NON APPLICABILITY OF DOCTRINE OF RES JUDICATA IN TAXATION: SCOPE FOR ABSURDITIES

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INTRODUCTION

The *doctrine of res judicata* has played a pivotal role in guiding judicial systems across the world. However in the matters of taxation, the doctrine is held to not apply for reasons idiosyncratic to taxation. Yet it may be observed that the absence of res judicata in taxation when coupled with the presence of doctrine of precedents could lead to certain absurdities. This paper seeks to explicate on the non-applicability of res judicata in matters of taxation and draw out the absurdities that might arise because of the non-applicability and examine the lack of solutions for the same.

MEANING OF DOCTRINE OF RES JUDICATA

The Doctrine of res judicata implies that no court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

The doctrine of res-judicata as embodied in Section 11 of the Civil Procedure Code, 1908 (CPC) corresponds to what is known as "estoppel by judgment" in English law. It is a principle of convenience and rest and not of absolute justice[1].

However, it is well settled that Section 11 of the CPC is not the foundation of the principle of res judicata, but merely a statutory recognition thereof and hence, the provision is not to be considered exhaustive of the general principle of law[2].

NON- APPLICABILITY OF THE DOCTRINE IN TAX CASES

The applicability of Doctrine of res judicata is severely curtailed in the matters of taxation.

To illustrate, the fact situation of *CIT* v. *Brij Lal Lohia and Mahabir Prasad Khemka*[3] can be analyzed. In that case the question in issue was with regard to the genuineness of two gifts made by the assessee. In respect of the assessment years 1945-46 and

1. Delhi Golf Club Limited v. New Delhi Municipal Corporation, AIR 1997 Delhi 347.
2. Kalipada De v. Dwijapada Das AIR 1930 PC 22 at p. 23.
3. [1972] 84 ITR 273 (SC).

1946-47, the Tribunal had found that the said gifts were not genuine gifts and the High Court did not interfere with the said finding of the Tribunal on the view that it was a finding of fact and the Supreme Court affirmed the said view. In respect of subsequent assessment years 1947-48, 1948-49, 1949-50, 1950-51 and 1951-52, the assessee produced additional evidence and the Tribunal, after taking into consideration the said additional evidence, came to the conclusion that the gifts in question were genuine gifts.

The Supreme Court held that the fact that in the earlier proceedings, the Tribunal took a different view of the two gifts was not a conclusive circumstance and the decision of the Tribunal reached in those proceedings did not operate as res judicata. The Doctrine of Res judicata would not apply to tax assessments and hence the courts have a right to re-examine the case between the same parties on the identical questions of fact in a different assessment year. A decision taken by the authorities in the previous year would not estop or operate as res judicata for subsequent years[4].

To understand the true scope of non-applicability of res judicata in taxation, it would be ideal to first chart out the developments in England, the parallel changes in the Indian scenario and then analyze the reasons for the non-applicability of res judicata in the field of taxation.

EVOLUTION OF THE PRINCIPLE OF NON-APPLICABILITY

ENGLISH LAW

Position in England is unambiguous now with respect to non-applicability of res judicata in tax matters. But earlier the courts had come to opposing viewpoints on this matter.

The first case to uphold this rule was *Broken Hill Properietary Co. Ltd.* v. *Broken Hill Municipal Council*[5]. In that case, the Court held that the assessment in the previous year would not estop the parties from re-litigating the same question on a subsequent year's assessment[6].

However, in the same year, *Hoystead* v. *Taxation Commissioner*[7] was decided in which their Lordships held to the contrary[8], which made the picture hazy.

The situation cleared a bit with the case of *IRC* v. *Sneath*[9] where the courts explicitly stated that although a decision reached in one year would be a cogent factor in the

4. Municipal Corporation of City of Thane v. Vidyut Metallics Ltd. and Anr. (2007)8SCC688.
5. 1926 AC 94.
6. ibid.
7. 1926 AC 155.
8. 1926 AC 155.
9. [1932] 2 KB 362; 101 LJKB 330 (CA).

determination of a similar point in a following year "but it [could not]" be treated as an estoppel binding upon the same parties, for all years[10].

