H.C.D.-I (a) Continuation Sheet

Sr. No.	Date	Orders

* IN THE HIGH COURT OF DELHI AT NEW DELH

\+ ITA No.364/2005

THE COMMISSIONER OF INCOME TAX ..... Appellant.
Through Mr. R.D. Jolly with Ms.Sonia Mathur, Advs.

versus

M/S NHK JAPAN BROADCASTING COR ..... Respondent
Through Mr. M.S.Syali, Sr.Adv. with Mr.Satish Khosla & Mr.M.K.Gir Advs.

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE BADAR DURREZ AHMED

ORDER

% **15.07.2005**

For orders see ITA No.360/2005.

T.S. THAKUR, J.

BADAR DURREZ AHMED, J.

July 15, 2005,
ss

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITAs No.360-368/2005

THE COMMISSIONER OF INCOME TAX ..... Appellant.
Through Mr. R.D. Jolly with Ms.Sonia Mathur, Advs.

versus

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HON'BLE MR. JUSTICE T.S. THAKUR
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ORDER

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The only question that fell for consideration before the Income-tax Appellate Tribunal was whether there was reasonable cause for not deducting tax at source under Section 192 of the Income-tax Act, 1961 (for short 'the Act') in respect of the retention money paid outside the country to the Japanese expatriates working in India. The Tribunal upon consideration of the circumstances recorded a finding of fact that there was reasonable cause for not making the deduction and, accordingly, cancelled the penalty levied upon the assessee under Section

271C of the Act. In doing so, the Tribunal also placed reliance upon the orders passed by it in the cases of M/s.Mitsui & Co. Ltd., M/s. Marubeni Corporation & M/s.Fuji Bank Ltd., which orders had been upheld even by this Court in appeal. This is evident from the following paragraph appearing in the Tribunal's order:

> "However, the appeals of the assessee for all these years including AY 89-90 deserve to succeed on the reasoning that there was reasonable cause for not deducting the tax at source in view of the sec. 192 in time. In such circumstances, the penalty is not leviable on the ground that there was a reasonable cause in view of the provisions of sec 273B has been considered by the various benches of the Tribunal already. In the case of Mitsui & Co. Ltd., in the case of Marubeni Corporation and in the case of Fuji Bank Ltd., the penalty was levied on identical facts. The matter came before the Tribunal and the Tribunal after discussing the issues at great length held that there was no malafide intention on the part of the respective parties for not deducting the tax at source in time. These orders of the Tribunal have been affirmed by the Hon'ble Delhi High Court." (Emphasis supplied)

The present batch of appeals assails the above finding of the Tribunal. Mr.Jolly, learned counsel for the Revenue, argued that while the Tribunal had held that the facts and circumstances of these cases were similar to those of the three cases referred to by the Tribunal, there was in fact no such

similarity. He contended that the Tribunal was duty bound to enumerate the circumstances before recording a finding that the same constituted a reasonable cause for not making the deductions.

We have given our anxious consideration to the submissions of Mr Jolly but find it difficult to accept the same. We say so for two precise reasons. In the first place, the question whether there was any reasonable cause for not making a deduction is a question of fact as held by a Division Bench of this Court in Commissioner of Income-tax Vs. Itochu Corporation, **(2004) 268 ITR 172**. This Court had in that case further held that a finding recorded by the Tribunal on the question of reasonableness of the cause could not give rise to a substantial question of law. This is evident from the following passage from the said decision:

> "The Division Bench again reiterated what constitutes "reasonable cause" in the case of *Woodward Governor India (P.) Ltd. Vs. CIT* 253 ITR 745 (Delhi). In view of what is stated hereinabove, we are of the view that the issue, whether there was reasonable cause or not for the assessee not to deduct tax at source is a question of fact which has been determined by the Tribunal. As such, no substantial question of law arises." (Emphasis supplied)

In the second place, the question whether the facts of the three cases decided earlier were similar to those of the present case does not appear to have been seriously disputed before the Tribunal. A careful reading of the Tribunal's order would show that the similarity to the facts of the said three cases was one of the main contentions advanced on behalf of the assessee. The Revenue did not dispute that the circumstances in which deductions were not made in the said cases were similar to those in the instant case. But assuming that the Revenue wished to point out any dissimilarity in the facts to escape a similar conclusion, the least it was expected to do was to enumerate the so called dissimilarities. This, the Revenue has not done either in the memo of appeal or even before us during the course of the hearing. That apart the question considered by the Tribunal and by this Court in the cases decided earlier precisely was whether failure to deduct tax at source on the retention money paid to the Japanese expatriates working in India was justified. The finding recorded in the said cases took into consideration the circumstances in which the failure had arisen and held that the same constituted a reasonable cause. The same question arises before us in these appeals. Here too the failure to deduct arose in relation to Japanese expatriates in

India, in circumstances which the Tribunal has held are similar to those in the said previous cases.

Mr Jolly all the same argued that there was a solitary distinction which made all the difference between the two sets of cases. He submitted that the assessee's representatives in India had addressed a letter to its own company in India stating that the company knew that a penalty could be imposed upon the company on account of non-deduction of tax at source. A similar argument was, it appears, advanced before the Tribunal also and has been dealt with by the Tribunal in para 13 in the following words:

> "From the details placed on record, we find even before the survey, the assessee was trying to solve the dispute and they were prepared a letter which was handed over on the date of survey to the official of the survey party. Therefore, it cannot be said that there was no bona fide intention on the part of the assessee. As from the facts and from the correspondence exchanged between the assessee and the other authorities, it is clear that the assessee was tried to solve the dispose amicably, therefore, it cannot be said that there was any malafide intention on the part of the assessee."

In the light of the above, there is no real basis for holding that the facts in the two sets of cases were dissimilar warranting a different view. No question of law much less a substantial question of law therefore arises for our consideration

to warrant admission of these appeals.

The appeals are, accordingly, dismissed.

T.S. THAKUR, J.

BADAR DURREZ AHMED, J.

July 15, 2005,
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