CHAPTER 9
A CORPORATION CANNOT BE AN IMPERVIOUS COVERLET OF GROSS ABUSE

SYNOPSIS

We must not perish by the distance between people and government, between people and power, by which Babylon and Egypt and Rome failed. And that distance can only be conflated, can only be closed, if knowledge sits in the homes and heads of people with no ambition to control others, and not up in the isolated seats.

— J. Bronowski, *The Ascent of Man*

I

1. The Implications of Incorporation

A Corporation is a *created* juristic person for business purpose. Law ascribes collective and limited liability to a group of persons conceived and contrived as a jural entity not entitled to transgress the frontiers prescribed under jurisprudence. Incorporation is the formation of a legal corporation. "*Prima facie*, the nationality of a corporation or limited company is that of the state of incorporation, and this test is also adopted by some treaties."[1] It simply means that it is a juristic person capable of certain rights and duties for the promotion of certain objects for which it is created. The certificate of incorporation is virtually its birth certificate. Tedeschi rightly points out:

---

[1]. Starke's Introduction to International law, Tenth Ed. p. 347.

> "In this era of increased corporate mobility, the choice of the place of incorporation may be purely a matter of convenience without any intention on the part of those who manifest the corporate will to have any other connection with the jurisdiction of incorporation."[2]

Incorporation is a mere formal criterion. Summarizing the legal position Starke has observed:[3]

> "However, for different purposes, other test of the nationality of a corporation have been adopted; *e.g.*, the principal place of business test for exchange control purposes, and the location of central control test for the purpose of determining the right to take advantage of double taxation treaties."

Criteria of "incorporation" and "location of central management and control" were adopted in the OECD Model in its Articles 4(1) and 4(3). But it must be noted:

(a) That the OECD Model is contemplating only *a bilateral situation*; and

(b) that the OECD Model is contemplating *a good-faith situation*, not a situation when persons not entitled to benefits sailed under false colours to take unfair advantage.

(i) When it is fair and just to explore the inner realities

A corporation evolved as a form of business organization in which public interest was greatly involved. It was not conceived as an impervious coverlet for abuse. This point has been clearly brought out by an eminent author in these words:

> "Before dealing with exceptional situations in which the veil is lifted, it should be emphasized that the veil never means that the affairs of the company are completely concealed from view. On the contrary, the legislature has always made it an essential condition of the recognition of corporate personality with limited liability that it should be accompanied by wide publicity. Although third parties dealing with the company will normally have no right to resort against its members, they are nevertheless entitled to see who those members are, what shares they hold and, in the case of a listed company, the beneficial interests in those shares if substantial. They are also entitled to see who its officers are (so that they know with whom to deal), what its constitution is (so that they know what the company may do and how it may do it), and what its capital is and how it has been obtained (so that they know whether to trust it). And unless it is an unlimited company they are also entitled to see its accounts, or at least a modified version of them—again in order to know whether to trust it[4]."

[2]. M. Tedeschi, "The Determination of Corporate Nationality" *The Australian Law Journal* Vol. 50 p. 561.

[3]. Starke's Introduction to International Law, Tenth Ed. p. 347; Kanga & Palkhivala's The Law and Practice of Income-tax, pp. 242-246.

[4]. Gower's *Principles of Modern Company Law*, Sixth Ed. by Paul L. Davies, (London Sweet and Maxwell 1997) pp. 148-49.

It is clear from the above that transparency is not excluded by "incorporation". It is a matter of public policy that the affairs of a company should be under public gaze so that the form of business organization devised, with the best of commercial interests, is not used for extraneous purposes. Under the very grammar of its existence it must remain under public scrutiny. But, as is evident from the realities of the economic globalization, every effort is being made to evade scrutiny:

(a) by the whole corporate *imperium* as its constituents have a lot of skeletons in their cupboards which they want always to remain shrouded in secrecy;

(b) by the big players under the present global architecture, like the IMF, World Bank and the WTO, which provide models of secrecy, lack of public accountability, and absence of democratic character;

(c) by the tax havens and many other states having an opaque system to wax on the ill-gotten wealth of others who can manage their tainted wealth from those regions of darkness most vociferous about their sovereignty as it provides them with sword and shield against those who suffer wrongful loss;

(d) by all those who believe that illegal wealth and illicit power can flourish most when opaqueness is ensured.