The position was strengthened with the case of *Society of Medical Officers of Health* v *Hope*[11] which clearly upheld the *Broken Hill* case.

Finally the current position of law was laid down conclusively in the case of *Gaffoor* v. *Colombo Income-tax Commissioner*[12]. Herein the Privy Council was compelled to choose between its two former decisions in *Broken Hill* case and *Hoystead* case. Their Lordships expressly adopted the principle laid down in *Broker Hill* case and expressly disapproved *Hoystead* case. They held that although "[i]t may be that the principles applied in these cases form a somewhat anomalous branch of the general law of *estoppel per rem judicatam*,", they are well established in their own field[13].

INDIAN LAW

The Indian position can be understood to be a gradual transformation from applicability being the rule and non-applicability being the exception to the reverse scenario. In one of the earliest cases, i.e. in *M. M. Sankaralinga Nadar and Bros.* v. *CIT*[14], the Court had attempted to reconcile *Broken Hill* case and *Hoystead* case and held that that unless fresh facts come to light, the Income Tax Officer is bound by the earlier assessment proceedings[15].

The situation relaxed a bit with time and in the decision of *Kamlapal Molilal*[16] the court held that the doctrine of res judicata should not apply to taxation in general. However, interestingly the rationale behind the non-availability was this: because the Income-tax authorities are not Courts, there are no two parties before them and there are no pleadings. So consequently the doctrine of res judicata was still understood to apply to decisions of courts and not apply to only Income Tax authorities.

A yet more liberal approach followed in the case of *Amalgamated Coalfields Ltd. and Anr.* v. *The Janapada Sabha, Chhindwara*[17] wherein the non-applicability of res judicata was extended to even constructive res-judicata in writ petition. This position was squarely upheld in *Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi* v. *Sales Tax Officer, Ratlam and Ors*[18].

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10. Ibid.
11. (I960) 1 All ER 317.
12. 1961 AC 584.
13. Ibid.
14. 1930 Mad 209 [FB].
15. Ibid.
16. 1950-18 ITR 812.
17. [1963] Supp. 1 S.C.R. 172.
18. AIR 1965 SC 1150.

The actual scope of the non-availability of res judicata is expounded succinctly in the case of *M.M. Ipoh and Ors.* v. *Commissioner of Income-tax, Madras* [19] which may be stated as follows:

1) The Doctrine of res judicata does not apply so as to make a decision on a question of fact or law in a proceeding for assessment in one year binding in another year
2) Not only decisions at an administrative level, 'but also those by courts' of competent general jurisdiction fall within the exception to the general rule, and no estoppel can be founded upon them when the same point is raised again in another year of assessment or is in respect of a list other than that fixed in the original decision.
3) This will be so even in cases, where there is a formal admission that no material circumstance has in the meantime changed.

RATIONALE OF NON-APPLICABILITY OF DOCTRINE OF RES JUDICATA IN TAXATION

There have been several reasons for exclusion of the doctrine of res judicata in tax matters, offered by Courts during the course of time. The reason which is attached to the exclusion, in effect is indicative of the true scope of the exclusion itself. For example initially Courts[20] supported the exclusion because they felt that IT authorities were not courts and hence the doctrine should not apply to their decisions. In effect, the exclusion was limited only to IT authorities and not to courts.

A catena of cases has held that the rationale for exclusion is that the cause of action itself has changed from the previous assessment year to the present assessment year and hence the doctrine has no application[21]. Others have stated that the doctrine is inapplicable because there cannot be any estoppel against a statute and tax laws are subject to changes annually[22].

In *Delhi Golf Club Limited* v. *New Delhi Municipal Corporation*[23] it was felt that public interest would be better served by by-passing the rule of res-judicata and taxing the property in a year of assessment if the incidence of tax be rightly attracted under the law and ignoring the factum of its having escaped in an earlier year though by a

19. [1968] 67 ITR 106 (SC).
20. Kamlapal Molila AIR 1950 All 249; also Lord Rudeliffe in Gaffoor v. Colombo Income-tax Commissioner, 1961 AC 584.
21. Bharat Sanchar Nigam Ltd. and Anr. v. Union of India (UOI) and Ors AIR 2006 SC1383, Commissioner v. Sunnen 333 U.S. 591 (1948).
22. Delhi Golf Club Limited Vs. Respondent: New Delhi Municipal Corporation AIR 1997 Delhi 347, Jain Exports v. Union of India and Ors 1987 (29) ELT 753.
23. AIR 1997 Delhi 347.

conscious and deliberate decision. Scholars[24] believe that this public purpose is so vast that it offsets any disadvantages from instances of re-litigation which might spill over because of non-availability of the doctrine.

