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

% Date of decision : August 21, 2007

\+ **ITA No. 263 of 2007**

COMMISSIONER OF INCOME TAX XVI .... Appellant.
Through Ms. Rashmi Chopra, Advocate.

versus

MARUBENI INDIA P. LTD. ..... Respondent
Through Mr. M.S.Syali, Senior Advocate with
Mr.Saubhagya Aggarwal, Advocate.

AND

\+ **ITA No. 264 of 2007**

COMMISSIONER OF INCOME TAX XVI .... Appellant.
Through Ms. Rashmi Chopra, Advocate.

versus

MARUBENI INDIA P. LTD. ..... Respondent
Through Mr. M.S.Syali, Senior Advocate with
Mr.Saubhagya Aggarwal, Advocate.

CORAM:
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE DR. JUSTICE S.MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the order? ✓

2. To be referred to the reporter or not? ✓

3. Whether the order should be reported in the Digest? ✓

2006 passed by the Income Tax Appellate Tribunal ('Tribunal'), New Delhi in TDS No. 10 and 11/Del/2002 whereby the appeals filed by the Respondent Assessee were allowed and the order passed by the Commissioner of Income Tax (Appeals) ['CIT (A)'] for the assessment year 1999-2000 and 2000-01 levying interest under Section 201 (1A) of the Income Tax Act, 1961 ('Act') were set aside.

2. The Respondent Assessee, a private limited company incorporated in India, employs foreign nationals. The Respondent deducted tax on the salary paid to its employees and was depositing the same in accordance with the law. Some of the expatriate employees of the Respondent, who were also in receipt of income from certain foreign companies, informed the Respondent company of such receipts of income in the month of March of the relevant financial year (1999-2000) and requested that tax be deducted thereon. The Deputy Commissioner of Income Tax ('DCIT'), TDS Circle 23(1) by the order dated 16.11.2000 did not accept the explanation of the Respondent company for short deduction of TDS on the ground that in February, 1999 the company had made a TDS declaration of Rs. 8.09 crores towards additional tax and interest payable on overseas

calculated and paid interest under Section 201 (1A) for late deposit of tax for all those years. Accordingly, the DCIT opined that the company could not be excused for the year under consideration and levied interest under Section 201(1A) in the sum of Rs. 23,90,762 towards the short deduction of TDS at the average rate applicable under Section 192(1) of the Act.

3. In regard to the financial year 1999-2000, the explanation offered to the DCIT by the company was that it was deducting TDS from the monthly salary of the employees on an average rate and that the performance incentive in the sum of Rs. 1,75,06,959/- was paid to the employees only in the month of March 2000. Since the precise amount of incentive could not be gauged while estimating the salary income, there was a short deduction of the TDS. This explanation was not accepted by the DCIT on the ground that the expatriate employees were full-time employees of the company and were "rendering services only to the deductor company and no one else. Whatever salary they are getting in India or outside India is for the services to the deductor company itself or on its behalf." Accordingly interest in the sum of Rs. 12,87,078 on the short deduction of TDS was levied under Section 201 (1A) for the assessment year 2000-01.

the DCIT for the assessment year 1999-2000 and 2000-01 respectively, the Respondent company appealed to the CIT (A). By a common order dated 11.2.2002 the CIT (A) dismissed the appeals on the ground that the performance incentive was paid every year and was in the knowledge of the company. It was held that the TDS ought to have been deducted by the company on that basis.

5. The appeals filed thereafter by the Respondent company were allowed by the Tribunal by the impugned order dated 7.7.2006. The Tribunal held that the declaration made by the expatriate in respect of their income from overseas was voluntary and was furnished in terms of Rule 26 B of the Income Tax Rules, 1962 ('Rules') in form 12C to the Respondent company in the month of March. Accordingly it was held that the company was justified in not deducting tax in respect of other income which had not been declared earlier than March of the relevant financial year 1998-99. As regards the performance incentive, it was held that they were not in the form of contractual payments accruing to the employees every month and, therefore, the company could not be fastened with the vicarious liability of deducting tax on the basis of estimates. It was held that since the estimates

