CHAPTER 19
STATUS OF A TAX TREATY *VIS-À-VIS* THE STATUTE

SYNOPSIS

1. Judicial Observations............................ 359
2. Case law noticed: manifest misdirection.. 362
3. Legislative indications 369
4. Law as judicially declared......................370
5. Conclusion 370

When law can do no right,
let it be lawful that law bar no wrong

—Shakespeare, *King John* Act III, Scene I, II 184-186

It is understandable that the terms of an Agreement done by the Central Government in exercise of delegated power can prevail over the executive and administrative norms and regulations; but to say that they can even detract from the statute, or that they can ignore the law declared by the courts is to offend the Rule of Law itself.

1. Judicial Observations

That the Hon'ble Court observed, in *Azadi Bachao*, the following:

> "A survey of the aforesaid cases make 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 they apply, would operate even if inconsistent with the provisions of the Income-tax Act. …. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue notification under section 90 towards implementation of the terms of the DTAAs which would automatically override the provisions of the Income-tax Act in the matter of ascertainment of total income, to the extent of inconsistency with the terms of the DTAC."

> "As we have pointed out, Circular No. 789 ([2000] 243 ITR (St.) 57) 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 the Income-tax Act, 1961, in so far as assesses covered by the provisions of the DTAC are concerned." [1]
> "When the requisite notification has been issued thereunder, the provisions of sub-section (2) of section 90 spring into operation and an assessee who is covered by the provisions of the DTAC is entitled to seek benefits thereunder, even if the provisions of the DTAC are inconsistent with the provisions of the Income-tax Act, 1961" [2]

It is not understood how the Court states that the Circular 789 emanates from the exercise of power under Section 90 (2) of the Income-tax. The CBDT never issued any circular in exercise of power under Section 90 of the Act. Section 90(2) speaks of the beneficial "provisions of this Act", not the beneficial provisions of this tax treaty. It is wrong to distort it as if it said "provisions of this treaty". Nor can this power be derived from the power to 'implement' a treaty as provided by Section 90(1) of the Act. The following reasons are also relevant:

(a) The Section 90 of the Act empowers only the Central Government to "make such provisions as may be necessary for implementing the agreement"; *it does not authorize the CBDT to issue a Circular for this purpose*. The CBDT is not the Central Government.

(b) The expression *implementation* implies that the Agreement exists *ab exrta* being a consensual creature bound to conform to the base provisions and the pre-conditions prescribed under section 90(1).

(c) There is nothing in the content of the Circular to indicate that it is issued under section 90(2).

(d) To "implement" means to execute (a contract)[SOD]. Section 90 of the I.T. Act contemplates two distinct acts by the Central Government: *creation* of an agreement, and its *implementation*".

For rendering the terms of a tax treaty functional and operative the terms of the Section 788 of the United Kingdom's Income and Corporation Taxes Act 1988 and the Income-tax Act of India are substantially analogous. The expression "it is expedient" in the British Act is semantically same as "as may be necessary" in the Indian Act. "Expedient" means" "Advantageous (in general or to a definite purpose); fit, proper, suitable to the circumstances of the case"[3]. To "make such provisions as may be necessary for implementing the agreement" under the Indian Act is semantically analogous with " then those arrangements shall have effect…" under the British Act. The word 'implement" means, as the *New Shorter Oxford Dictionary* says, "put (a decision or plan) into effect".

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1. (2003) 263 ITR 706, 724-725.
2. (2003) 263 ITR 706, 724-725.
3. *The New Shorter Oxford English Dictionary.*

The insertion of sub-Section 2 to Section 90 of the Income-tax Act proves a point, which militates against the view taken by the Court. The object and the import of Section 90(2) is worth taking into account.[4] If it is assumed that a tax treaty overrides the statute, then it was utterly futile to bring about any substitution in Section 90(1) by the Finance Act 2003 to make the provisions of the Indo-Mauritius DTAC conform to the statutory provisions. This fact is a legislative pointer to the fact that the DTAC must conform to the law. The judicial logic, in *Azadi Bachao*, comes to this:

(a) Section 90 empowers the Central Government "to issue notification for the implementation of the terms of a double taxation agreement."

