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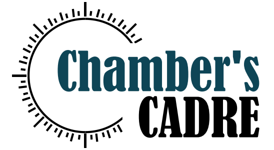

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STATUTORY INTERPRETATION OF TAX STATUTE

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Interpretational issues in Anti-Abuse Provisions

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Overview

This article analyzes certain anti-abuse provisions in Indian tax law, related interpretational issues and possible approaches to interpretation in given situations. It outlines key specific anti-avoidance rules under the Income Tax Act such as thin capitalization rules, transfer pricing regulations, tax specific valuation requirements, and the general anti-avoidance rules (GAAR). The article also touches upon the principal purpose test under the Multilateral Instrument which aligns tax treaties with OECD's BEPS recommendations to combat treaty shopping and improper treaty use. A significant portion of the article examines key interpretational issues and debates surrounding anti-abuse provisions. It discusses how one factor alone is not determinative and a combination of various factors such as the object of the relevant tax provision, taxpayer's motive and surrounding circumstances are important for interpretation and application of anti-abuse provisions, so that undue harassment of taxpayers in genuine situations is avoided. The analysis covers relevant principles like substance over form and highlights the complexity of interpreting anti-abuse provisions. In this light, the article emphasizes the delicate balancing act required to uphold legislative intent, protect the tax base, and avoid unjust outcomes when applying anti-abuse measures. It argues that thoughtful, balanced interpretation is crucial for ensuring fairness while discouraging abusive tax avoidance, underscoring the need for clarity, consistency, and adaptability in this evolving area of tax law.

Abstract

This article analyses certain anti-abuse provisions in Indian tax law, related interpretational issues and possible approaches to interpretation in given situations. It outlines key specific anti-avoidance rules under the Income Tax Act such as thin capitalization rules, transfer pricing regulations, tax specific valuation requirements, and the general anti-avoidance rules (GAAR). The article also touches upon the principal purpose test under the Multilateral Instrument which aligns tax treaties with OECD's BEPS recommendations to combat treaty shopping and improper treaty use. A significant portion of the article examines key interpretational issues and debates surrounding anti-abuse provisions. It discusses how one factor alone is not determinative and a combination of various factors such as the object of the relevant tax provision, taxpayer's motive and surrounding circumstances are important for interpretation and application of anti-abuse provisions, so that undue harassment of taxpayers in genuine situations is avoided. The analysis covers relevant principles like substance over form

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and highlights the complexity of interpreting anti-abuse provisions. In this light, the article emphasises the delicate balancing act required to uphold legislative intent, protect the tax base, and avoid unjust outcomes when applying anti-abuse measures. It argues that thoughtful, balanced interpretation is crucial for ensuring fairness while discouraging abusive tax avoidance, underscoring the need for clarity, consistency, and adaptability in this evolving area of tax law.

Introduction

Prior to introduction of GAAR, unless fraudulent or sham, "form" of a transaction or arrangement was determinative of tax consequences, not the "substance". In the context of tax treaty benefits, treaty shopping was permissible and lifting of corporate veil was permissible only in cases where the entity was a sham or a conduit. Under current law which has a strict anti-abuse regime both under domestic law and tax treaties, commercial substance in structures is key. The main purpose of a transaction or an arrangement determines tax consequences when the transaction or arrangement, or any step thereof, lacks commercial substance or justification. However, except certain specific anti-avoidance rules, law does not prescribe any objective criteria to define substance and it is impossible to prove intention or motive easily. This leads to challenges in interpretation and application of GAAR and similar tests under tax treaties. The specific anti avoidance rules have clearer tests and therefore, relatively easier to apply albeit with challenges in genuine situations which are not aimed at tax abuse or avoidance.

This article provides an overview of anti-avoidance provisions under the Indian Income-tax Act, 1961 (the Act). It begins by outlining major domestic anti-avoidance rules as well as international anti-abuse measures. The article highlights certain relevant rules of interpretation commonly used to interpret such provisions and also, some of the apparent issues that are faced by the taxpayers that arise at the time of the applicability of the anti-abuse provisions. Finally, it concludes by emphasising the complex balancing act required in interpreting anti-abuse rules to uphold legislative intent while avoiding undue hardship to taxpayers.

