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*IN THE HIGH COURT OF DELHI AT NEW DELHI

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+ ITA 669/2006

COMMISSIONER OF INCOME TAX TDS..... Appellant
Through Ms. P.L. Bansal with Mr. Vishnu Sharma, Advocate

versus

M/S CONTINENTAL CARRIERS P.LTD .... Respondent
Through Dr. Narayanan with Mr. Viraj Datar and Ms. Namrata, Advocates

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

ORDER

% **26.09.2006**

1. The Respondent/assessee is in the business of freight forwarding. During the course of a survey operation, it was found that the assessee has paid Ocean Freight & Inland Haulage Charges (IHC) for the financial year 2001-01 till 2003-2004. (31.10.2004). The assessee was asked the reasons for not deducting tax at source on the Ocean Freight and IHC in terms of Item No.(c) of Explanation III

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mandates that any person responsible for paying any sum to any "resident" for "carriage of goods and passengers by any mode of transport other than by railways" is liable to deduct tax at source. The assessee took the stand that the payments made were not amendable to tax deducted at source (TDS) in view of Circular No. 723 dated 19.9.19945 issued by the CBDT explaining the scope of Section 172 in the context of Section 194 C of the Act. Section 172 deals with the mode of levy and recovery of tax in the case of a non-resident ship owner and the recovery of the tax in that case is ship-wise and journey wise.

2. Thereafter, the assessing officer issued notice under Section 133 (6) of the Act to some of the payee companies to confirm if they were the agents of the non-resident shipping companies. On the basis of the information received, the assessing officer concluded that provisions of Section 172 of the Act would not apply to the payments of IHC. Further, it was held that since all the agents of non-resident shipping companies are resident companies, the provisions of Section 194 C were attracted. Accordingly,

in default' within the meaning of Section 201(1) of the Act as it had failed to deduct tax at source. The TDS liability on account of IHC and Ocean Freight together with interest thereon was assessed at Rs.7,78,273/-.

3. In the appeal filed by the assessee, the Commissioner of Income Tax (CIT) (Appeals) by an order dated 24.9.2004 held that even where the agent was a resident, he received payments on behalf of the non-resident shippers. Further it was held that IHC was also covered under Section 172 (8) of the Act and as such the assessee could not be made liable for TDS on such payments. The appeals of the respondent/ assessee were accordingly allowed.

4. The department's appeal to the ITAT was dismissed. It was noticed that the assessee had submitted a list of shipping lines along with the names of the agents and corresponding bills of lading to the assessing officer at the time of the survey itself. It was further held: "In case the

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shipping lines or agents thereof. Even if payments have been made to sub-agents in some cases, these are passed on to the agents, who file return under Section 172 in respect of such payments on behalf of the shipping lines. The finding of CIT (Appeal) is that confirmations have been filed from all the agents for filing of returns under Section 172. Thus finding has not been controverted by the learned DR by producing any other material."

5. Before us, Ms. Prem Lata Bansal, the learned counsel for the Appellant, points out that the assessing officer had not discarded the case of the assessee entirely. Wherever the assessee had submitted proof that the payee company was an agent of the non-resident shipping company, such payment was not considered for the purpose of TDS. In particular, she placed reliance on paras 16.2, 16.3 and 16.4 of the assessment order which read as under :

> "16.2 Thus, payments of Ocean Freight made to non-resident or agents thereof for shipping business of non-residents are covered under

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723, Going by the law, where ever the assessee has submitted the confirmation from the payee Companies to the effect that these (Payees) are the non resident Shipping Companies or the agents thereof, all such payment are excluded and not taken into consideration for the purpose of working out the default of the assessee company in not deducting tax at source under Section 194C.

16.3 However, in certain cases, the assessee have not been able to furnish any evidence to establish the payments of Ocean freight are made to non resident shipping companies or the agents therefore, on such payments the assessee was liable to deduct tax at source as all such payees have received the Ocean freight charges in their own rights and not as the agent of Non resident shipping companies.

16.4 The assessee company vide it reply dated 21.11.2003, had filed partywise details of Ocean freight along with certain letters from the shipping companies/agents thereof stating that the said companies are Non Resident Shipping Company or the agents thereof."

6. We are of the view that the question whether whether

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resident shipping companies is a question of fact, which has been decided against the Revenue concurrently by both the CIT (Appeals) as well as the ITAT. As already noticed, both the CIT (Appeals) as well as the ITAT have based their conclusions upon an appreciation of the evidence and held that in the facts and circumstances of the present case, the provisions of Section 194 C of the Act are not attracted.

7. We, accordingly, hold that no substantial question of law arises in this appeal. The appeal is, accordingly, dismissed.

VIKRAMAJIT SEN, J

S. MURALIDHAR, J

SEPTEMBER 26, 2006
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