(ii) Public Policy and Corporate Personality

In *R v. Registrar General, ex parte Smith* it was held that Public Policy would enable an authority even to ignore a mandatory legal provision if compliance with that would promote some criminal activity, whether already taken place or apprehended to take place. These legal propositions are the broad general principles of justice and fair play. The legal propositions are articulated in the judgments of Sir Stephen Brown P. and Staughton LJ. It is sufficient to quote from Stephen Brown P:

> "He submitted that the authorities showed that public policy required that no person should profit from his own serious crime: see P*uttick's case and R v National Insurance Comr, ex p Connor* [1981] 1 All ER 769, [1981] 1 QB 758. Accordingly, he argued, if the court would interpret a statute so as to prevent grave crime being recorded, a *fortiori* it should interpret a statute in a way which will prevent grave crime from being committed. In the present circumstances, the court, he said, is the guardian of public policy. It would be an affront to the public conscience to allow the natural mother of the appellant to be placed at serious risk. There was here, he said, no question of discretion. Consideration of the scale of future risk was a matter of degree. What is involved is an implied exception on public policy grounds."[5]

---

[5]. [1991] 2 All ER 88 at p. 93.

It has been aptly ruled that Public Policy can even modify and mollify the rigour of law under aspects of justice. In this phase of economic globalization there are good grounds to believe that the corporations rule the world. And nothing helps them dominate better than the recognition that the corporations are the impervious cover-lets of gross abuse. The expression **"eye of equity"** is an expanding metaphor. Transparency and the eye of equity can ensure justice in this global world where opaqueness and lack of public accountability are the most disturbing facts.

II

2. A Corporation cannot be an impervious cover-let of gross abuse

In a recent judgment, in *Azadi Bachao's Case,* our Supreme Court examined the doctrine of the lifting of corporate veil under circumstances to be set forth by the author in a separate chapter on the "A Morbid Story of the Indo-Mauritian DTAC". However for comprehending and evaluating the Court's view a contextual extraversion may be excused. In course of investigation the Assessing Officers under the Income-tax Act found that a good number of the residents of the third States attempted to avail of the bilateral tax treaty between India and Mauritius (the Contracting States). At one go 24 Assessment Orders were passed towards the end of March 2000 holding that the Indo-Mauritius Double Taxation Avoidance Convention was abused. The tax authorities found that the third country residents set up conduit companies in Mauritius. These companies were incorporated under the Mauritian Companies Act. They obtained Certificate of Incorporation in Mauritius. They were even granted Certificates of Residence for the purposes of obtaining benefits under the Indo-Mauritius DTAC. They had no economic presence or impact in Mauritius. Their control and management were in countries other than Mauritius. Their theatre of operation was in India, mainly in the Indian Stock Market, to earn capital gains which are, for them, neither taxable in India nor in Mauritius. Besides, the tax treaty had some other beneficial provisions. The Assessing Officers lifted the corporate veil of these companies to see the operative realities in order to determine liability under the Income-tax Act. They held that for the tax purposes these companies incorporated in Mauritius were to be ignored from the scope of the tax treaty: and they held further that they were chargeable to tax as non-residents *simpliciter*. Pressure was built on the Central Government by the vested interests and their lobbyists. The Central Board of Direct Taxes issued a Circular No. 789 dated April 13, 2000 directing the tax authorities to abandon what they were doing in the matter of investigation of such cases. They were directed to accept the Certificates of Residence granted by the Mauritian authorities as conclusive evidence not only for the determination of the status as residents in Mauritius but also for determination of the beneficial ownership of income earned. The Delhi High Court quashed the Circular, but our Supreme Court reversed the judgment of the High Court in *Azadi Bachao's Case.* Our Supreme Court observed:

"The decision of the Chancery Division in *Re: F.G. Films Ltd*., was pressed into service as an example of the mask of corporate entity being lifted and account be taken of what lies behind in order to prevent "fraud". This decision only emphasizes the doctrine of piercing the veil of incorporation. There is no doubt that, where necessary, the Courts are empowered to lift the veil of incorporation while applying the domestic law."[6]

The Court's above observation is on account of evident misdirection to which this author has drawn attention towards the end of the Chapter on **"***Mcdowell*: The decision and the *ratio*". This misdirection ensued on account of the following two factors:

(a) The Court erroneously adopted a formalistic and analytical approach when the modern jurisprudence admits of a functional approach.