(b) The provisions of such notified agreement "would operate even if inconsistent with the provisions of the Income-tax Act".

But this is not what Section 90 of the Act says. The referent of the expression "provisions" is not the content (the individual terms) of an Agreement but its referent is the expression "implementing". The expression "make provision" has been thus explained in the *New Shorter Oxford Dictionary*:

> "The action or an act of providing something; the fact or condition of being provided. Freq. In *make provision*, make prior arrangement or preparation (*for*), supply necessary resources."

The *Collins Cobuild Dictionary* explains the expression "make provision":

> "If you make provision for something, you prepare for it by making arrangements e.g. They made provision for the defence of England…"

And what is to be *implemented* is an Agreement. And the Agreement is what is done under Section 90 in terms of Section 90 (1). In order to be valid it must not transgress the limitations on power put by the said Section. The case before the Hon'ble Court was: whether in exercise of power to avoid double taxation it is possible to bring about a situation of no-taxation, or even a nominal taxation. The word "implementation" in the Section refers to " the agreement"; but this in

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4. "39.The the object of sub-section (2) to section-90, inserted by the Finance Act (No.2) Act, 1991 was brought out in the Board's Circular No 621 of December 19, 1991 (quoted at page 879 Chaturvedi & Pithisaria's *Income Tax Law,* 4th ed.Vol. 7):

"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".

no way validates what goes counter to the terms of that Section. The trajectory of the word "implementing" cannot reasonably be widened as to include whatever the Executive wants, even at the wreck of the law. The Central Government is empowered by Section 90 to perform the following two tasks:

(a) to enter into an agreement with the government of any country for the purposes specified in the Section 90; and

(b) to make preparation for giving effect to that Agreement within the domestic jurisdiction.

No rule as to treaty override can emerge from the fact of *notification in Official Gazette* or " from making such provisions as may be necessary for implementing the agreement". *Notification* means, as the COD says, "make known; announce or report". *Black's* has spelt out its sense in the context of International Law as "a formal announcement of a legally relevant fact…" *Implementation* means, to quote COD, '*Law* performance of an obligation". Creation of a tax treaty is a precedent act; its notification and implementation are the subsequent acts. In causing operative effect both are integral but they are separate and distinct events. We cannot draw something from a source where it does not exist. The word *implementation* in the context of Art 253 means a legislative implementation, whereas in Sec.90 it means administrative implementation as what the Central Govt does u/s 90 of the Act is to enter into an international *contract.* In exercise of this power to implement the range of the permissible power should not be transgressed. "Notification" is the official information to the all concerned within the domestic jurisdiction that an agreement with X country has been entered into. This accords with the meaning of this term in *Collins Co-build* which explains "notification" thus: "Notification is an act of informing someone officially about something". And this is done through Gazette which is a Publication of an official character which contains government notifications, etc.

2. Case law noticed: manifest misdirection

The Court misdirected itself in relying on *CIT v. Vishakhapatnam Port Trust*[5]*; CIT v. Davy Ashmore India Ltd*[6] *CIT v. R.M. Muthaiah*[7]*;* and *Arabian Express Line Ltd*[8]. *CIT v. Vishakhapatnam Port Trust*[9] is the leading case as all the reasons on account of which these High Courts, and now the Supreme Court, have accorded a tax treaty overriding effect on the statute are stated therein. These reasons are the following:

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5. [1988] 144 ITR 146 (AP).
6. [1991] 190 ITR 626 (Cal).
7. [1993] 202 ITR 508.
8. [1995] 212 ITR 31.
9. [1988] 144 ITR 146 (AP).

(a) the decision of the House of Lords in *Ostime v. Australian Mutual Provident Society*[10]

(b) certain stipulations in the tax treaties of the European countries[11]; and

(c) reliance on Sections 4 and 5 of the Income-tax Act, 1961.

CIT v. Davy Ashmore India Ltd[12] *CIT v. R.M. Muthaiah*[13]*;* and *Arabian Express Line Ltd*[14] stress on the following two points:

(a) The CBDT circular no 333 of April 2,1982; and

(b) The effect of Sections 4 and 5 of the Income-tax Act, 1961.

