* **HIGH COURT OF DELHI : NEW DELHI**

\+ **ITA No. 1129 of 2005**

Judgment reserved on: March 20, 2008

% Judgment delivered on: March 25, 2008

Commissioner of Income Tax
Delhi – XVII
New Delhi …Appellant

Through Mr. R.D. Jolly, Advocate

Versus

M/s Mitsubishi Corporation
Vijaya, 2nd Floor
17, Barakhamba Road
New Delhi …Respondent

Through Mr. M.S. Syali, Sr. Advocate with
Ms. Mahua C. Kalra, Advocate

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, J.

The Revenue is aggrieved by an order dated 3rd May, 2005 passed by the Income Tax Appellate Tribunal, Delhi Bench 'G' in ITA No.5059, 5060 and 5061/Del/04 relevant for the financial years 1995-96 to 1997-98.

2. The Assessee is a non-resident company incorporated in Japan. It has a liaison office in Delhi which employs local staff as well as expatriate employees deputed from the parent company in Japan. In so far as the local staff is concerned, the Assessee deducts tax at source in respect of payment of salaries paid to them and there is no dispute in this regard. In so far as expatriate employees are concerned, they receive salary both in India as well as in Japan. In respect of the salary paid in India, the Assessee deducts tax at source. There was some dispute with regard to deduction of tax on the salaries paid and benefits given to the expatriate employees in Japan and also the method of calculation. This has also been resolved and we are not directly concerned with this, except to the extent of the fall-out of the resolution.

3. On 24th January, 1998, a survey under Section 133A of the Income Tax Act, 1961 (the Act) was carried out in the office premises of the Assessee in Delhi. As a result thereof, it was found that the Assessee was not deducting tax at source in respect of certain payments

made to the expatriate employees. The Assessee gave its explana but in any event, it suo motu agreed to pay taxes and interest thereon without any demand being raised by the Revenue.

4. In December, 1998 the Assessee paid to the Revenue an amount of Rs.52,79,76,749/- towards payment of tax and interest thereon for a period of ten years, that is, for the financial years 1988-89 to 1997-98. The dispute in the present appeal pertains only to the financial years 1995-96 to 1997-98. The Assessee gave its calculations for the year-wise appropriations.

5. Even after the payment was made, the Assessee was asked, from time to time, to file necessary details not only with regard to the payments made to the expatriate employees but also with regard to the computation. At one point of time, proceedings under Section 271-C of the Act were sought to be initiated against the Assessee for the purposes of levying penalty on account of short deduction of tax but these proceedings were dropped.

6. Be that as it may, by an order dated 30th March, 2000, the Deputy Commissioner of Income Tax (DCIT) worked out the liability of the Assessee for the ten financial years under Sections 201 and 201(1A) of the Act. The tax liability worked out by him was Rs.41,03,49,352/- and the interest liability was worked out at Rs.33,39,27,546/- making a

total of about Rs.75 crores. After adjusting the tax and interest already paid by the Assessee of Rs.52,79,76,749/-, the tax liability for the ten financial years was worked out at Rs.8,02,78,168/- and the interest liability was worked out at Rs.15,00,91,350/- making a total of roughly Rs.23 crores.

7. Feeling aggrieved by the order passed by the DCIT, the Assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [CIT (A)] who dismissed the appeal of the Assessee and upheld the liability.

8. The Assessee then preferred a second appeal before the Income Tax Appellate Tribunal (the Tribunal) which passed an order on 29th November, 2002. The Tribunal arrived at two important conclusions, namely, that the demand pertaining to the financial years 1988-89 to 1994-95 was barred by time having been made beyond a reasonable period of four years. This conclusion has since become final. The second important conclusion arrived at by the Tribunal was that the method of grossing up adopted by the Revenue was erroneous and, therefore, the tax and interest liability was required to be recomputed correctly and in accordance with law. Accordingly, the orders passed under Sections 201 and 201(1A) of the Act pertaining to the financial years 1988-89 to 1994-95 were held to be illegal and were quashed and

for the financial years 1995-96 to 1997-98, the matter was remitted to the file of the Assessing Officer for making a re-computation in accordance with law.