(b) The Court was under an erroneous notion that it was beyond its jurisdiction to explore the inner realities of a company incorporated in a foreign land.

Our Supreme Court made a serious error of law by holding that *Re R.G. Films Ltd.*[7] contemplates the Lifting of the Corporate Veil only in the province of "domestic law". This view is apparently erroneous for the following reasons:

(I)The doctrine of the Lifting of Corporate Veil was considered in Public International Law also as it is a step in the quest of justice as the province of which does not end with municipal law of any country. In the case concerning *the Barcelona Traction, Light and Power Company Ltd.*[8], the international Court of Justice noticed "the profound transformations which have taken place in the economic life of nations"; and, after discussing the circumstances in which this doctrine is invoked in domestic jurisdictions, stated that the process of lifting the veil "is equally admissible to play a similar role in international law[9]." This approach accords well with the view of Klaus Vogel that in evaluating artificial transactions

6. (2003) 263 I T R 706 , 747-748.
7. [1953] 1 All ER 615.
8. [1970] *International Court of Justice Reports* Index p. 4.
9. The Court observed:
"…….Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting of corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain case of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."

structured for tax avoidance purposes it is proper to see the operative realities rather than their formal profile[10].

(II) *Re R.G. Films Ltd.* states general principles universally recognized. Dias in his *Jurisprudence* draws general juristic principles in these words[11]:

> "Public policy may make it necessary to look at the realities behind the corporate façade…Courts are always vigilant to prevent fraud or evasion. Thus, they will not permit the evasion of statutory obligations. In *Re FG (Films) Ltd.*, a film was made nominally by a British company, which had been formed for this purpose with 100 capital of which the director of an American company held 90. The film was financed and produced by the American company, and it was held that the British company was not the maker of it within the meaning of the Cinematographic Films Act, 1948, SS 25(1)(a) and 44(1) but that it was purely the nominee of the American company. This case and others like it are example of the mask of corporate unity being lifted and account being taken of what lies behind in order to prevent fraud. The converse situation is also true, if a person finds it to his advantage to disregard corporate unity, he may discover to his discomfiture that the courts refuse to do so.
>
> Devlin J once said 'the legislature can forge a sledge hammer capable of cracking open the corporate shell, and the legislature has done so in a variety of statutes, principally to prevent the evasion of tax and other forms of revenue."

(III) The certificate of incorporation is virtually its birth certificate. Under the tax jurisprudence the concept of incorporation is to be understood in the light of a host of specific legal provisions. It would be clear from the following:

(i) Section 2 (17) of the Income-tax Act, 1961 recognizes the conventional view that a corporation is a person created in the country wherein it is incorporated. Section 6 (3) of the Income-tax Act prescribes the residential status for the Indian tax law purpose. It says—

> "A company is said to be resident in India in any previous year, if—(i) it is an Indian company; or (ii) during that year, the control and management of its affairs is situated wholly in India."

---

10. Klaus Vogel observes:[10].
"As has already been discussed, an artificial transaction created merely for tax avoidance purposes should be judged according to its substance rather than according to its form. According to the view of this commentary, this originally domestic rule applies as a 'general legal principle recognized by civilized nations' and is also applicable in the relationship between contracting States of a DTC……Consequently, the obligation under international law arising from a DTC with respect to other contracting State is subject to a general **'substance v. form proviso based on international law'.**"

11. at p. 259.