The Court missed to notice that *Vishakhapatnam Port Trust* of the Andhra Pradesh High Court was wrong in relying on the decision of the House of Lords in *Ostime v. Australian Mutual Provident Society*[15] as the House was considering *an enactment* which the British Court was bound to follow . Besides, the High Court had gone wrong in relying on the decisions of the Belgian Supreme Court (construing the French-Belgium Treaty), the German Federal Supreme Tax Court, and the Swiss Federal Tribunal by overlooking the differences in the statutory and constitutional provisions of the individual countries. In each of these country a tax-treaty is an *enactment*. Besides, their courts do not possess the wide power of Judicial Review. The Court, in effect, relied only on:

(a) The CBDT circular no 333 of April 2,1982; and

(b) The effect of Sections 4 and 5 of the Income-tax Act, 1961.

The CBDT Circular 333 does not give any basis to support its view. It borrowed ideas from certain tax treaties in the OECD countries. Surely this view was adopted on the pressure of that very lobby and the persuaders who inspired the Executive to adopt the OECD Model despite its non-conformity on many points with our law.

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10. (1959) 3 All ER 245 at 248 [39 ITR 210 at p.215].

11. In *CIT v. Vishakhapatnam Port Trust* the Hon'ble High Court relies on a Belgium tax treaty but misses the point that under Art.68 of the Constitution Belgium "provides that treaties of commerce and treaties which may impose obligations on the state or individuals have effect after the assent of Parliament.".

12. [1991] 190 ITR 626 Cal.

13. [1993] 202 ITR 508.

14. [1995] 212 ITR 31.

15. (1959) 3 All ER 245 at 248 [39 ITR 210 at p.215] *Ostime v. Australian Mutual Provident Society*. In that case Lord Radcliffe said: "It should add at this point that the agreement became municipal law of this country by virtue of an Order in Council made on April 23, 1947, under the authority given by section 51(i) of the (Finance No. 2) Act, 1947, which allows the enactment by such Orders of the arrangements contained in double taxation relief agreements and prescribes further that the arrangements covered by an Order shall have effect in relation to income-tax notwithstanding anything in any enactment "so far as they provide for relief from tax, or for charging the income arising from sources in the United Kingdom to persons not resident in the United Kingdom, determining the income to be attributed to such persons and their agencies, branches or establishments in the United Kingdom,…." It is plain, therefore, that if there is a conflict, the unilateral legislation of the United Kingdom must give way."

The Supreme Court should have noted that most of the judgments by the High Courts relied on the CBDT Circular No 333 dated April 2,1982. This circular's validity was never questioned, or considered. "Acquiescence for no length of time can legalize a clear usurpation of power" for as Dixon J observed, "time does not run in favor of the validity of legislation"[16]. In the present case the circular should have been critically evaluated. Reliance on it illustrates the fallacy of the *post hoc*; it assumes that which is itself under question.

The Supreme Court, in *Azadi Bachao*, misdirected itself in considering the import and the synergy of the Sections 4 and 5 of the Income-tax Act, 1961; and missed also to ascertain the role and the province of these Sections *vis-vis* Section 90. The import of "subject to the provisions" in these Sections had been examined in *Commissioner Of Income-tax V. F. Y. Khambaty*[17] by the Bombay High Court[18] which held that the expression 'subject to' in s. 5 does not connote that other provision of the act override the provisions of section 5. It only denotes that income, which is excluded from the Scope of total income by reason of any provision, should be excluded for the purpose of s. 5. The Hon'ble High Court observed, per Kania J.:

> "Therefore, what the use of the said expression shows is that in considering what is total income under *section 5*, one has to exclude such income as is excluded from the scope of total income by reason of any other provision of the Income-tax Act and *not that the other provisions of the Income-tax Act override the provisions of* section 5 *as suggested by Mr. Jetley*."

In fact, it is a matter of mere statutory construction.

