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# DOCTRINE OF BINDING PRECEDENTS AND ITS ESCAPE IN TAX LAWS

In this article author has tried to explain the doctrine of binding precedents of judicial decisions to understand its scope and use in tax litigation. Not everything said in a judgement has binding nature. So, reader of a judgement needs to carefully segregate the “*obiter dictum*” and the “*ratio decidendi*”. Judicial decisions are binding based on various factors such as jurisdiction, bench size and hierarchy of the forum. However, it is not absolute binding in all situations. This article is divided into two Parts, Part A deals with doctrine of *binding precedent* and its related concepts and Part B deals with the escape route using doctrine of *per incuriam* and *sub-silentio*.

## PART A: WHAT IS BINDING PRECEDENT

In any judicial/quasi-judicial decision the authority relies on the precedent which means they use any earlier law or decision to decide the matter before them. As per the doctrine of precedent, all lower Courts, Tribunals and authorities exercising judicial or quasi-judicial functions are bound by the decisions of the High Court within whose territorial jurisdiction these Courts, Tribunals & authorities' functions<sup>1</sup>.

Binding precedent of any judicial decision is based on doctrine of “*Stare decisis*”. The doctrine of “*Stare decisis*” is derived from Latin phrase “*Stare Decisis et non quieta movere*” which implies “to stand by decisions and not to disturb settled matters”. If any law is declared by the competent court, it should not be disrespected and should be followed. The doctrine of binding precedent has merit of promoting certainty and consistency in judicial decisions and enables an organic development of law 'besides providing assurance to an individual as to the consequence of transaction<sup>2</sup>.'

Not everything said in a judgement has binding precedent. While reading any judgement, we need to identify the “*obiter dictum*” and “*ratio decidendi*”. It is the *ratio decidendi* which has binding nature.

## WHAT IS OBITER DICTUM?

**Obiter dictum** or **obiter dicta** is a Latin phrase meaning “other things said” i.e., a remark in a judgment that can be construed to be said in passing. The Wharton's Law Lexicon (14<sup>th</sup> Ed. 1993) defines term “*obiter dictum*” as an opinion not necessary to a judgment; an observation

as to the law made by a judge in the course of a case, but not necessary to its decision, and therefore of no binding effect; often called as *obiter dictum*, a remark by the way.

Using the American Jurisprudence, Hon'ble Supreme Court in the case of *Arun Kumar Aggarwal v. State of Madhya Pradesh* reported in AIR 2011 SC 3056, explained “*obiter dicta*”, as follows:

“21. ....The expression *obiter dicta* or *dicta* has been discussed in American Jurisprudence 2d, Vol. 20, at pg. 437 as thus:

“74. - *Dicta* Ordinarily, a court will decide only the questions necessary for determining the particular case presented. But once a court acquires jurisdiction, all material questions are open for its decision; it may properly decide all questions so involved, even though it is not absolutely essential to the result that all should be decided. It may, for instance, determine the question of the constitutionality of a statute, although it is not absolutely necessary to the disposition of the case, if the issue of constitutionality is involved in the suit and its settlement is of public importance. An expression in an opinion which is not necessary to support the decision reached by the court is *dictum* or *obiter dictum*.

“*Dictum*” or “*obiter dictum*” is distinguished from the “*holding of the court* in that the so-called “*law of the case*” does not extend to mere *dicta*, and mere *dicta* are not binding under the doctrine of *stare decisis*. As applied to a particular opinion, the question of whether or not a certain part thereof is or is not a mere *dictum* is sometimes a matter of argument. And while the terms “*dictum*” and “*obiter dictum*” are generally used synonymously with regard to expressions in an opinion which are not necessary to support the decision, in connection with the doctrine of *stare decisis*, a distinction has been drawn between mere *obiter* and “*judicial dicta*,” the latter being an expression of opinion on a point deliberately passed upon by the court.”

Further at pg. 525 and 526, the effect of *dictum* has been discussed:

“190. Decision on legal point; effect of *dictum* ... In applying the doctrine of *stare decisis*, a distinction is made between a *holding* and a *dictum*. Generally *stare decisis* does not attach to such parts of an opinion of a court which are mere *dicta*. The reason for distinguishing a *dictum* from a *holding* has been said to be that a question

<sup>1</sup> CIT v. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom).

<sup>2</sup> UOI v. Raghuraj Singh 178 ITR 548 (SC)

actually before the court and decided by it is investigated with care and considered in its full extent, whereas other principles, although considered in their relation to the case decided, are seldom completely investigated as to their possible bearing on other cases. Nevertheless courts have sometimes given dicta the same effect as holdings, particularly where “judicial dicta” as distinguished from “obiter dicta” are involved.”