(ii) But this concept of residential status of a company has been clearly modified in framing the *residential status* of a company for the purpose of Article 4(1) of the Indo-Mauritius Double Taxation Avoidance Convention, which says:

> "For the purposes of this Convention, the terms "resident of a Contracting State" means any person who, under the laws of that State, is liable to taxation therein by reason of his domicile, residence, place or management or any other criterion of similar nature. The terms "resident of India" and "resident of Mauritius" shall be construed accordingly."

In fact, in framing the provisions of Article 4 (1) of the DTAC, the Contracting States have telescoped the concept of residence as understood under section 2 of the Income-tax Act with the concept of "liability to pay tax" emanating from the charging sections of the Income-tax Act. Clearly it is a case of semantic widening. Most often this point of jural telescoping is lost sight of as was done while framing Circular of the CBDT.

(IV) That the development of jurisprudence is from the *analytical to the functional* is illustrated by the judicial approaches in the two leading cases, one decided by the House of Lords (*Furniss v. Dawson*)[12] and the other decided by the U.S Supreme Court (*Knetsch v. United States)*.[13] The House of Lords ignored the existence of that tax haven company by circling out transactions effected through it without negating its corporate personality. As there was no economic impact of this transposed entity its relevance was not recognized in determining effect *for the purposes of the tax laws*. The U.S Supreme Court shows that even legitimate corporation may engage in transactions lacking economic substance; and so the Commissioner could disregard transactions between related legitimate corporations. This *functional approach* has been adopted in various other European jurisdictions to which references would be made in the chapter on "Treaty Shopping". Corporate personality, which incorporation brings about, is designed to operate only within its permissible province. It can never be allowed to become a rogue's charter. Neither it can be allowed to become an impervious coverlet, a hard shell, for pursuing interests contrary to law, or public policy. Where the line should be drawn is a matter of judicial statesmanship.

(V) The aforesaid facts show that a company can be a legal person without being a *resident* for the purpose of a tax convention. In the 1986 decision of the Bundesfinanzhof in German jurisdiction *the doctrine of the abuse of*

[12]. [1984] 1 All ER 530.
[13]. 364 US 361 (1960).

legal form[14] has been recognized. Klaus Vogel has outlined the judicial perspective in these words[15]:

> "If the form of a transaction is not recognized for tax purposes under domestic law or under treaty law, the tax consequences which the tax payer sought to obtain through structuring the transaction in question will not occur and tax authorities will then apply those tax rules which would have applied according to the appropriate legal form of transaction…"

(VI) In *Johns v. Lipman* [16] the Chancery Division granted specific performance holding that the defendant company was a creature of the first defendant, a mask to avoid reorganization by the eye of equity. The expression 'eye of equity' is an expanding metaphor. Transparency and the eye of equity can ensure justice in this global world where opaqueness and lack of public accountability are the most disturbing facts. The Multinational Corporations argue for an impregnable corporate shell so that how they really operate is not under public gaze. Secrecy, and lack of public accountability are best promoted by advancing exclusively formal criteria. The tax havens, and those who sail in the common boat, think that it is not for them to see whether certain companies are managed by criminals, or whether they draw their fund from the tainted earnings from the most unscrupulous sources (amassed through bribery, receipt of kick-backs, drug-trafficking, insider-trading, embezzlement, computer fraud, under invoicing-over invoicing, and other sordid and morbid activities spawning scams having deep lethal consequences on the welfare of common people).

(VII) A corporation was evolved as a form of business organization in which public interest was greatly involved. It was not conceived as an impervious coverlet [*Life Insurance Corporation of India v. Escorts Ltd.* [17]; *Commr. of Income-tax v. Meenakshi Mills; Workmen v. Associated Rubber Industry*; *New Horizons Ltd. v. Union of India* [18]"; *Juggi Lal Kamlapat v. CIT* [19]*; State of UP v. Renusagar Power Company* [20].] After examining various cases on "lifting of the veil" Gower's *Principles of Modern Company Law* [21] states.