9. After the matter was remitted back to the file of the DCIT for re-computing the tax and interest liability, he held that the Assessee was liable to pay tax of Rs.11,30,99,420/- and interest of Rs.13,98,93,597/- for the three financial years. As regards the financial years 1988-89 to 1994-95, the Assessing Officer held that the Assessee was not entitled to any refund whether of principal or of interest for these years and, therefore, rejected the claim of the Assessee for refund. We are not concerned with the refund issue.

10. The Assessee then preferred an appeal before the CIT (A) which was dismissed by him by an order dated 27th August, 2004.

11. Feeling aggrieved, the Assessee then preferred an appeal before the Tribunal which was allowed by the order which is now under challenge under Section 260-A of the Act.

12. After noting the facts of the case, the Tribunal framed two questions for its consideration. These two questions read as follows:-

> "i) Whether the appellant is entitled to a refund of taxes and interest paid as a person responsible for deduction of [tax] on salary paid to his employees. This issue arises for consideration in FY 88-89 to 94-95.

> ii) Whether the demand for tax and interest Rs.25,29,93,017/- made for the FY 95-96 to 97-98 without giving credit to taxes and interest already paid for a sum of Rs. 14.88 crores, which is part of the sum of Rs.52.79 crores paid by the appellant and which was appropriated towards tax and interest due for FY 95-96 to 97-98 is proper. The second issue arises for consideration in FY 95-96 to 97-98 only."

13. In so far as the first question is concerned, the Tribunal declined to answer it since an identical question is already pending for determination in this Court.

14. In so far as the second question is concerned, the Tribunal decided the issue in favour of the Assessee and we agree with the views expressed by the Tribunal and are of the opinion that no substantial question of law arises for consideration in this regard.

15. What we are required to really consider is whether the Assessee is entitled to be given credit for the taxes and interest already paid, that is, Rs.14,88,61,518/- for the financial years 1995-96 to 1997-98. This amount is a part of the amount of Rs.52.79 crores paid by the Assessee in December, 1998. The additional demand made by the Revenue, as determined on re-computation by the Assessing Officer, was Rs.25,29,93,017/- and if the Assessee is given credit of the amount of Rs.14.88 crores already paid by it in December, 1998, its tax and interest liability would be reduced to that extent. This adjustment or credit has

been denied to the Assessee by the Assessing Officer and the CIT (A).

16. Before we deal with the merits of the case, we may mention a preliminary objection raised by learned counsel for the Revenue, which was also raised before the Tribunal. The objection is to the maintainability of the appeal before the Tribunal on the ground that the grounds of appeal have been signed by Mr. Hiroshi Yashino, General Manager of the New Delhi office of the Assessee. He had filed the appeal on the basis of a Power of Attorney dated 5th March, 2003 executed by the Assessee, represented for the purpose of the Power of Attorney by Mr. Hidetoshi Kamezaki, a representative Director and Executive Vice President of the Assessee. The Power of Attorney was duly notarised in Japan as per the Japanese law by the Ministry of Foreign Affairs. The Indian Consular in Tokyo had authenticated the signatures of the competent authority in the Ministry of Foreign Affairs in Japan.

17. The notarial certificate authenticating the Power of Attorney certifies that Mr. Kayoko Gingawa stated in his presence that Mr. Hidetoshi Kamezaki had signed the Power of Attorney. The objection raised is that Mr. Hidetoshi Kamezaki did not himself appear before the notary and, therefore, the Power of Attorney was not valid and consequently the authorization given to Mr. Hiroshi Yashino was also

not valid making the appeal filed by him incompetent.

18. We are not at all impressed by this preliminary objection for the reason that the Power of Attorney appears to have been executed in accordance with the laws of Japan and there is nothing to show that under the Japanese law Mr. Kayoko Gingawa could not have made the statement that he did or that it was absolutely necessary for Mr. Hidetoshi Kamezaki to be personally present before the notary. No such objection was raised by anybody before the Indian Consular in our Embassy in Tokyo, Japan and it is now too late for the Revenue to raise such an objection.

19. Apart from the above, we are of the opinion that whether the appeal was filed by a competent person or not, is a finding of fact arrived at by the Tribunal and we do not see any reason to disturb this finding unless it is perverse, in any manner, which it does not appear to be. We are, therefore, of the opinion that no substantial question of law has been made out in this regard by the Revenue.