Understanding Domestic as well as International Anti-Abuse Provisions

Domestic perspective

With the aim of protecting India's tax base and tackle tax avoidance, Indian government has over time introduced several anti-avoidance rules targeting specific situations (SAAR), and general anti-avoidance rules (GAAR) which codify the 'substance over form' principle. Further, with India's ratification of the OECD's Multilateral Instrument (MLI), which seeks to address base erosion and profit shifting concerns, various tax treaties have been modified/supplemented by the provisions of the MLI. A brief overview of these anti-avoidance measures is outlined below:

SAAR

1. *Thin capitalisation norms:* The thin capitalisation rules limit tax deductibility of interest expense in case of an Indian company (or a permanent establishment of foreign company in India) having borrowed debt from, or guaranteed by, an offshore affiliate, is capped at 30% of its EBITDA for the year. This is aimed at preventing excessive interest deductions and profit shifting between associated enterprises.

2. *Transfer pricing regulations:* The transfer pricing provisions are in place to ensure that transactions between related parties are conducted at arm's length prices. This helps avoid shifting of profits from higher tax jurisdictions to low-tax jurisdictions and protecting India's tax base.

3. *Lapse of business losses in case of change in control*: Carry forward and set-off of past tax losses is denied in case of change in shareholding of a closely held company beyond 49%. The provision was introduced to avoid acquisition of loss-making companies by shareholders with the sole purpose of reducing their tax liabilities.

4. *Tax specific valuation requirements*: There are several tax specific valuation requirements such as under section 56(2)(x), section 50CA, section 56(2)(viib) which result in deemed income in the hands of the transacting entities if the specified transactions are carried out at a discount or excessive premium to the value computed as per the prescribed tax rules.

5. *Deemed dividend provisions*: These provisions were introduced to curb the practice of companies making distributions to their shareholders in forms other than as dividends to avoid the dividend distribution tax/tax in the hands of the shareholders.

GAAR

Introduced with an aim to counter harmful tax practices, the law of GAAR was introduced for the first time in formal legislation through the *Finance Act, 2012* which has finally been made effective from 1 April 2017 and there are certain grandfathering provisions and exceptions.

The intent behind introducing the legislation was to codify the doctrine of substance over form, the need for which arose due to the existence of aggressive tax planning through sophisticated structures. The substance over form doctrine takes into account the real intention of the parties, the purpose of the arrangement and the effect of the transaction.

Chapter X-A of the Act contains the GAAR provisions, which are found in Sections 95 through 102 of the Act. According to Section 96 of the Act, an “impermissible avoidance arrangement” is any arrangement made where the main purpose is to obtain a tax benefit **and** such an arrangement (a) has resulted in the misuse of the Act's provisions, whether directly or indirectly, or (b) lacks or is judged to lack commercial substance in whole or in part, or (c) was made using any means or method that is typically not used for legitimate/bona fide purposes, or (d) creates rights and obligations not normally created between parties dealing at arm’s length.

The insightful input provided by the Shome Committee enabled the Government to build-in certain safeguards so as to ensure sufficient redressal mechanisms are provided for taxpayers if GAAR is invoked.

International perspective

The Organisation for Economic Co-operation and Development (OECD) introduced the MLI as part of its Base Erosion Profit Shifting (BEPS) Action Plan. It coexists with current tax treaties in order to align them with the BEPS Action recommendations for addressing the threat of tax base erosion. On June 7, 2017, India signed the MLI in Paris. To prevent treaty abuse, MLI mandates that all parties adhere and implement a set of minimum standards relevant to the treaty.

The Principal Purpose Test (PPT), which is one of the minimum standards, allows tax treaty advantages to be refused where one of the principal purposes of an arrangement or a transaction is to receive a tax treaty benefit, either directly or indirectly.

Apart from PPT, the MLI also prescribes certain limitation of benefits conditions which are more stringent with respect to the substance requirements. However, unlike PPT, these limitations or conditions are optional and subject to the discretion of the jurisdictions as to whether to incorporate such articles/conditions in the respective tax

treaties. Further, certain countries like India-Singapore already have certain limitation of benefits (LOB) conditions in place in their respective tax treaties.

Interplay of GAAR, SAAR and tax treaty measures

Often the interpretation and application of anti-abuse rules depend on the particular facts and circumstances of the arrangements and differing scope of anti-abuse measures adds to the complexity.