> "Where then does this leave "lifting of the veil"? Well, considerably more attenuated than some of us would wish. There seem to be three circumstances only, in which the courts can do so. These are:

---

14. Philip Baker in *Double Taxation Conventions and International Law* 2nd ED. p. 101.
15. *Klaus* Vo*gel on Double Taxation Conventions* at pp. 41-42.
16. [1962] 1 W. L. R 832 Ch.
17. AIR 1986 SC, 1370 [O. Chinnappa Reddy, E.S. Venkataramiah, V. Balakrishna Eradi, R.B. Misra, V. Khalid, JJ.].
18. [1995] 1 SCC 478.
19. AIR 1969 SC 932.
20. [1988] 4 SCC 59.
21. Gower's *Principles of Modern Company Law,* Sixth Ed. Paul L. Davies p. 173.

(1)When the court is construing a statute, contract or other document:

(2) when the court is satisfied that a company is a "mere façade" concealing the true facts;

(3) when it can be established that the company is an authorized agent of its controllers or its members, corporate or human."

(VIII) Realities cannot be evaded. The Court stresses on the fact of "incorporation". If a company is incorporated in Mauritius, it is taken as the end of the matter. A company may become a coverlet of gross abuse. This shocks our conscience. The days of legal formalism are over. Tedeschi rightly points out:

> "In this era of increased corporate mobility, the choice of the place of incorporation may be purely a matter of convenience without any intention on the part of those who manifest the corporate will to have any other connection with the jurisdiction of incorporation."[22]

How companies are incorporated and how they are used can be illustrated with reference in one of many examples. While evaluating the argument to prove residential status only on the basis of mere "incorporation", it is worthwhile to see what is happening in God's good World in this phase of globalization. The facts deserve a judicial notice. What the *2002 Britannica Book of the Year* (p. 392) says about The Bahamas, a country (Area 5382 sq.mil.) having Population only (2001) 298000, may not be untrue about Mauritius, and many other countries profiting by the sale of good faith :

> "The Bahamian government moved smartly against dubious offshore banks in Feb. 2001; it closed down two operations and revoked the licenses of five others following the publication of a U.S. Senate report that described them as conduits for money laundering. In June The Bahamas was removed from the Paris-based Financial Action Task Force list of countries with inadequate laws to fight money laundering. The government had launched several initiatives, including the banning of anonymous ownership of more than 100,000 international business companies registered in the country."

The author has pointed out in the chapter on "An Opaque System" how easy it is for the terrorists to take advantage of the misuse of a tax treaty. They might float subsidiary companies or a conduit companies in Mauritius for transacting on the Indian Stock Exchange. Our country cannot be lax in vigilance. The price of liberty and societal weal is always eternal vigilance…. It would be a queer irony that the government, which rightly asserts its case against terrorism, tends to become, perish the thought, a facilitator of terrorism ! T.B. Smith rightly says; 'For

[22]. M. Tedeschi, "The Determination of Corporate Nationality" *The Australian Law Journal* Vol. 50 p. 561.

me, as for Lord Stair, Father of Scots Law writing in 17th century, law is 'reason versant about affairs of men.'[23]

Applying the perspective of public international law one can notice an evident error in *Azadi Bachao*. It is a settled principle that the conferment of a corporate status by a State may not be recognized internationally without question. In the *Nottebohm' Case* the International Court of Justice determined the principles governing "nationality" in these words:

> "… a legal bond having as its basis a social fact of attachment, a genuine connection of existence and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State."

"The Court found that there was no bond of attachment between Nottebohm and Liechtenstein, and that there was a long-standing and close connection between him and Guatemala, a link which his naturalization in Liechtenstein in no way weakened; that naturalization had been ' granted without regard to the concept of nationality adopted in international law'. Accordingly the Court held that Guatemala was under no obligation to recognize Nottebohm's Liechtenstein nationality, and that Liechtenstein could not institute proceedings against Guatemala in respect of damage suffered by him."[24] "…. However, this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only not manifestly groundless but are also of such gravity as to cause serious doubts with regard to the truth and reality of that nationality." "…Furthermore, it is not only international tribunals which may question the grant of nationality by a state to an individual. Even the national courts of other states may, although usually reluctant to do so, in certain circumstances feel it right to inquire into the justification and lawfulness of a state's grant of its nationality. This is likely to be the case where the grant of nationality is questioned because of alleged non-conformity with international law." [25] *Oppenheim* refers to the Federal German Constitutional Court's decision in German *Nationality (Annexation of Czechoslovakia* Case ILR, 19 (1952), No. 56 in which the Court 'accepted that while as a rule every state was entitled to provide in its own discretion how its nationality was acquired and lost, that discretion was subscribed by the general rules of international law according to which a state may confer its nationality only upon persons who have some close factual connection with it."[26]