6. Appearing for the Revenue, Ms. Rashmi Chopra, learned senio standing counsel submitted that although the requirement of Section 192(1) of the Act was that TDS had to be deducted on the basis of estimates, the payment of performance incentive paid to the employees was a routine payment and, therefore, it could not be said that the exact amount payable as salary was not known by the Respondent company for the purposes of deducting TDS. As regards the financial year 1998-99 she referred to the findings in the order passed by the DCIT which had held that the expatriates were working exclusively with the Respondent company and with no one else. She submitted that since the company had itself paid interest on the short deduction of TDS for the period from 1988-89 to 1997-98 there was no reason for it to be subjected to a different treatment for the financial year in question. According to her the requirement of payment of interest on the short deduction was mandatory in terms of Section 201(1A) of the Act.

7. Appearing for the Assessee, Mr. M.S.Syali, learned senior Advocate submitted that as regards the financial year 1998-99, the information provided to the Respondent company by the expatriate employees under

rightly held that for the said financial year the Respondent could not be an Assessee in default. As regards the financial year 1999-2000 (Assessment Year 2000-01), Mr. Syali submitted that the Assessee was not in fact in default at all since there was no guarantee in terms of the contract with the employees for them to be paid the performance incentive year after year. The said payment was entirely linked to the results in a given year and it need not be paid at all if the performance in that year did not warrant such payment. Till the conclusion of the year, therefore, it would not be possible to determine the amount that would become payable as performance incentive. He pointed out that in terms of Section 192 (1), the deduction had to be "at the time of payment" of the salaries.

8. We are of the considered view that there is no merit in these appeals. The requirement of an employer to deduct TDS at the time of payment of salaries is spelt out in Section 192 (1) of the Act which reads as under:

> "192 (1). Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made on the estimated income of the assessee under this head for that financial year.

is required to be deducted would of the tax payable at the rates in force during that financial year "on the estimated income of the Assessee" under the head salary for that financial year. The provision therefore envisages that the employer would proceed to deduct TDS on the estimate income. Where an Assessee is employed simultaneously under more than one employer, he is required to furnish to the employer responsible for deducting tax at source "such details of the income under the head 'salaries' due or received by him from the other employer." Section 192(2) further mandates that once that information is furnished "the person responsible for making payment referred to above shall take into account the details so furnished for the purposes of making the deduction under Sub-section (1)." The Statutory Scheme therefore appears to be that where an Assessee has more than one more employer, the liability of the employer who is expected to deduct TDS in terms of Section 192(1) would get triggered after the employee furnishes such employer the details of the income due or received by him from the other employer.

10. In the instant case it is not in dispute that the Respondent company received the intimation from the expatriate employees as regards the

were working exclusively only for the Respondent company and no one else, does not mean that these employees did not receive payment from the other employer. In fact the DCIT himself acknowledges this position in the next sentence where he says "whatever salaries they are getting in India or outside India is for the services to deductor company itself on its behalf." What has, however, been missed by the DCIT is that the provisions to Section 192(2) of the Act are attracted in such a situation and the liability to deduct TDS in terms of Section 192(1) arises after the information is provided by the employee in terms of Section 192(2). Therefore, in the facts of the instant case, it cannot be said that the Respondent company was an Assessee in default for the financial year 1998-99. There is no infirmity in the decision of the Tribunal in this regard.

11. As regards the financial year 1999-2000, the counsel for the Respondent is right in contending that by its very description the performance incentive cannot be a fixed mandatory payment made year after year. Since it is dependent on the performance of the company in a given financial year, the payment of the incentive is not only uncertain but the amount is also likely to vary. Giving the requirement of Section 192

of the short deduction of the TDS from the salary of its employees to the extent the short deduction was relateable to the performance incentive. Therefore, it cannot be said that the Respondent company was in default due to short deduction of the corresponding TDS. On the facts of the instant case, Section 201 (1A) is not attracted. This is not a case of non-deduction of TDS but one of short deduction of TDS for bonafide reasons.

12. Therefore, we find no ground to interfere with the impugned order of the Tribunal. No substantial question of law arises. The appeals are accordingly dismissed.

S.MURALIDHAR, J

MADAN B. LOKUR, J

AUGUST 21, 2007
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