When applying domestic anti-abuse rules to cross border tax matters which may be subject to the anti-abuse tests (such as PPT/LOB) under the applicable tax treaty as well, interactions between the two sets of tests must be considered. This will be increasingly relevant now as tax treaties covered by the MLI will have the PPT test (applying as minimum standard). In such scenarios, PPT and GAAR are overlapping in scope but there are certain important differences and related interpretational issues. For instance, PPT comes into play when one of the principal purposes of the arrangement is to obtain benefits under the tax treaty whereas for GAAR provisions to trigger, the main purpose of the arrangement should be to obtain tax benefits. However, GAAR rules have a specific deeming fiction which states that where the main purpose of any step or part of a transaction/arrangement is to obtain a tax benefit, the entire transaction/arrangement will be presumed to have been entered into for the main purpose of obtaining a tax benefit (unless proved to the contrary by the taxpayer). Also, PPT has a carve out for situations where the object of the tax treaty is to give such a benefit, in which case, even if the primary purpose is to obtain such benefits, PPT shall not apply.

Some countries have enacted priority guidance stating that the domestic GAAR will take precedence over tax treaties. Other countries may first apply the specific treaty anti-abuse provision before the broader domestic GAAR. In the Indian context, as per the provisions of the Act, if tax treaty provisions are more beneficial to the taxpayer, the same prevail over domestic law except the GAAR provisions. In other words, tax treaties do not override domestic GAAR and if GAAR is invoked, the tax authorities are empowered to deny treaty benefits (subject to facts). This implies that if GAAR applies to a particular arrangement, then one need not test the applicability of PPT and therefore, any distinction in the scope of GAAR and PPT may be academic in such case. Any distinction between the scope of PPT and GAAR should be more relevant where GAAR is not applicable for any reason (say where the issue is grandfathered under GAAR or there is a specific exclusion), in which case, applicability of PPT would then need to be examined.

The Central Board of Direct Taxes (CBDT) had issued a circular in 2017 clarifying certain issues that were raised on implementation of the GAAR provisions introduced back then vis-à-vis SAAR and/or treaty related anti-abuse provisions (i.e., LOB). The CBDT has clarified that there may be situations which may not be covered by the SAAR/LOB provisions and therefore, in such a case GAAR can be invoked, and these anti-abuse provisions are to coexist and should be applicable based on the facts of each case. Accordingly, tax administration does not intend to exclude applicability of GAAR to situations covered by SAAR/treaty measures, which creates more uncertainty for taxpayers and the position may evolve in due course.

Common factors analysed when tax authorities invoke an anti-abuse provision include: whether the transactions and entity structures seem artificial or contrived; whether there is conduit usage or circular cash flows through interposed entities that lack economic substance; whether the manner of carrying out transactions differs from normal commercial

practices; and whether there is evidence that a principal intention was to circumvent the object and purpose of the country's tax laws or relevant treaty provisions.

- *For example,* a company resident in Country A may establish a wholly owned subsidiary in Country B to act as a conduit for channelling income from other countries to Country A in a treaty shopping arrangement that exploits Country B's extensive tax treaty network. This type of arrangement could potentially be counteracted by the principal purpose test article in the applicable tax treaties. However, where the subsidiary in Country B is set up with the objective of raising debt, local listing, accessing local resources, attracting investors, which provide commercial advantages not just tax savings, one can counter applicability of anti-abuse provisions.
- Another instance, a multinational group could shift income and profits to a controlled subsidiary located in a low or no-tax jurisdiction through intragroup transactions that lack economic substance. While formally structured to comply with arm's length transfer pricing rules, tax authorities may challenge the arrangements under the domestic GAAR legislation as an abusive tax avoidance scheme.

Hence, GAARs and specific anti-avoidance provisions have become vital tools for counteracting tax avoidance at both the domestic and international level when taxpayers comply with the literal words but not the substance and purpose of tax laws and treaties. When applying anti-abuse rules, the totality of facts and circumstances must be carefully examined to determine whether the transactions or arrangements could be characterized as abusive in nature for tax purposes before disregarding them. Implementing anti-abuse rules requires balancing the policy aims of protecting a country's tax base and fostering investment through appropriate certainty in business tax planning.