20. In this context, we may refer to ***Madras Port Trust v. Hymanshu International, (1979) 4 SCC 176***. In that case, the Supreme Court made a very telling observation (though in the context of the rights of citizens), which we think is worth quoting *in extenso*:

> "The plea of limitation based on this section is one whic court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. **It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens.** Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well-founded, it has to be upheld by the court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority, unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become unavailable. Here, it is obvious that the claim of the respondent was a just claim supported as it was by the recommendation of the Assistant Collector of Customs and hence in the exercise of our discretion under Article 136 of the Constitution, we do not see any reason why we should proceed to hear this appeal and adjudicate upon the plea of the appellant based on Section 110 of the Madras Port Trust Act (II of 1905).
>
> We accordingly revoke the special leave granted to the appellant, and direct that the appellant do pay the cost of the respondents." (Emphasis given)

21. We are mentioning this decision only to bring home the fact that the State should not raise technical pleas for the sake of it and to defeat a just claim. In the present case, we feel that the Revenue has raised a plea of maintainability only to obfuscate the real issue and to deny to the Assessee what is legitimately due to it. This is unfortunate, but we leave it at that.

22. On the merits of the case, the Tribunal has noted that after the Assessing Officer re-computed the tax and interest at Rs.25,29,93,017/-

for the financial years 1995-96 to 1997-98, the Assessee was entitl be given credit for the amount that it had already paid towards tax and interest for these very financial years, the payment having been made in December, 1998. There is absolutely no reason why the Assessee cannot be given credit for the total payment made by it of Rs.14,88,61,518/-. There is no dispute that the Assessee had paid this amount towards tax and interest thereon. All that was required was for the Assessing Officer to make a simple adjustment of the amount paid against the amount due and re-calculate the tax liability of the Assessee. The Tribunal has noted that the CIT (A) rejected the plea of the Assessee for adjustment of the amount on three grounds. These have been summarized as follows:-

> "i) The appropriation made by the appellant in its letter dt 21.12.98 did not have any legal sanctity when it was found that the tax and interest paid were less than what was actually due to proceedings determining tax and interest u/s 201(1) and 201(1A) were initiated by the AO.
>
> ii) The payment of Rs.52.79 crores by the appellant in Dec 98 was an "on account payment" for a period of time and the appropriation of such payment in its order dt 30.3.200 shall be taken as satisfaction or applicant's liability in the chronological order of FY's involved viz 88-89 to 94-95.
>
> iii) The appropriation by the appellant, even assuming there was one, did no longer survive in view of the quashing of the order u/s 201(1) and 201(1A) dt 30.3.2000 for FY 88-89 to 94-95."

23. We are of the opinion that the view expressed by the CIT (A) hardly provides any basis for denying credit for tax and interest paid by the Assessee. The CIT (A) failed to appreciate that the appropriation made by the Assessee in December, 1998 was not disputed at any stage and it was now too late to dispute the manner of appropriation. Moreover, the CIT (A) needlessly mixed up the tax chargeable for the period 1988-89 to 1994-95, the demand for which was held to be barred by time by the Tribunal. The State cannot recover or hold back any tax except in accordance with law for otherwise it would be unjustly enriching itself, which is clearly impermissible. The Revenue having received and accepted the amount paid by the Assessee for the relevant financial years that we are concerned with, it was under an obligation to give credit to the Assessee for the payments already made or appropriated against those very financial years. Otherwise the liability of the Assessee would be unreasonably increased and the Assessee would be required to pay tax and interest twice over (or at least a part thereof) which is clearly unconscionable.

24. In our opinion, the Tribunal did not at all err in directing the Revenue to grant to the Assessee adjustment or credit of the amount of Rs.14,88,61,518/- already paid by it in December, 1998 towards tax and interest thereon for the financial years 1995-96 to 1997-98.

25. No substantial question of law arises for consideration. In of the decision of the Supreme Court in ***Madras Port Trust*** the appeal is dismissed with costs. Counsel's fee is assessed at Rs.10,000/-. The Revenue will deposit this amount in the registry of this Court by a crossed cheque drawn in favour of the Registrar General within four weeks from today.

26. List for compliance on 3rd May, 2008.

MADAN B. LOKUR, J

March 25, 2008 **V.B. GUPTA, J**
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Certified that the corrected copy of the judgment has been transmitted in the main Server.