Turner in his book[25] has stated that not only decisions at an administrative level, but also those given by courts of competent general jurisdiction fall within the exception to the general rule, because the question of the liability of the taxpayer-for the subsequent year's tax or rates is not to be regarded as the same question as that of his liability for the first. What might in other types of case be regarded as *eadem quaestio* is not so to be regarded in taxation and rating cases, which are *sui generis* in this regard.

LIMITATIONS TO THE NON-APPLICABILITY OF RES-JUDICATA

While examining the scope of exclusion of res judicata in tax cases, a rider becomes essential. It is not that in all cases the courts would simply overlook the decisions previously delivered. Here two schools of thoughts exist. The first school maintains that the exclusion of the doctrine is absolute and in all cases, the authorities/ courts would have the power to re-open the case and overlook the previous decisions[26]. However the other school of thought emphasizes that the exclusion may be applicable only after certain conditions are fulfilled. In other circumstances, the courts would still be bound by previous decisions.

The position is summarized tersely in the case of *Tejmal Bhojraj* v. *Commissioner of Income-tax*[27] as follows:

(i) The doctrine of res judicata or estoppel by record does not apply to the decisions of income-tax authorities.

(ii) A previous finding or decision of such an authority may, however, be reopened and departed from in subsequent years in the following circumstances, namely:

  (a) the previous decision is not arrived at after due enquiry

  (b) the previous decision is arbitrary or perverse[28]

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24. Willis S J., "Some limits of equitable recoupment, tax mitigation, and res judicata: reflections prompted by Chertkof v. United States", (1985) 38 *Tax Law.* 625.
25. Spencer-Bower and Turner on Res Judicata, 2nd Edn., pp. 260-61 cited in Agricultural Income-tax Officer and Ors v. Puthumoole Krishna Bhat [1982] 133 ITR 532 (Ker).
26. Amalgamated Coalfields Ltd. and Anr. v. The Janapada Sabha, Chhindwara [1963] Supp. 1 S.C.R. 172 as interpreted in Agricultural Income-tax Officer and Ors. Vs. Respondent: Puthumoole Krishna Bhat [1982]133ITR532(Ker).
27. [1952] 22 ITR 208 (Nag).
28. Upheld in CIT v. Dalmia Dadri Cement Ltd. [1970] 77 ITR 410 and H. A. Shah and Co. V. CIT [1956] 30 ITR 618.

(c) if fresh facts come to light which, on investigation would entitle the officer to come to a conclusion different from the one previously reached[29];

(iii) In the absence of such circumstances, the Income-tax Officer cannot arbitrarily depart from the finding reached after due inquiry by his predecessor in office simply on the ground that the succeeding officer does not agree with the preceding officer's findings.

The effect of revising a decision should not lead to injustice and the court must always be anxious to avoid injustice being done to the assessee[30]. If the validity of a taxing statute is impeached by an assessee who is called upon to pay a tax for a particular year and the matter is taken to a High Court and it is held that the taxing statute is valid, it may not be easy to hold that the decision on this basic and material issue would not operate as *res judicata* against the assessee in a subsequent year[31].

These conditions are important because "even though the principle of res judicata may not apply [.....] it is very desirable that there should be finality and certainty in all litigations including litigations arising out of the Income-tax Act."[32]

DOCTRINE OF PRECEDENTS

Consistency is the cornerstone of the administration of justice. It is with a view to achieve consistency in judicial pronouncements that the courts have evolved the rule of precedents, principle of stare decisis[33]. Black's law dictionary defines *Stare decisis* as "the doctrine of precedent under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation"[34]. The doctrine of precedents or the principle of Stare Decesis would mean that the Single Judge of the High Court is bound to accept as correct, the judgments of the Courts of co-ordinate jurisdiction of Division Benches and of Full benches of the High Court and of the Supreme Court[35]. A corollary of the rule is that the Courts are bound only by decisions of higher courts and not by those of lower or equal rank[36].