To understand obiter dictum further, following judgements can be referred to:

1. *K. Jayarama Iyer v. State of Hyderabad* [AIR 1954 Hyd. 56]
2. *CIT v. Madhukant M. Mehta* [[1981] 132 ITR 159 (Guj.) and *CIT v. Smt. T.P. Sidhwa* [1982] 133 ITR 840 (Bom.)]

### WHAT IS RATIO DECIDENDI?

*Ratio decidendi* is Latin for “rationale for the decision. *Ratio decidendi* means the reason of decision or reason for deciding. A decision is an authority for what it actually decides and what is of essence in a decision is its ratio and not what logically follows from various observations made while deciding the case<sup>3</sup>.

<sup>4</sup>To be the ratio decidendi amongst others, the minimum requirements are:

- (1) that the matter was directly at issue,
- (2) that the issue needs to have been decided, and
- (3) the matter has been decided by giving reasons.

### HIERARCHY OF JUDICIAL PRECEDENTS

#### 1. Supreme Court of India

Hon’ble Supreme Court of India exercises jurisdiction over all India. The law declared by the Supreme Court shall be binding on all courts within the territory of India<sup>5</sup>. All courts mean courts subordinate to the Hon’ble Supreme Court<sup>6</sup>. Hon’ble Supreme Court has power to overrule its judgment if it deems fit considering changing legal, social and economical environment.

#### 2. High Courts

The power of High Court is limited to the territory over which it exercises jurisdiction. According to Article 227 of the Constitution of India, every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it

exercises jurisdiction. Decision of one High Court is not binding on another High Court; however, it has great persuasive value. A High Court when not following another High Court should record its dissent along with the reasons therefore<sup>7</sup>.

However, position relation to constitutional validity of central law is different. Writ jurisdiction of any High Court under article 226(2) relating to constitutionality of any law made by the Parliament is binding throughout India. Hon’ble Supreme Court in the case of *Kusum Ingots And Alloys Ltd. v. Union of India* [AIR 2004 SC 2321] made it clear and held:

“The court must have the requisite territorial jurisdiction. An order passed on writ petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.”

#### 3. Tribunals

Any judgement of Division bench or Three-member bench is binding on one member bench of the tribunal. Further, decision of Special Bench is binding on all the benches of the tribunal. One bench cannot differ from the view of another Co-ordinate Bench<sup>8</sup>. If the co-ordinate bench is not agreeing to the decision of earlier bench, it should refer matter to the larger bench<sup>9</sup>. Tribunal is bound by the decision of jurisdictional High Court and can’t ignore the decision of the jurisdictional High Court on the ground that it did not take into consideration a particular provision<sup>10</sup>.

### EFFECT OF APPEAL FILED AT HIGHER AUTHORITY AGAINST THE ORDER OF LOWER AUTHORITY ON BINDING PRECEDENT

It is not permissible for the authorities below to ignore the decision of the higher forum on pretext that an appeal is filed in the Supreme Court, which is pending or that steps are to be taken to file an appeal<sup>11</sup>. Assessing Officer is bound by decision of Tribunal-Pendency of an appeal would not amount to an order of stay<sup>12</sup>. Merely filing of an SLP would not make the order of High Court bad in law or give a license to the revenue to proceed on the basis that the order is stayed and/or in abeyance<sup>13</sup>.

<sup>3</sup> *Nav Nirman (P.) Ltd. v. CIT* [1988] 174 ITR 574 (MP).

<sup>4</sup> *Industrial Credit and Investment Corporation of India Ltd. v. Dhanesh D. Ruparelia* [2000] 99 Comp. Cas. 181 (Bom.).

<sup>5</sup> Article 141 of the Constitution

<sup>6</sup> *Bengal Immunity Co. v. State of Bihar* [AIR 1955 (SC) 661]

<sup>7</sup> *Pradip J. Mehta v. CIT* (2008) 300 ITR 231(SC)

<sup>8</sup> *Mercedes Benz India Pvt. Ltd. v. UOI* (2010)252 ELT 168 (Bom)

<sup>9</sup> *CIT v. Goodlass Nerolac Paints Ltd.* 188 ITR 1 (Bom), *UOI v. Paras Laminates Pvt. Ltd.* (1990) 186 ITR 722 (SC).

<sup>10</sup> *Dy. CIT v. Gujarat Ambuja Cements Ltd.* (2011) 57 DTR 179 (Mum.)(Trib.)