Understanding the Interpretational Rules in India

Before we dive into the interpretational issues arising in anti-abuse provisions, below is a gist of the various rules of interpretation applicable to tax statutes in general, and anti-abuse provisions in particular.

Rules of Interpretation

Literal and strict Interpretation

The paramount principle in statutory interpretation is the literal rule, wherein the words employed in a statute are to be construed according to their natural or ordinary meaning. Applying this rule, if the meaning is clear and unambiguous, the provision of a statute is to be given effect, regardless of potential consequences. One should look squarely at the words in the light of what is expressly stated, and nothing can be implied so as to supply any assumed deficiency.

Pursuant to this rule, the court's singular responsibility is to uphold the language of the statute if it is clear, without delving into potential repercussions.

Mischief Rule

The mischief rule of statutory interpretation is one of the oldest of the rules. Its main aim is to determine the "mischief and defect" of the statute. This rule was established in Heydon's case in 1584.

It was held that the mischief rule should only be applied where there is ambiguity in the statute. Under the mischief rule, the court's role is to identify the mischief that was sort to be resolved and then interpret the statute. Courts, while applying this principle, are expected to find out the real purpose of the

enactment. This rule, thus, enables the court to identify the proper construction of the statute according to the original purpose and the mischief that was sort to be resolved by the legislators.

As per this rule, for true interpretation of a statute, four things have to be considered:

1. What was the common law before the making of the statute?
2. What was the mischief and defect for which the common law did not provide?
3. What remedy did the Parliament resolve and appointed to cure the disease of the common law?
4. The true reason for the remedy.

Golden Rule

It is known as the golden rule because it largely solves all the problems of interpretation. This rule stipulates an initial adherence to the literal rule; however, should the literal interpretation result in ambiguity, injustice, inconvenience, hardship or inequity, it mandates a departure from the literal meaning. Instead, this rule states that the interpretation must align with the purpose or intention of the legislation. This rule suggests that the consequences and effects of interpretation deserve more importance because they are the clues of the true meaning of the words used by the legislature and its intention.

Harmonious Construction

Harmonious construction is a principle in legal interpretation that emphasises the need to reconcile conflicting provisions within a statute or with different statutes dealing with the same subject matter. The goal is to achieve a harmonious and consistent interpretation that gives effect to all relevant provisions without creating conflicts. If there are different parts of a statute that seem to clash or create confusion, the court aims to find an interpretation that allows each part to have its intended effect without undermining the other parts.

Specific prevails over general

The principle of “specific prevails over general” is a key rule of interpretation in the context of tax laws. This principle provides guidance on how conflicting provisions within laws or rules should be understood.

In essence, when there is a conflict between a specific provision and a general one, the specific provision takes precedence. The rationale behind this rule is that the legislature, by providing a specific rule, likely intended to address a particular issue specifically. Therefore, when a specific rule and a general rule clash, the specific rule is considered more applicable to the given circumstances.

There are various external aids (circulars, notifications, forms, legislative history, speech of a minister, etc) as well as internal aids (provisos, explanations, definitions, judicial precedents, etc) of interpretation that are available to the experts as well as the taxpayers to interpret the law and understand the intention of the legislature.

Issues in Interpreting Anti-Abuse Provisions

Given the complex and varied provisions under the Act, it is difficult to apply a single rule of interpretation in all situations. For instance, the charging and computation provisions are concerned with creating and crystallising tax liability. The principle of strict interpretation generally applies to such provisions. As per this principle, a taxpayer cannot be subject to tax, unless it strictly falls within the purview of the provision.

With respect to exemption and deduction provisions, however, courts have adopted a liberal interpretation at times. The socio-economic objectives of the Government have often influenced the courts while seeking to give true effect to exemption provisions.

The anti-abuse provisions have been introduced to target specific forms of tax abusive behaviour. Often, deeming fictions are introduced to prevent taxpayers from exploiting loopholes in the law. While courts have emphasised that deeming fictions are to be read strictly and given full effect to, they have also often looked at the legislative intent behind the provisions along with the mischief that was sought to be remedied by it. A deeming fiction cannot be applied beyond its original context by reading the same into unrelated provisions.