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29. Upheld in Sankaralinga Nader v. Commissioner of Income Tax ILR 53Madras 420(44).
30. N.A. Shah and Co. v. Commissioner or Income-tax 1956-30 ITR 618 (45).
31. Amalgamated Coalfields Ltd. v. Janapada Sabha 1963 Supp (1) SCR 172] and Municipal Corporation of City of Thane v. Vidyut Metallics Ltd. and Anr JT2007(11)SC131.
32. N.A. Shah and Co. v. Commissioner or Income-tax 1956-30 ITR 618 (45).
33. Government of Andhra Pradesh & Ors. v. A.P. Jaiswal & Ors. 2000(8)SCALE181.
34. Bryan A Garner (ed), "Black's Law Dictionary", 8th ed, 2004 Thomson Press MN, US, p 519 p 1442.
35. National Insurance Co. Ltd., rep. by its Manager v. Smt. Huligemma and Anr II(2005)ACC576.
36. State of Gujarat v. Gordhandas Keshavji Gandhi and Ors. AIR 1962 Guj128.

SOURCE OF DOCTRINE OF PRECEDENTS

The underlying principle of the doctrine of precedents is that normally the Courts should maintain the finality of judicial decisions and finality of binding precedents. It has been accepted in India and the USA as well as in the legal system based upon that of England [37]. The doctrine is embodied under Article 141 in the Constitution which states that "the law declared by the Supreme Court shall be binding on all courts within the territory of India"[38]. With respect to taxation, Chapter XX of the Income Tax Act, 1961 deals with Appeals and Revision. The doctrine of precedents may be derived specifically from sections 256, 257, 260 and 261 which deal with the appellaté and revisionary power of the High Court and the Supreme Court.

SCOPE OF DOCTRINE OF PRECEDENTS

It can be stated that there are three basic elements in a judgment, which would constitute as precedents:

(i) Findings of material facts, direct and inferential. An inferential finding of facts is the inference, which the judge draws from the direct or perceptible facts.

(ii) Statements of principles of law applicable to the legal problems disclosed by the fact

(iii) Judgment based on the combined effect of the same[39].

A precedent essentially builds itself up on the facts particular to a case. A decision is an authority for only what it decides which may be figured out by bearing in mind that a decision of the court takes its colour from the questions involved in the case in which it was rendered[40]. In fact the facts are so important, that "even a sight distinction in fact or an additional fact may make a lot of difference in decision making process"[41].

It is trite law that under the Doctrine of Precedents, High Courts are not bound by the decision of each other. Specific to taxation, it has been held that the structure of S. 257 and 260 itself depends on the fact itself encourages High Courts to have their own separate viewpoints[42].

There is unanimity of opinion amongst different High Courts that decisions of the High Court are binding on the subordinate courts and authorities or Tribunal under

37. Ahamed Hossain Sk. v. State of West Bengal and Ors (2001) 3 CAL. LT 335(HC).
38. Article 141, The Constitution of India.
39. supra n. 3 p 8074.
40. State of Punjab v. Baldev Singh (1999) 6 SCC 172.
41. Jaya Sen v. Sujit Kr. Sarkar AIR 1998 Cal 288.
42. Suresh Desai v. CIT (Del HC) 1998 II AD (Delhi) 578.

its superintendence throughout the territory in relation to which it exercises jurisdiction. The binding authority does not extend beyond its territorial jurisdiction. The decision of one High Court is not a binding precedent for another High Court or for courts or Tribunals outside its territorial jurisdiction[43].

ABSURDITIES WHEN BOTH THE DOCTRINES DO NOT CO-EXIST

It is re-emphasized in several cases that even a slight variation in facts would make the precedents invalid[44]. So theoretically the perfect precedent would be a case having the identical facts, which is most probable if the case deals with the same assessee. However the same conditions are required for the non-applicability of doctrine of res judicata. So the applicability of doctrine of precedents and non-applicability of the doctrine of res judicata would be most visible in case of same assessee and the same question of law in a different year. The interception of the two doctrines in the matters of taxation is highlighted in a number of cases.