<sup>11</sup> *Addl. CIT v. Royal Bank of Scotland N. V.* (2011) 130 ITD 305 (Kol.)(Trib.)

<sup>12</sup> *LIC Employees Co-Operative Bank Ltd. v. ACIT* (2018) 408 ITR 287 (Mad) (HC)

<sup>13</sup> *PCIT v. Associated Cable Pvt. Ltd.* (Bom.)(HC), (ITXA. No. 293 of 2016 dt.03.08.2018)

## WHEN PRECEDENT LOSE ITS BINDING FORCE

<sup>14</sup>It may be noticed that precedent ceases to be a binding precedent -

- (i) if it is reversed or overruled by a higher court,
- (ii) when it is affirmed or reversed on a different ground,
- (iii) when it is inconsistent with the earlier decisions of the same rank,
- (iv) when it is *sub silentio*, and
- (v) when it is rendered *per incuriam*.

### Part B: ESCAPE FROM BINDING PRECEDENT

It is not open for an authority of lower status to escape the doctrine of binding precedent and pass order. However, the doctrine of binding precedent can be escaped if the judgement suffers either from “*per incuriam*” or “*sub-silentio*”.

### DOCTRINE OF PER INCURIAM

Hon'ble Supreme Court in *Government of A. P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others (2000) 4 SCC 262* observed as under:

*“The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.”*

In case of *M/S Hyder Consulting (UK) Ltd vs Governor State of Orissa, CIVIL APPEAL No. 3148 of 2012* decided on 25/11/2014, Hon'ble Supreme Court elaborated the concept of *per incuriam* as follows:

*“The latin expression per incuriam literally means ‘through inadvertence’. A decision can be said to be given per incuriam when the Court of record has acted in ignorance of any previous decision of its own, or a subordinate court has acted in ignorance of a decision of the Court of record. As regards the judgments of this Court rendered per incuriam, it cannot be said that this Court has “declared the law” on a given subject matter, if the relevant law was not duly considered by this Court in its decision. In this regard, I refer to the case of State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139, wherein Justice R.M. Sahai, in his concurring opinion stated as follows:*

*40. ‘Incuria’ literally means ‘carelessness’. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The ‘quotable in law’ is avoided and ignored if it is rendered, ‘in ignoratium of a statute or other binding authority’. ...”*

The Court is not bound to follow a decision of its own if it

<sup>14</sup> *CIT v. B.R. Constructions [1993] 202 ITR 222*

<sup>15</sup> *The Rule in Young v. Bristol Aeroplane Co., Ltd. 1944 KB 718 Young v. Bristol Aeroplane Co., Ltd.*

<sup>16</sup> *B. Sharma Rao v. Union Territory of Pondicherry, 1967 AIR 1480*

is satisfied that the decision was given *per incuriam*, for example, where a statute or rule having statutory effect which would have affected the decision was not brought to the attention of the earlier Court<sup>15</sup>.

In simple terms when any law or judgement on the subject is not brought to the attention of the court and court passes its judgement, the said judgement falls in the doctrine of *per incuriam*.

### DOCTRINE OF SUB-SILENTIO

When a particular point of law involved in the decision is not perceived by the court such decision comes under the ambit of doctrine of *Sub-silentio*. Professor P. J. Fitzgerald, editor of the *Salmond on Jurisprudence*, 12<sup>th</sup> edn, explains the concept of *sub-silentio* with this illustrative example:

*“The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour.; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.”*

In the English law the best illustration to demonstrate *Sub-silentio* is the case of *Lancaster Motor Co. Ltd v. Bremith Ltd, [1941] 1 KB 675*, wherein the court has observed that it is not bound by the decision of earlier court because the order was passed without proper deliberation and without argument, without reference to the crucial words of the rule and any citation of authority.

Hon'ble Supreme Court of India in the case of *Municipal Corporation of Delhi v. Gurnam Kaur, 1989 AIR 38*, after discussing English law in detail held precedents *sub-silentio* and without argument are of no moment.

It is trite to say that a decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein<sup>16</sup>.

### CONCLUSION

Binding precedent of judicial decision is for bringing consistency in legal process. However, such decision must be in the light of all legal provisions and fully argued before the court. The Judges interpret the statute and not the judgements. They interpret words of the statute and their words should not be read as statute. Doctrine of *per incuriam* and *sub-silentio* are heavily relied as defence against doctrine of *Stare decisis*.

**Contributed by CA. Bineet Sundriyal**