



Sr. No.	Date	Orders
		<p>• IN THE HIGH COURT OF DELHI AT NEW DELHI</p> <p>+ W.P.(C) 13295/2005</p> <p>SCHINDLER AUFZUGE UND FAHRTREP Petitioner Through Mr. Rakesh Munjal, Sr. Adv. with Ms. Surekha Raman, Adv.</p> <p>versus</p> <p>DIRECTOR OF INCOME TAX & ORS Respondents Through Mr. Sanjeev Sabharwal, Adv.</p> <p>CORAM: HON'BLE MR. JUSTICE T.S. THAKUR HON'BLE MR. JUSTICE BADAR DURREZ AHMED</p> <p><u>ORDER</u> 22.08.2005</p> <p>%</p> <p>Issue rule. Mr. Sanjeev Sabharwal accepts notice on behalf of the respondents and agrees to the disposal of the writ petition at this stage itself.</p> <p>The petitioner is aggrieved of two orders, one dated 16th January, 2003, passed by the Director of Income-tax, International Taxation and the other dated 28th January, 2004, passed by the Assistant Director of Income-tax, International Taxation. In so far as the order passed by the Director of Income-tax, International Taxation, is concerned, the same arises out of proceedings under Section 264 of the Income-tax Act, 1961 (for short "the Act") in a revision filed against the Assessing Officer's order dated 28th April, 2005. By the said order, the Assessing Officer had declined grant of a 'No Tax Certificate' under Section 197 of the Act. The Director of</p>

Ho



Sr. No.	Date	Orders
		<p>Income-tax, International Taxation, while overriding the said order, came to the conclusion that the liability of the petitioner to pay any tax under the Act would depend upon whether the petitioner-company is carrying on its business in India through a permanent establishment and whether any income is attributable to any such permanent establishment. Having said so, the Director observed that the question whether the petitioner has a permanent establishment in India had not been examined by the Assessing Officer. The Director, all the same, assumed that such a permanent establishment may be in existence in which event the income of the petitioner could be assessed at 3% of the contract receipt and a tax liability towards TDS fixed at 1.26% of the payments made under the contract. Aggrieved, the petitioner has assailed the said order, in the present petition, as noticed earlier.</p> <p>In the subsequent order passed by the Assistant Director of Income-tax, International Taxation under Section 197 of the Act, the order passed by the Director under Section 264 of the Act has been followed and the tax deduction at source @ 1.23% directed for the financial year 2003-04.</p> <p>Learned counsel for the petitioner argued that the Director of Income-tax was legally correct in holding that the petitioner's liability to pay Income-tax could arise only if it was carrying on its business through a permanent establishment and if any</p>



Sr. No.	Date	Orders
		<p>income was attributable to any such establishment. He submitted that the Director, having come to the clear conclusion that the Assessing Officer had not examined the issue of existence of a permanent establishment in India or the profits attributable to any such establishment, ought to have referred the matter back to the Assessing Officer with a direction to examine the said issue and pass a fresh order under Section 197. In as much as the Director had not followed that course of action and proceeded to allow the deduction at 1.26% on the assumption that there was such a permanent establishment, it had committed a mistake.</p> <p>He further argued that the determination of the question whether the petitioner-assessee had any permanent establishment in India would take a long time if the same was deferred till regular assessment proceedings were concluded. There was, according to the learned counsel, no difficulty in examining and determining the said issue in proceedings under Section 197 of the Act and passing an appropriate order if it was found that any such establishment was really in existence and any income was being earned by the petitioner out of the same. It was, in the premises, submitted that the matter could be sent back to the Assessing Officer with a direction to examine the same afresh and to pass appropriate orders in accordance with the law.</p> <p>Mr.Sabharwal. learned counsel for the Revenue. fairly</p>

ms

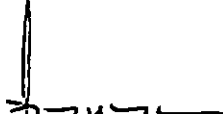



Sr. No.	Date	Orders
		<p>conceded that the legal proposition stated in the order passed by the Director of Income-tax was unexceptionable. He urged that the liability of the petitioner to pay Income-tax would arise only in case a permanent establishment exists in India and the petitioner was earning income out of the said establishment. That issue had not, according to learned counsel, been determined and could, therefore, be left to be determined in the regular assessment proceedings. At the same time, there was no difficulty in the determination of the said issue even at the stage of examining the prayer for a certificate under Section 197 of the Act. He, therefore, had no objection to the matter being remitted back to the Assessing Officer to pass a fresh order under Section 197 on the application filed by the petitioner.</p> <p>In the circumstances, therefore, we allow this petition and quash order dated 16th January, 2003, passed by the Director of Income-tax (International Taxation) to the extent the same directs deduction of Income-tax at source at the rate of 1.26% of the payments made under the contract. We further direct that the application filed by the petitioner for issue of a certificate under Section 197 shall stand remitted back to the Assessing Officer to pass a fresh order on the same, keeping in view the observations made in the order passed by the Director and the fact that the liability of the petitioner would arise only if there is a permanent establishment in India out of which the petitioner earns its income.</p>

Pro

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



Sr. No.	Date	Orders
		<p>Since the subsequent order passed by the Assistant Director of Income-tax (International Taxation) under Section 197 proceeds entirely on the basis of the Director's order dated 16th January, 2003, the same shall also stand quashed with the direction that the application filed by the petitioner for the said assessment year 2003-04 shall also be examined afresh in the light of the observations made hereinabove. No costs.</p> <p>The Assessing Officer shall expedite fresh orders on the applications and dispose the same as soon as possible within a period of two months from today. The petitioner to appear before the Assessing Officer on 31st August, 2005. Dasti.</p> <p style="text-align: right;"> T.S. THAKUR, J</p> <p style="text-align: right;"> BADAR DURREZ AHMED, J</p> <p>AUGUST 22, 2005 SS</p>