In the case of *Agricultural Income-tax Officer and Ors.* v. *Puthumoole Krishna Bhat*[45] the courts observed an 'exception' to the proposition that the courts can reopen the case in a different assessment year would be a valid precedent, the effect of which is derived from the fact that a precedent is enforceable not only on the same parties but on all people alike. Hence while applying the doctrine of precedents, the court would be liable to hold the same thing and although they are allowing the case again, because of non application of res judicata, they are in the end holding same decision.

While the assessment of the previous year would not be taken into account for the assessment of this year due to non applicability of res judicata, the same would nevertheless be taken into consideration due to the applicability of doctrine of precedents. In the case of *New Jehangir Vakil Mills Co. Ltd.* v. *CIT*[46], the issue before the court was whether the assessment of the year 1943 can be applied to 1944. After stating the law that doctrine of res judicata was not applicable, the Court nevertheless observed that

"it was open to the taxing authorities to consider the position of the assessee in 1943 for the purpose of determining how the gains made in 1944 should be computed" even though the subject of the assessment proceedings was the computation of the profits made in 1944[47].

43. CIT v. Thana Electricity Supply Ltd, 206 ITR 727 Bombay; CIT v. Ved Parkash, 178 ITR 332 Pb & Har; State of A.P. v. CTO, 169 ITR 564 A.P.
44. Jaya Sen v. Sujit Kr. Sarkar AIR 1998 Cal 288.
45. [1982]133ITR532(Ker).
46. [1963] 49 ITR (SC) 137.

In any case there are a series of cases which uphold that the previous decision may nevertheless be taken as cogent evidence for the subsequent year. As was reiterated in *IRC* v. *Sneath*[48], "rules of fair-play will require him to consider all materials including an earlier decision on a similar point placed before him". Again, in the case of *E. V. Koradu* v. *Commr. of Agrl. I.T.*[49], it was pointed out that it is open to the Tribunal to rely upon the previous order of the. Tribunal "as a piece of evidence on which it may rest its present conclusion"[50] and that "the rule of exclusion of the doctrine of res judicata in tax cases does not go to the extent of requiring the taxing officers to ignore the earlier proceedings."[51]

Despite the non-applicability of the doctrine, the lower courts cannot escape the decisions of the higher courts made previously on the same issue. This point comes out in the observations made in the case *British Indian Corporation Ltd.* v. *Commissioner of Income Tax*[52]. While commenting on the fact that the principle res judicata is not applicable even on decisions of higher courts, the court clarified that

"Of course when the Tribunal receives the High Court's advice on reference in one year it would be bound when the same question arises in a subsequent year." However such requirement is imposed "on the ground of stare decision and not of res judicata"[53].

Similarly in *Bharat Sanchar Nigam Ltd. and Anr.* v. *Union of India (UOI) and Ors*[54], the Court observed that although res judicata does not apply in matters pertaining to tax for different assessment years, the Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is "not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement"[55]. The court clarified that "where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view."[56]

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47. Ibid.
48. 1932] 2 KB 362; 101 LJKB 330 (CA).
49. [1980] 122 ITR 615 (Ker).
50. Ibid.
51. Ibid.
52. AIR1967All362.
53. Ibid.
54. AIR2006SC1383.
55. Ibid.
56. Ibid.

The most appropriate case to highlight the absurdity is the case of *Amalgamated Coalfields Ltd.* v. *Janapada Sabha*[57], where the court held that even if a direct decision of this Court on a point of law does not operate as res judicata in a dispute for a subsequent year, such a decision would, "under Article 141, have a binding effect not only on the parties to it, but also on all courts in India as a precedent in which the law is declared by this Court." The Court discarded the question about the applicability of res judicata to such a decision as "a matter of merely academic significance."[58]

There are repercussions of the applicability of one doctrine and the non-applicability on the same set of facts. While other areas of law function harmoniously due to the presence of both the doctrines, in taxation, the non-co-existence of the two doctrines leads to the following absurdities:

As has been stated above, in taxation, the doctrine of precedent applies to higher courts while the lower courts are not bound by the doctrine. If res judicata is not applicable to taxation, but doctrine of precedent is, the lower courts would allow a case year after year, but in case the matter is appealed, strictly applying the doctrine of precedents, the courts would have to hold the same decision year after year. This is truly an absurdity since while the assessee is allowed to try his case again in a different assessment year he/she might still be reverted back with the samedecision applying the doctrine of precedent. Under the doctrine of precedents, the lower authorities are bound by the decision of the higher courts. So although the lower authority is allowed to try the case again the following year, it is still bound by the decision of the higher court in the previous year(s). Ultimately, the applicability of doctrine of precedent would make the non-application of res judicata redundant.