The summary of the international law position submitted above would show that the tax authorities in India were competent to go behind the Certificate of Residence granted by the Mauritius tax authorities when they had found, on

---

[23]. *Property Problems in Sale* [1978 Tagore Law Lectures] p. 7.
[24]. *Oppenheim's Internationa Law*9th ed. Vol. 1 PEACE p. 854.
[25]. *Oppenheim's Internationa Law*9th ed. Vol. 1 PEACE p. 855.
[26]. *Oppenheim's International Law*9th ed. Vol. 1 PEACE p. 856 fn. 20.

investigation, that it was sheltering the masqueraders of the third States contrary to the intention of the bilateral tax treaty. An analogy with a passport is quite apt. As in *German Nationality (Annexation of Czechoslovakia* Case ILR, 19 (1952), No. 56, by going behind the Certificate of Residence, they were merely examining "some close factual connection". The Division Bench of our Supreme Court missed that a domestic court is competent to examine such Certificates. The tax authorities are entitled to do so as they are duty bound by the law of the land to do so. It is well settled that neither the principles of the Acts of the State nor of Comity applies in the field of revenue law.[27] It is well known that a passport "does not conclusively establish as against other states that a person to whom it is issued has the nationality of the issuing state. It constitutes merely *prima facie* evidence of nationality, which is normally accepted for usual immigration and police purposes[28]. It is true that a state "may for purposes of its own law make the possession of a foreign passport *conclusive proof* of the holder's nationality of that foreign state….".[29] But it was the Court's patent mistake to sustain the CBDT Circular No. 789 which created a *conclusive presumption* in favour of those operating through the Mauritian route. This happened despite the fact that under the law[30] the creation of a conclusive proof or presumption is always a legislative act..

As an additional prop to its refusal to invoke the doctrine of the Lifting of the Corporate Veil the Court, in *Azadi Bachao,* held:

> "In the situation where the terms of the DTAC have been made applicable by reason of section 90 of the Income-Tax Act, 1961, even if they derogate from the provisions of the Income-tax Act, it is not possible to say that this principle of lifting the veil of incorporation should be applied by the court. As we have already emphasized, the whole purpose of the DTAC is to ensure that the benefits thereunder are available even if they are inconsistent with the provisions of the Indian Income-tax Act. In our view, therefore, the principle of piercing the veil of incorporation can hardly apply to a situation as the one before us."

It is difficult to comprehend the judicial logic that the application of the said doctrine is controlled by the statute's subordination to the double taxation avoidance agreement. Assuming *arguendo*, that the agreement is designed to override the Income-tax Act, nothing prevented the Court to consider the application of

27. *Collco Dealings Ltd. v. IRC*[1961] 1 All ER 762 at 765.
28. Weis, *Nationality and Statelessness* pp. 222-30, Turack, *The Passport in International Law* (1972), pp. 230-33.
29. *Oppenheim's Internationa Law*9th ed. Vol. 1 PEACE p. 855 fn. 16.
30. That the Hon'ble High Court observed what is amply evident from the provisions under various enactments *Sarkar on Evidence* 14th ed. p. 69 refers, *inter alia*, to: Companies Act, 1956, s. 132; Succession Act, 1925, s. 381; Christian Marriage Act, 1872, s. 61; Madras Revenue Act,1864, S. 38; Oaths Act, 1873, s. 11. Conclusive presumptions are enacted by the legislature, where in public interest it is desired to shut out inquiry about the real state of facts. This view accords well with the juristic analysis and the Indian legislative practice as would be clear from the following exposition in Seervai's *Constitutional Law of India* 4th ed. p. 344. "From 1872, conclusive presumptions are part of the law of evidence and the legislative power to make laws on evidence and oaths (entry12, List III, Sch. 7) must therefore include conclusive presumptions".

the doctrine on account of the appropriateness of its application in the administration of justice. As the Court's observation that "the whole purpose of the DTAC is to ensure that the benefits thereunder are available even if they are inconsistent with the provisions of the Indian Income-tax Act" is itself *per incuriam*, the author would examine this aspect of the matter comprehensively in a separate chapter.