The Hon'ble High Court committed constitutional solecism by relying on the tax treaties of the OECD countries without realizing that in those countries tax treaties are enacted by legislature and their constitutional provisions are different. To the extent sections 4 and 5 of the Income-tax Act, within the legitimate province of their function, operate in valid way, they are simply the commands of the Act itself. Hence, there is no question of a tax treaty acquiring primacy over the Act. These provisions of the Act grant priority to Section 90 of the Act. A tax treaty must not transgress Section 90(1). A tax treaty broadly consists of two segments:

(i) the segment containing the terms of a tax treaty having bearing on the incidence of tax under charging Sections 4 & 5 of the Income-tax Act;

(ii) the segment containing procedural provisions relevant for implementation of the treaty.

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16. [H.M. Seervai , Const. Law 4th ed p.181 quoting Wynes, *Legislative,Executive and Judicial Powers in Australia* 5th ed p. 21 and fn 86].
17. 1986-(159)-ITR -0203 –BOM.
18. Bharucha and M H Kania JJ.

The terms of the second segment would likewise be classified in two groups. Those that reasonably relate to *implementation* simpliciter would clearly be in accordance with law. But those terms that go beyond that sphere to override the law would not be valid. On this point the provisions of the British Act bring out the differences in high relief as there a tax treaty's overriding is complete both in view of provisions of section 788(3), and the fact that a tax treaty in the U.K. is an *enactment.*

Our Supreme Court, in *Azadi Bachao*, invoked the doctrine of *Stare decisis.* Explaining this doctrine, Halsbury's *Laws of England* states:

> "But the supreme appellate Court will not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside the statute and outside the common law, when no title and no contract will be shaken, no persons can complain, and no general course of dealing be altered by the remedy of a mistake."

And *Corpus Juris Secundum* says :-

> "This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the Courts, it is not universally applicable."

The Court should have noted that this doctrine is to promote justice where unsettling of the *bona fide* settled affairs would be unfair. This doctrine was never conceived to be invoked in a *mala fide* situation. These treaty-shoppers constitute a stream of marauders of our economy. The individual operators keep on changing, even splitting into many but all remaining shrouded in dense fog concealing their identity and credentials. A regular reader of newspaper is aware of the sinister behaviour of these silhouettes. Even *The Indian Express*[19] has something relevant to say:

> "According to the data available with SEBI, out of the total net investment of Rs. 72,965 crores (over dollars 16 billions) in equities as on September 30, 2003, 84 per cent is held by mutual funds, asset management companies, investment companies, banks and pension funds. "But who are the investors in these funds and companies? Sebi is not clear about it. It can be NRIs or resident Indians," says an Indian fund manager who preferred anonymity."

For invoking the doctrine of *Stare decisis,* there must be justice on the side of the persons in whose favour it is invoked. To say that the above mentioned High Court decisions create *Stare decisis* is a complete miscomprehension of this well-known doctrine. These decisions are examples of errors kept circulating as none felt it essential to place the propositions for a judicial evaluation by the courts. These cases belong to that category about which C.K. Allen writes[20]:

> "And yet it is remarkable how sometimes a dictum which is really based on no authority, or perhaps on a fallacious interpretation of authority, acquires a spurious

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19. Oct 31,2003, Mumbai.
20. *Law in the Making* pp 263-264.

> importance and becomes inveterate by sheer repetition in judgments and textbooks."

To the extent a tax treaty conforms to the limitations of Section 90 (1), its terms *pro tanto* have overriding effect. But the Sections 4 and 5 accord this overriding; it is not on account of any fount of power in the treaty *per se*. In whichever country a tax treaty is given an overriding effect it is so provided by the supreme legislation. This would be clear from the following:

(a) Under Section 788 (3) of the United Kingdom's Income and Corporation Taxes Act 1988 it is specifically provided through a *non obstante clause*.

(b) Section 4(2) if the International Tax Agreements Act, 1953 of Australia provides:

"(2) The provisions of this Act have effect notwithstanding anything inconsistent with those provisions contained in Assessment ACT (other than sections 160AO or Part IV of the ACT) or in any Act imposing Australian tax.'