SECTION 158A: A POSSIBLE SOLUTION?

Section 158A under Chapter XIVA, weas introduced in the Income Tax Act, 1961 in the year 1984. As per the CBDT Circular[59], while explaining the insertion of a new chapter XIVA: "when there is a difference between the Income tax Officer and a taxpayer on any question of law arising in the case of the taxpayer for several years, the taxpayer has to contest the question of law for each of these years. This leads to unnecessary proliferation of appeals before the appellate authorities and reference application before the HC on identical questions of law in the case of the same taxpayer. To rectify the same Section 158A gives the assessee an option to furnish to the ITO or the appellate authority as the case may be, a declaration in the

57. (1963) Supp.1 SCR 172.
58. Ibid.
59. No 398, dated 14th Sept 1984.

prescribed form and verified in the prescribed manner, that if the authority agrees to apply to the relevant case (which is currently pending before that authority), the final decision on the question of law in his case for another assessment year which is pending before the HC or the SC under Sections 256, 257 or 261, he shall not raise such question of law in the relevant case in appeal before any appellate authority or for reference before the HC or the SC or in appeal before the SC under the aforesaid sections of the Income Tax Act. The only factor necessary for invoking this section is that the question of law involved in both these decisions should be the same."

As is evident, Section 158A gives the opportunity to the assessee to overcome the absurdities posed by the applicability of doctrine of precedents and the non applicability of doctrine of res-judicata.

However the section itself is fraught with certain loopholes which as per Chaturvedi[60], prevents it from fulfilling its main objective. Firstly, the option is only available to the assessee and not to the department. Secondly, the assessee in turn is discouraged to invoke the section for two primary reasons:

1) He/ She would not wish to debar himself/herself from the option of a further appeal, in case the decision in the other case is unfavorable

2) In case more than one questions of law is in dispute, some not squarely covered by the previous decision, the assessee would have to anyway file for an appeal/ review for the same

CONCLUSION

The non-applicability of doctrine of res judicata to tax cases is arrived at after careful judicial calculations and reckoning. Under general rule, the doctrine of res judicata is rested on, (i) public policy that finds expression in the maxim, *interest repuhlicae ut sit finis litium*- it is in the interest of the State that litigations come to an end, and (ii) private justice, namely, that one may not be vexed or harassed by litigation after litigation on the same cause of action.

This exclusion also rests on public policy, public policy outweighing repetitive litigation as was stated by Lord Radcliffe in *Mohamed Falil Abdul Caffoor* v. *CIT*[61]. He held that private justice is achieved to the extent of giving finality and attributing conclusiveness to what is decided in one assessment, so far as that assessment is concerned, and only to that extent. Such confinement of the operation of the principle of res judicata to the particular assessment in which the decision is given

60. Chaturvedi, Pithisaria, *Income Tax Law*, (Agra: Wadhwa and Company Law Publishers 1999), 5450.
61. [1961] AC 584 (PC).

"is a necessary consequence of accepting the fact that it is in public interest"[62] that there be no bar or prohibition in examining a question afresh each time that question recurs, recurrence of the same question for a decision in assessment after assessment being an inevitable feature of taxation.

Be that as it may, with the existence of doctrine of precedents, absurdities crop up as stated above. The non-applicability of res judicata to taxation has become redundant due to applicability of doctrine of precedents. In any case even the non-applicability of the doctrine of res judicata itself is diluted as is stated above. In this regard although S 158A comes to aid, it is at best a half-baked solution. The dearth of any sort of judicial discussion on this issue is also worrying. This topic of study surely deserves a lot more judicial exposition.

62. Ibid at pp. 599-600