III

3. A 'Corporation's Residence'

It is time now to evaluate our conventional ideas about "incorporation" of a company. We have already noticed the pragmatic solutions which were judicially arrived at in *F.G. Films' Case* in which for eradicating fraud 'a lifting of corporate veil was considered justified. The graphic accounts of the operative facts having a direct bearing on the point under consideration, is given by Alvin Toffler in his *Power Shift*[31]:

> "Just as nations are proving inept in coping with terrorists or religious frenzy, they are also finding it harder to regulate global corporations capable of transferring operations, funds, pollution, and people across borders.
>
> The liberalization of finance has encouraged the growth of some six hundred megafirms, which used to be called "multinationals" and which now account for about one fifth of value added in agriculture and industrial production in the world. The term *multinational*, however, is obsolete. Mega-firms are essentially non-national.
>
> Until the recent past, globe-girding corporations have typically "belonged" to one nation or another even if they operated all over the world. IBM was an unquestionably American firm. Under the new system for creating wealth, with companies from several countries linked into global "alliances" and "constellations," it is harder to determine corporate nationality…….
>
> What is the "nationality" of Visa International? Its headquarters may be in the United States, but it is owned by 21,000 financial institutions in 187 countries and territories. Its governing board and regional boards are set up to prevent any one nation from having 51 per cent of the votes.
>
> With cross-national takeovers, mergers, and acquisitions on the rise, ownership of a firm could, in principal, switch from one country to another overnight. Corporations are thus becoming more truly non-national or transnational, drawing their capital and management elites from many different nations, creating jobs and distributing their streams of profits to stockholders in many countries.
>
> Changes like these will force us to rethink such emotionally charged concepts as economic nationalism, neocolonialism, and imperialism…
>
> As they lose their strictly national identities, the entire relationship between global firms and national governments is transformed. In the past, "home" governments of such companies championed their interests in the world economy, exerted

---

[31]. Pp. 454-455.

diplomatic pressure on their behalf, and often provided either the threat (or the reality) of military action to protect their investments and people when necessary.

In the early 1970s, at the behest of ITT and other American corporations, the CIA actively worked to destabilize the Allende government in Chile. Future governments may be far less ready to respond to the cries for help from firms that are no longer national or multinational but truly transnational…"

Under the circumstances of our times the easiest of all ways to respond to the present challenges posed by the instruments of darkness is to use the judicially created doctrine of the Lifting of the Corporate Veil. This new insight would solve many fraudulently conceived and operated designs of the MNCs through e-commerce in this Cyber Age. The baffling controversy as to the regulations and taxation of *e-transactions* can also be solved if the idea of "incorporation" as an index of nationality is given up/ or by passed/ or judicially circled out by adopting a functional and purposive approach. A nation can assert its right to regulate transactions, and impose taxation thereon or incidental thereto, with respect to the commercial events taking place within a particular nation's biosphere superjacent its territory. As such events would be brought about by factors with transnational habitat, appropriate mechanism would have to be devised so that the regulations and taxation are effective and also accord well with equity and justice.

(i) Not a public law approach

A PIL, generally speaking, is said to suffer from paucity of facts. This happens primarily because our governmental process is extremely secretive. Between assertions and denials truth is most often lost. John Milton's *Comus* to which the Supreme Court referred in *Shrisht Dhawan v. Shah Bros*[32] makes his Comus say:

''T is only daylight that makes sin.'[33]

In *Azadi Bachao* the PIL was remarkable as all the material facts were brought out by a group of Income-tax Authorities who passed 24 Assessment Orders in the cases of treaty-shoppers, one of which, the Assessment Order passed in the case of M/s. Cox & King, got circulation in public domain; and its copy was filed by *Azadi Bachao Andolan* under affidavit before the Delhi High Court. The material facts of the case would be discussed in the chapter on "Fraud unravels everything". The facts contained in the Assessment were never challenged. Our Supreme Court did not take into accounts the facts found by the government's

---

[32]. AIR 1992 SC 1555.

