, hold that such an assessee has a right of appeal under Section 30 of

1AIR (1965) SC 325 : 1964 (53) ITR 225

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> the Act against the order of the Income Tax Officer assessing the association of members instead of the members thereof individually."

It was concluded that *the expression "denial of liability" is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances.*

10. The submission advanced on behalf of the appellant, however, is that "denial of the assessee's liability to be assessed" in Section 246A is confined to his liability to be assessed under Section 143(3) of the Act and the same has nothing to do with the liability to pay tax under Section 115QA. According to the appellant, tax payable in respect of buy back of shares under Section 115QA is not a tax payable on "total income".

11. We may now consider kinds of orders or situations that are referred to in Section 246(1)(a) of the Act, which are:-

(i) An order against the assessee, where the assessee denies his liability to be assessed under this Act, or

(ii) An intimation under sub-section (1) or sub-section (1B) of Section 143 where the assessee objects to the making of adjustments, or

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(iii) Any order of assessment under sub-section (3) of Section 143 or Section 144, where the assessee objects:-

to the amount of income assessed, or

to the amount of tax determined, or

to the amount of loss computed, or

to the status under which he is assessed.

The contingencies detailed in (ii) and (iii) hereinabove arise out of assessment proceedings under Section 143 or Section 144 of the Act but the first contingency is a standalone postulate and is not dependant purely on the assessment proceedings either under Section 143 or Section 144 of the Act. The expression "denies his liability to be assessed" as held by this Court in ***Kanpur Coal Syndicate***[1] is quite comprehensive to take within its fold every case where the assessee denies his liability to be assessed under the Act.

12. Section 115QA of the Act stipulates that in case of buy back of shares referred to in the provisions of said Section, the company shall be liable to pay additional income tax at the rate of 20% on the distributed income. Any determination in that behalf, be it regarding quantification of the liability or the question whether such company is liable or not would be

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matters coming within the ambit of the first postulate referred to hereinabove. Similar is the situation with respect to provisions of Section 246A(1)(a) where again out of certain situations contemplated, one of them is "an order against the assessee, where the assessee denies his liability to be assessed under this Act". The computation and extent of liability is determined under the provisions of Section 115QA of the Act. Such determination under the Act would squarely get covered under said expression. There is no reason why the scope of the such expression be restricted and confined to issues arising out of or touching upon assessment proceedings either under Section 143 or Section 144 of the Act.

13. If the submission of the appellant is accepted and the concerned expression as stated hereinabove in Section 246(1)(a) or in Section 246A(1)(a) is to be considered as relatable to the liability of an assessee to be assessed under Section 143(3) as contended, there would be no appellate remedy in case of any determination under Section 115QA. The issues may arise not just confined to the question whether the company is liable at all but may also relate to other facets including the extent of liability and also with regard to computation. If the submission is accepted, every time the dispute will be required to be taken up in proceedings such as a petition under Article 226 of the Constitution, which

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normally would not be entertained in case of any disputed questions of fact or concerning factual aspects of the matter. The assessee may thus, not only lose a remedy of having the matter considered on factual facets of the matter but would also stand deprived of regular channels of challenges available to it under the hierarchy of fora available under the Act.

14. We, therefore, reject the submissions advanced by the appellant and hold that an appeal would be maintainable against the determination of liability under Section 115QA of the Act.

15. We now turn to the question whether the High Court was justified in refusing to entertain the writ petition because of availability of adequate appellate remedy. The law on the point is very clear and was summarised in ***Commissioner of Income Tax and others*** v. ***Chhabil Dass Agarwal***[2] as under:-

> "**11.** Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the

2 (2014) 1 SCC 603

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petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (See *State of U.P.* v. *Mohd. Nooh*[3], *Titaghur Paper Mills Co. Ltd.* v. *State of Orissa*[4], *Harbanslal Sahnia* v. *Indian Oil Corpn. Ltd.*[5] and *State of H.P.* v. *Gujarat Ambuja Cement Ltd.*[6])

12. The Constitution Benches of this Court in *K.S. Rashid and Son* v. *Income Tax Investigation Commission*[7], *Sangram Singh* v. *Election Tribunal*[8], *Union of India* v. *T.R. Varma*[9], *State of U.P.* v. *Mohd. Nooh*[3] and *K.S. Venkataraman and Co. (P) Ltd.* v. *State of Madras*[10] have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. [See *N.T. Veluswami Thevar* v. *G. Raja Nainar*[11], *Municipal Council, Khurai* v. *Kamal Kumar*[12], *Siliguri Municipality* v. *Amalendu Das*[13], *S.T. Muthusami* v. *K. Natarajan*[14], *Rajasthan SRTC* v. *Krishna Kant*[15], *Kerala SEB* v. *Kurien E. Kalathil*[16], *A.*

