*IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 710-11/2006, 713/2006, 715/2006, 717/2006, 719/2006, 873/2006, 886/2006, 1033-39/2006, 1102/2006

COMMISSIONER OF INCOME TAX TDS ..... Appellant
Through Ms. Prem Lata Bansal, Sr. Standing Counsel with Mr. Vishnu Kumar & Ms. Sonia Mathur, Advs.

versus

ELI LILLY & CO.I.P.LTD. ..... Respondent
Through Mr. Salil Aggarwal with Mr. Prakash Kumar, Advs.

**CORAM:**
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE DR. JUSTICE S. MURALIDHAR

ORDER

% 08.11.2006

It appears that the Respondent, a joint venture Indian company formed by the collaboration between Eli Lilly, Netherlands B.V. and Ranbaxy Laboratories Limited, engaged the services of four expatriates in India. These four employees seconded by Eli Lilly, Netherlands B.V. were receiving salaries from the Respondent in India and,

admittedly, additionally from Eli Lilly outside India. So far as salary paid by the Respondent is concerned it had deducted Tax Deducted at Source (TDS) from the salaries payable by it to these four Executives and thereafter had duly deposited these amounts with the Department. It is not in dispute that the entire salary of these four employees was exigible to tax in India. The four employees have been assessed to tax and have paid tax on their global salaries also. Since they had not deposited Advance Tax, they appear to have also paid interest as per the Income Tax Act.

Learned counsel for the Revenue has vehemently argued that three of these employees were Managing Directors and the fourth was the General Manager of the Respondent Company. Therefore, the argument is that an assumption cannot be drawn that the Respondent Company was unaware of the salaries received by its four Executives abroad. Hence, she submits, the Respondent Company was duty-bound to deduct TDS not only in respect of the salaries payable by it to the said Executives, but also in respect of salaries receivable by these Executives from the

collaborating company viz. Eli Lilly, Netherlands B.V. .

In **Commissioner of *Income-Tax vs. Tej Quebecor Printing Ltd.***, [2006] 281 ITR 170 the Division Bench of this Court has opined that "the person making the payment can or is required to make a deduction towards tax at source only at the time of making such payment. The accrual of the payment and the actual act of making the payment must both exist in order that a deduction at source may be made. No deduction at source is contemplated under section 192 of the Income-tax Act, 1961, in cases where a payment towards salary has accrued but is not made". Our learned Brothers had further found the reasoning in ***Standard Triumph Motor Co. Ltd. vs. CIT***, [1993] 201 ITR 391 viz. that it was the responsibility of a company to deduct TDS since in that case royalties on all sales effected had been credited in favour of the foreign party could not be extrapolated into that case.

In other words, so far as the present case is concerned while some salary may have accrued to these four employees outside India, the vital incidence of the payment of the salaries to them abroad had not actually been made

by the Respondent Company. The question raised on behalf of the Revenue is, therefore, squarely covered by ***Tej Quebecor.***

In ***CIT vs. Sencma Sa, France,*** *[2006] 156 TAXMAN 403 (Delhi)* another Bench of this Court had given its imprimatur to the decision of the Tribunal which had deleted the penalty in a similar factual matrix, viz. failure to deduct tax at source in respect of employees working in India who were paid salaries in India as also in France. Our learned Brothers had held that since confusion was prevailing on this issue, imposition of a penalty was wholly misplaced. We would hasten to emphasise that a failure to deduct tax or to pay tax should not inexorably lead to initiation of penalty proceedings. Imposition of interest may be an adequate recompense.

It has further been contended by learned counsel for the Revenue that even mindful of the decision in ***Commissioner of Income-Tax vs. Prem Nath Motors (Pvt.) Ltd.,*** *[2002] 253 ITR 705,* since four employees have paid Income-tax on their foreign incomes also whilst tax

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cannot be recovered twice, i.e. from the individual as well as the company, nevertheless interest could be recoverable from the Respondent Company. We are unable to agree with this submission since it pre-supposes that an infraction of the law has been committed by the Respondent in not deducting tax at source. This argument has already been rejected by us. There is, therefore, no justification for claiming interest from the Respondent Company.

In the facts and circumstances, we hold that no substantial question of law has arisen for consideration in these Appeals. The fact that we have incidentally expressed an opinion on the issues raised before us would not justify this Order being treated as a precedent. The Order is restricted to the facts of these cases. The Appeals are dismissed with no order as to costs.

VIKRAMAJIT SEN, J

S. MURALIDHAR, J

NOVEMBER 08, 2006
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