[33]. *notpadyate vina jnanam vicarena nyasadhanaih.*
yatha padarthabhanam hi prakasena vina kvacit
(Without inquiry, wisdom cannot be attained by any other means,
even as things of the world cannot be seen without light.)
Samkar in his Aparoksanubhuti

"It has been established that more the effort at secrecy the greater the chances of abuse of authority by the functionaries". [Shah Commission Of Enquiry, *Third and Final Report P. 231]*

own officers under some erroneous miscomprehension. The Court observed in the impugned Judgment:

> "The High Court seems to have heavily relied on an assessment order made by the assessing officer in the case of Cox and Kings Ltd. drawing inspiration therefore. We are afraid that it was impermissible for the High Court to do so. An assessment made in the case of a particular assessee is liable to be challenged by the Revenue or by the assessee by the procedure available under the Act. In Public Interest Litigation it would be most unfair to comment on the correctness of the assessment order made in the case of a particular assessee, especially when the assessee is not a party before the High Court. Any observation made by the Court would result in prejudice to one or the other party to the Litigation. For this reason, we refrain from making any observations about the correctness or otherwise of the assessment order made in Cox and Kings Ltd. Needless to say, we decline to draw inspiration therefrom, for our inspiration is drawn from principles of law as gathered from statutes and precedents".

The Court adopted a mistaken view when it felt it was not proper to put the assessment order of M/s. Cox & King into judicial focus as it was not a formal party to the judicial proceeding. The grievance in the PIL was against the wielders of public power: it was not against any individual assesses. If certain executive acts were found contrary to law, the consequences of such determination would overtake those who enjoyed the undeserved benefits of the governmental acts contrary to law. If a tree is to be uprooted in obedience to law, none should think mournfully about the black ants or red ants that flourished on the tree so long it stood erect before law ceased to be a rogue's charter. It is felt that the private beneficiaries of public wrong could not be the necessary parties. Mulla in his *CPC* 14th Ed at p. 868 writes:

> 'Necessary parties are parties "who ought to have been joined", that is, parties necessary to the constitution of the suit without whom no decree at all can be passed.[34] "In order that a party may be considered a necessary party defendant, two conditions must be satisfied, first, that there must be a right to some relief against him in respect of the matter involved in the suit, and second, that his presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit."[35] Failure to implead a necessary party as a party to the proceeding is fatal.
>
> "…. This principle has been applied to writ petitions also.[36]"

34. *Kishan Prasad v. Har Narain Singh,* (1911) 33 ALL. 272, 276, 9 I.C. 739 P.C.; *Shahsaheb v. Sadashiv,* (1919) 43 Bom. 573, 51 I.C. 223.
35. *Durga Charan v. Jatindra Mohan,* (1900) 27 Cal. 493; *Jibandas v. Narbada Bai,* (1959) A.C. 519; *Jivalal v. Narayan,* 73 Bom L.R. 814; *S.C. Lew v. K.S. Ray,* 1974 A.C. 274.
36. *K.B. Sharma v. Transport Commr.* 1968 A A 276; *Nagabhushnam v. Ankam v. Ankarah,* 1968 A A P 74.

(ii) The judicial approach and the modern realities

The author is driven to the view that if the world is to be saved from the exploitation by the corporate *imperium* through the corporations floated as the impervious cover-lets of gross abuse, there should be judicial readiness to see their operative realities. This is needed not only for tax purposes, but also to ward off security risks, and to prevent the moral degeneration of the society through tainted and criminal activities. Even if the world really becomes a village providing a common space to all, as the protagonists of the globalization say, the mask of the masqueraders must fall:

> *The loathsome mask has fallen, the man remains*
> *Spectreless, free, uncircumscribed, but man*
> *Equal, unclassed, tribeless and nationless.* [37]

---

37. Shelley, *Prometheus Unbound* III.iv.193.