3 AIR 1958 SC 86
4 (1983) 2 SCC 433 : 1983 SCC (Tax) 131
5 (2003) 2 SCC 107
6 (2005) 6 SCC 499
7 AIR 1954 SC 207
8 AIR 1955 SC 425
9 AIR 1957 SC 882
10AIR 1966 SC 1089
11 AIR 1959 SC 422
12 AIR 1965 SC 1321 : (1965) 2 SCR 653
13 (1984) 2 SCC 436 : 1984 SCC (Tax) 133
14 (1988) 1 SCC 572
15 (1995) 5 SCC 75 : 1995 SCC (L&S) 1207 : (1955) 31 ATC 110
16 (2000) 6 SCC 293

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> *Venkatasubbiah Naidu* v. *S. Chellappan*[17], *L.L. Sudhakar Reddy* v. *State of A.P.*[18], *Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha* v. *State of Maharashtra*[19], *Pratap Singh* v. *State of Haryana*[20] and *GKN Driveshafts (India) Ltd.* v. *ITO*[21].]
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> …
>
> **15.** Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal case*[22], *Titaghur Paper Mills case*[4] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

Recently, in ***Authorised Officer, State Bank of Travancore & Anr.*** v. ***Mathew K.C.***[23], the principles laid down in ***Chhabil Dass Agarwal***[2] were reiterated as under:

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17 (2000) 7 SCC 695
18 (2001) 6 SCC 634
19 (2001) 8 SCC 509
20 (2002) 7 SCC 484 : 2002 SCC L&S) 1207 : (1995) 31 ATC 110
21 (2003) 1 SCC 72
22 AIR 1964 SC 1419
23 (2018) 3 SCC 85

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> "The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed in *CIT* v. *Chhabil Dass Agarwal*[2] …"

16. We do not, therefore, find any infirmity in the approach adopted by the High Court in refusing to entertain the Writ Petition. The submission that once the threshold was crossed despite the preliminary objection being raised, the High Court ought not to have considered the issue regarding alternate remedy, may not be correct. The first order dated 25.01.2017 passed by the High Court did record the preliminary objection but was prima facie of the view that the transactions defined in Section 115QA were initially confined only to those covered by Section 77A of the Companies Act. Therefore, without rejecting the preliminary objection, notice was issued in the matter. The subsequent order undoubtedly made the earlier interim order absolute. However, the preliminary objection having not been dealt with and disposed of, the matter was still at large.

In ***State of U.P.** v. **U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti and others***[24] this Court dealt with an issue whether after admission, the Writ Petition could not be dismissed on the ground of alternate remedy. The submission was considered by this Court as under:

24 (2008) 12 SCC 675

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"**38.** With respect to the learned Judge, it is neither the legal position nor such a proposition has been laid down in *Suresh Chandra Tewari*[25] that once a petition is admitted, it *cannot* be dismissed on the ground of alternative remedy. It is no doubt correct that in the headnote of All India Reporter (p. 331), it is stated that "petition cannot be rejected on the ground of availability of alternative remedy of filing appeal". But it has not been so held in the actual decision of the Court. The relevant para 2 of the decision reads thus: (*Suresh Chandra Tewari case*, AIR p. 331)

> "*2*. At the time of hearing of this petition a threshold question, as to its maintainability was raised on the ground that the impugned order was an appealable one and, therefore, before approaching this Court the petitioner should have approached the appellate authority. *Though there is much substance in the above contention, we do not feel inclined to reject this petition on the ground of alternative remedy having regard to the fact that the petition has been entertained and an interim order passed*."

(emphasis supplied)

Even otherwise, the learned Judge was not right in law. True it is that issuance of rule nisi or passing of interim orders is a relevant consideration for not dismissing a petition if it appears to the High Court that the matter could be decided by a writ court. It has been so held even by this Court in several cases that even if alternative remedy is available, it cannot be held that a writ petition is not maintainable. In our judgment, however, it cannot be laid down as a *proposition of law* that once a petition is admitted, it could *never* be dismissed on the ground of alternative remedy. If such bald contention is upheld, even this Court cannot order dismissal of a writ petition which ought not to have been entertained by the High Court under Article 226 of the Constitution in view of availability of alternative and equally efficacious remedy to the aggrieved party, once the High Court has entertained a writ petition albeit wrongly and granted the relief to the petitioner.

25 AIR 1992 All 331 (Suresh Chandra Tewari vs. District Supply Officer)

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17. We do not, therefore, find any error in the approach of and conclusion arrived at by the High Court. It is relevant to mention that the concessions given on behalf of the Revenue as recorded in the directions issued by the High Court also take care of matters of prejudice, if any. Consequently, the appellant, as a matter of fact, will have a fuller, adequate and efficacious remedy by way of appeal before the appellate authority.

18. Certain issues raised during the course of hearing touching upon the aspects whether the appellant is liable under Section 115QA of the Act or whether the transaction of buy back of shares in the present matter would come within the statutory contours of said Section 115QA or not, are issues which will be gone into at the appropriate stages by the concerned authorities; and as such we have refrained from dealing with those issues.

19. In the circumstances we find that the judgment and order under appeal does not call for any interference. This appeal is, therefore, dismissed. No costs.

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20. Needless to say that the appeal preferred by the appellant on 30.08.2019 shall now be proceeded with in accordance with law.

………………………..J.
(Uday Umesh Lalit)

………………………..J.
(Indira Banerjee)

New Delhi;
November 22, 2019.