The interpretation of anti-abuse provisions in a tax statute normally sparks a debate among legal experts, practitioners, scholars, courts and taxpayers. While some argue for a strict application of statutory language to curb tax avoidance, others advocate for a more purposive approach that takes into account the underlying objectives of the provisions. There is no doubt that the application of the anti-abuse provisions to a particular situation requires detailed review of the facts and circumstances of each case.

Due to the introduction of GAAR, the concept of "substance over form" lies at the heart of many interpretational disputes involving anti-abuse provisions. Courts and tribunals are often tasked with discerning the economic substance of transactions from their legal form, particularly in cases where taxpayers employ complex structures or arrangements to achieve tax benefits.

There are various rulings (both domestic as well as international) which throw light on the interpretation of such provisions. The *Duke of Westminster's case* could be considered as one of the most cited cases in the history of tax avoidance. The principle laid down in this case was that every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate acts is less than it otherwise would be. If he succeeds in doing so legally, the authorities cannot step in the shoes of the businessman and compel the taxpayer to pay an increased tax. Subsequently, in the *Ramsay case* it was held that where a transaction has pre-arranged artificial steps which serve no commercial purpose other than to save tax, then the proper effect is to tax the transaction as a whole. Accordingly, the principal in the *Ramsay case* overturned the holding in the *Duke of Westminster's case*. Another case ie, ***Furniss vs. Dawson*** which affirmed or ruled in favour of Ramsay principle (as stated above).

Having said that, over time several anti-abuse rules have been introduced in the Act, which prescribe objective tests. This shift implies a move from emphasising subjective motives in assessing the transaction, and instead focuses on objective criteria laid down by the provisions of the law. Notably, the motive behind an action is deemed less relevant under these objective tests. The rationale behind this change appears to be rooted in a desire to curtail potential mischief or misuse of the rules and ultimately safeguard the Indian tax base. By applying these objective tests, the intention is to establish a more transparent and consistent framework for identifying and addressing mischiefs. However, these objective test-driven provisions lead to a universal applicability of the provisions encompassing both sham and conduit transactions where the intention is tax avoidance as well as fair commercial transactions where the motive is not malicious. We have discussed some of these situations below:

a) Section 56(2)(x) applies in case of receipt of shares for 'NIL' or inadequate consideration and its applicability in case of receipt of shares pursuant to a bonus issue or a rights issue is a grey area. If one is to apply the rule of literal interpretation, then the provisions of Section 56(2)(x) of the Act should apply to the shares received by the shareholders on bonus/right issue as they are issued for 'NIL'/inadequate

consideration. However, courts[1] have held that the interpretation of these anti-provisions should be based on the intent of the legislature and the mischief sort to be resolved is to be looked at. Where the literal interpretation gives absurd results, the intention of the law assumes significance. The provisions of Section 56(2)(x) of the Act were introduced with the intention to prevent the practice of receiving the sum of money or the property without consideration or for inadequate consideration Courts have concluded that the provisions of Section 56(2)(x) of the Act, do not apply on bonus issue/rights issue (which is on a proportionate basis) as they are simply an apportionment of the value of their existing holding over larger number of shares and there is no tax evasion.

b) As per Section 9(1)(i) of the Act, shares of a foreign company are deemed to be situated in India, if such shares derive substantial value from India (ie, as on the "specified date", the value of Indian assets exceeds INR 10 crores and represents 50% or more of the value of all the assets owned by the target foreign company). The "specified date" has been defined to mean the date on which the accounting period of the company ends preceding the date of transfer of shares unless there is a 15% increase in the book value of the assets of the foreign company from the date of its accounting year end and the date of transfer, in which case, the date of transfer would be the specified date for valuation purposes. In situations where a foreign company owned Indian assets as on the date on which its accounting period ended prior to the date of transfer of its shares but does not own any India assets as on the date of transfer of its shares, the applicability of this provision may not be straightforward. There are two views possible – (i) as per strict literal reading of the provision, despite the foreign company no longer holding any Indian assets as on the date of transfer of its shares, the transaction could be taxable in India (based on valuation position as of the accounting year end prior to the transaction); or (ii) in the absence of any Indian assets as on the transaction date, the provision should be inapplicable in its entirety and the mechanics of computing value derived from India should not drive chargeability. While there is no judicial precedent as on date on this issue, the facts and circumstances in each situation and whether a literal reading leads to any absurdity and hardship for the shareholders, should be considered in entirety before taking a position.