(c) In Canada, the Acts introducing each treaty into domestic law also provide that the treaty will prevail over domestic law. Thus section 5 of the *Income Tax Conventions Implementation Act*, 1986 provides:

> "(1) Subject to sub-section (2), in the event of any inconsistency between the provisions of this Part or the Agreement and the provisions of any other law, the provisions of this Part and the Agreement prevail to the extent of the inconsistency.
>
> 1. "In the event of any inconsistency between the provisions of the Agreement and the provisions of the Income-Tax Conventions Interpretation Act, the provisions of this Act prevail to the extent of the inconsistency."

(d) In Germany s. 2 of the *General Tax Code* provides:

> "Treaties with other States as defined by Art. 59 para 2 (1) of the Basic Law take precedence over national tax laws if the treaties have been incorporated properly into applicable national law."

(e) In France the Constitution of the Fifth Republic provides in Art 55

Title VI:

> "Art. 55 Duly ratified or approved treaties or agreements shall, upon their publication, override laws, subject, for each agreement or treaty, to its application by other party."

(f) The United States Constitution provides in Article VI, cl. 2, that:

> * * All Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, all treaties made under the authority of the United States are to be the Supreme law of the land and superior to domestic tax laws.

(g) In Belgium according to the *Cour de Cassation*: May 27, 1971, Etat Belge C. 'Fromagerie Franco-Suisse Le Ski" S.A. (1971) Pas., I, 886. The Belgian Constitution is silent on this point but case law establishes that a treaty approved by the Belgian Parliament and having direct effect prevails over existing and subsequent domestic legislation.

(h) "In other countries, treaties have a superior status to domestic legislation: in some they are regarded as special law (*lex specialis*). [as in Spain]. The issue of conflict then falls upon the maxim '*lex posterior generalis non derogat legi priori speciali'* (a subsequent general law does not override a prior special law). Tax conventions are given special status, for example, in Germany, France, the Netherlands, Japan, and Belgium.[21]

(i) That the Constitution of India does not permit limitations on India's Sovereign power in favour of any international organization or treaty though it is so in several constitutions in the world. [Viz. *Belgium* (Art 25bis*), Denmark* (Art 20), *Italy* (Art 11), the *Netherlands* (Art 92), *Spain* (Art 93), the *Federal Republic of Germany* (Art 24)……

Every great constitutional democracy gives priority to its law over executive acts. The U.S-India tax treaty too provides that the law of the land cannot be ridden roughshod. Even when in the U.S a treaty is the supreme law of the land it is not permitted to play truants with the domestic law. This aspect of the matter deserves to be stressed as the Hon'ble Supreme Court has held a treaty making a function of sovereign power. It is to be noted that India's Commerce Minister by signing the Uruguay Round Final Act has virtually subjected the whole country to obligations of serious nature under the threat of international delinquency. Under this *pactum de contrahendo* there are provisions, which would circle out the role of the courts including that of the Supreme Court by privatization of justice under the aegis of the WTO's Disputes Settlement Body. But the U.S.A by statutory provisions maintains the overriding effect of the law of the land. This point has been discussed in detail in the chapter on "the Uruguay Round: A Story of great Betrayal".

No great country allows its law to be bent or breached by an executive act. Parliamentary enactments cannot be overridden by the executive fiat, as it has

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[21]. *Ibid*

pathogenic effects destructive of the very fibre of a democracy. Despite the fact that under the US Constitution a tax treaty is a superior legislation, it is made subordinate by Art 25 of the treaty not only to the existing U.S. law but also to the law to be framed. In the United Kingdom too the position is the same (despite the fact that a tax treaty is done after the approval by the House of Commons having an exclusive control over taxation), per the provisions of the Parliament Act 1911.

In the Common Law countries, the United Kingdom [Australia, Canada (except Quebec), and the United States (except Louisiana)] traditional view is that an Agreement, whatever be name given, "once entered into domestic law (either automatically, after approval, or by transformation through legislation) has no higher status than any other law. The question of conflict may fall to be resolved, then, on the basis of the maxim '*lex posterior derogat legi priori*" (a subsequent law overrides a prior law)."

Following propositions need to be appreciated:

(a) A tax treaty is a self-executing treaty. " Tax treaty rules assume that both contracting States tax according to their own law; unlike the rules of private international law, therefore, treaty rules do not lead to the application of foreign law."[22] "The binding force of the treaty under international law is to be distinguished for its internal applicability. Internal applicability is a consequence only of treaties which-like *tax treaties* – are designed to be applied by domestic authorities in addition to obligating the States themselves, in other words, self-executing treaties."[23] Tax treaty rules assume that both contracting State tax according to their own law, unlike the rules of Private International law; therefore, treaty rules do not lead to the application of the foreign law.

(b) When a tax treaty is legislated investing all its provision with legislative force it has the force of a statute subject only to constitutional limitations, and radiation from the Fundamental Rights (as in the U.S.A. or India). This common law view is manifested in Art. 231(4) of the South African Constitution:

> "(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"

(c) A Tax Treaty is *sui generis* because, whether it is done at the international level or any other level, it must conform to the statute as a tax

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22. Klaus Vogel on Double Taxation Conventions p.20; Philip Baker pp.34-35; Art.23(1) of the Indo -Mauritius DTAC.

23. *Klaus Vogel on Double Taxation Conventions, p 20.*

treaty is done not under the Prerogative, or the executive, power but under specific Parliamentary mandate.

(d) In a tax treaty to which the statute itself does not grant an override can never prevails over the statute. This point is clearly recognized in the leading case of *Collco Dealings LTD v. IRC*[24] wherein the supremacy of the domestic tax statute was recognized. Viscount Simonds aptly stated:

> "But it is said in the first place that it is not entitled under an enactment but under an agreement (which the appellant company, to add weight to argument, prefers to call a treaty). This contention cannot be accepted. Its rights arise under the Act of Parliament which confirms the agreement and gives it the force of law."

Section 778 (3) of the British I.C.T.A., 1988 grants to the terms of a tax treaty an overriding effect through a specific *non-obstante clause.* In India there is no such provision. When in the United Kingdom it was considered expedient to incorporate the provisions pertaining to the Mutual Agreement Procedure prescribed in a tax treaty it was done through a statutory provision. Paragraph 20 inserted a new Section 815AA into the British Taxes Act says:

> "35. The paragraph provides statutory authority for the Inland Revenue to give effect to the solutions and agreements reached under the mutual agreement procedure …
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> 36. Section 815AA (3) enables a consequential claim for relief to be made within twelve months of the notification of a solution or mutual agreement even if other time limits have expired.
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> 37. New section 815AA applies so as to give effect to a solution or mutual agreement from the date of enactment (i.e. existing cases are covered). The time limit for presenting a new case, following enactment, is six years after the end of the chargeable period to which the case relates or any such longer period as may be specified in the relevant double taxation agreement."

3. Legislative indications

There is a recent legislative indication, which shows that our Parliament does not consider it proper that a tax treaty should override the Statute. If the DTAC could be in itself enough, there was no need to amend Section 90(1) of the Income-tax Act by the by the Finance Act 2003 with effect from 1 April 2004. When this author as the respondent in *Azadi Bachao* contended that to the extent that the Preamble to the Indo-Mauritius DTAC referred to promotion of trade and investment, the treaty contravened Section 90(1) of the Income-tax Act. Immediately our Parliament amended the Section with effect from April 1, 2004 by incorporating provisions, which could immunize it against such criticism. This negatives the view that a tax treaty can override the statute. Our Parliament

[24]. [1961] 1 All ER 762 at 765.

granted, thus, a statutory foundation to the terms of the treaty. This resembles what the British Parliament did by inserting Section 815AA into the British Taxes Act to provide a statutory foundation to the Mutual Agreement Procedure. If the Indo-Mauritius DTAC prevails over the statute, it was meaningless to enact sub-Section 2 of Section 90 of the Income-tax Act, 1961. If the DTAC gets priority or overriding effect, then the terms of the DTAC would prevail, not the more beneficial provisions of Section 90(2). This would make the object of the insertion of Section 90(2) meaningless It is well-known that Parliament does not legislate without any purpose.