c) It is a settled principle of interpretation that deeming provisions should not be given meaning wider than what it purports to, which is akin to the rule of strict interpretation. For instance, Section 2(22)(e) of the Act provides that any sum paid to the shareholders of the company by way of an advance or loan should be deemed as dividends in the hands of the shareholders. Based on the rule of literal interpretation, any advance or loans provided to the shareholders of the company would attract the provision and create a tax liability in the hands of the shareholders. However, in various rulings, courts have considered the intention and purpose of the provisions and held that where the loan or the advance was given to shareholder[2] in the ordinary course of business, the provisions of the Section 2(22)(e) of the Act should not be attracted. Accordingly,

1. *CIT vs. Dalmia Investment Co. Ltd. [1964] 52 ITR 567 (SC), Joint Commissioner of Income-tax vs. Bhanu Chopra [2022] 195 ITD 767 (Delhi – Trib.)* and *Sudhir Menon HUF vs. Assistant Commissioner of Income-tax 21(2) [2014] 148 ITD 260 (Mumbai)*

all loans/advances given to shareholders should not be deemed as dividends even though the literal reading covers them within its ambit.

d) As per Section 79 of the Act, carry forward and set-off of past tax losses is denied in case of change in shareholding of a closely held company beyond 49%. The purpose of Section 79 of the Act is to curtail misuse of benefit of carry forward and set-off of business losses of earlier years of a company and prohibits its availability in the hands of any new owner. Situations involving a change in the immediate shareholder of a company, and not the ultimate parent entity, have been subject matter of dispute in the context of this provision. In some rulings it has been held[3] that in the absence of a change in ultimate control, change in immediate shareholding alone should not attract the provisions of Section 79 of the Act. The provisions refer to beneficial ownership of shares and the courts have interpreted that liberally to consider ultimate holding akin to beneficial holding in the context of this provision.

Conclusion

The interpretational challenges surrounding anti-abuse provisions in the Act present a complex landscape for taxpayers, legal experts and authorities alike. The distinction between legitimate tax planning and impermissible tax avoidance requires a nuanced understanding of the provisions embedded in the law. The Act incorporates a range of anti-abuse measures applicable to both domestic as well as cross-border tax matters, designed to prevent strategies aimed at securing undue tax benefits.

The introduction of the GAAR marked a significant step towards codifying the doctrine of substance over form, empowering the tax authorities to determine tax consequences considering the real intention, purpose, and effect of transactions.

Internationally, the MLI provides a framework to combat treaty abuse and ensures that tax treaties are in line with global standards. The PPT within MLI acts as a safeguard against arrangements primarily aimed at securing tax benefits.

There is a delicate balance between discouraging tax avoidance and avoiding undue harassment where the tax administration and courts play an important role. There is also an intricate interplay between domestic and international rules aimed at countering tax avoidance.

As taxpayers navigate these provisions and challenges, and tax authorities seek to protect tax base erosion, a thoughtful and balanced approach to interpretation becomes paramount. Striking the right balance between upholding the legislative intent, protecting the tax base, and fostering a conducive environment for legitimate commercial activities is crucial for effective application of anti-abuse provisions and building taxpayer confidence. In this evolving tax landscape, clarity, certainty, and adaptability will be key to ensuring fair and just outcomes for all stakeholders involved.

2. *G.G. Continental Trades (P.) Ltd. vs. Deputy Commissioner of Income-tax [2023] 106 ITR(T) 356 (Amritsar Tribunal)* and *Assistant Commissioner of Income-tax vs. Global Agencies (P.) Ltd. [2004] 1 SOT 510 (Delhi)*
3. *Commissioner of Income-tax vs. AMCO Power Systems Ltd [2015] 379 ITR 375 (Karnataka), BancTec TPS India (P.) Ltd vs. Pricinipal Commissioner of Income-tax [2019] 111 taxmann.com 321 (Mumbai – Trib.)* and *CLP Power India (P.) Ltd vs. Deputy Commissioner of Income-tax [2018] 93 taxmann.com 326 (Ahmedabad - Trib.)*

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