4. Law as judicially declared

It is settled that "the law declared by this Court is binding on the Revenue/Department and once the position in law is declared by this Court, the contrary view expressed in the circular should per force lose its validity and become *non est*"[25]. And in *Hindustan Aeronautics Ltd v CIT*[26] our Supreme Court made a correct categorical proposition that "…. when the Supreme Court or the High Court has declared the law on the question arising for consideration it will not be open to a Court to direct that a circular should be given effect to and not the view expressed in a decision of the Supreme Court or the High Court." But can the terms of a tax treaty prevail over the law declared by the jurisdictional High Courts or the Supreme Court? The answer is clear 'No'.

5. Conclusion

After the Judgment in *Azadi Bachao*, Sri K Srinivasan, the author of the *Guide to Double Taxation Avoidance Agreements*[27], has examined the issue, after perusing the Judgment in *Azadi Bachao:* whether a tax treaty can override the Income-tax Act. In an article, written after this Judgment, he has observed:

> "The doctrine of reciprocity in the tax treatment of their respective citizens by the Contracting States is written into sections 90 and 91 of the Act; and so is the necessity for the agreements into which the Government may enter with other countries, ensuring that they contain no provision which is repugnant to section 90'. It is obvious that no treaty into which India enters can contain any term or clause repugnant to the laws of India: municipal law will prevail if there is any inconsistency, except to the extent that section 90 permits or else the Act will have to be amended to avoid the inconsistency".

Will someday our Supreme Court treat this criticism the way the House of Lords had done in *R .v Shivpuri* by overruling its earlier judgment in deference to

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25. *Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries* C.P. 4022 OF 1999.
26. AIR 2000 SC 2178 at 2180.
27. K Srinivasan 'Tax treatment of Non-residents: Need for amendment to Income-tax Act" [2004] 58 CLA (MAG.) 71.

the criticism by Professor Glanville Williams entitled "The Lords and Impossible Attempts, or *Quis Custodiet Iposos Custodies*? [1986] CLJ.

That by evaluating the view taken in the Judgment, in *Azadi Bachao*, in terms of its probable consequences this author humbly states:

(a) if power over taxation goes into the executive domain,then the great constitutional strides towards democratic control[28] of the executive power would be reversed to the days of the Stuarts;

(b) if a treaty done by the Executive in some dark dungeon of the World overrides the statute *per se*, then we admit that in the hip-pocket of the Executive there is uncontrolled sovereign power, derived from some extra-constitutional source, which can subjugate national sovereign space, modify the constitutional imperatives in socio-economic policy formulations, and can abrogate federal features of our polity, and establish executive dictatorship which may even become, perish the thought, a covert commercial imperialism of foreign bodies many times more powerful than the nation states.

If through the narrow aperture provided under the provisions before the amendment the tax treaty, the Executive could bring the tax law to its vanishing point, God knows what will happen under the terms of a tax treaty made under the provisions after the substitution and insertion in Section 90(1) of the Act by the Finance Act 2003. After this, the executive's power would be limitless. Aren't we moving fast "Towards the Sponsored State"?. We must keep in view what J. Bronowski considers the very human specific trait:

> "There are many gifts that are unique in man; but at the centre of them all, the root from which all knowledge grows, lies the ability to draw conclusions from what we see to what we do not see, to move our minds "through space and time, to recognize ourselves in the past on the steps of the present." [29]

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28. "The limits to the right of the public authority to impose taxes are set by the power that is qualified to do so under constitutional law. In a democratic system this power is the legislature, not the executive or the judiciary. The constitutions of some countries may allow the executive to impose temporary *quasi*-legislative measures in time of emergency, however, and under certain circumstances the executive may be given power to alter provisions within limits set by the legislature. The legality of taxation has been asserted by constitutional texts in many countries, including the United States, France, Brazil, and Sweden. In Great Britain, which has no written constitution, taxation is also a prerogative of the legislature. The historical origins of this principle are identical with those of political liberty and representative government – the right of the citizens." *The New Encyclopedia Britannica.*

29. J. Bronowski, *The Ascent of Man* Ch I.