* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 1308 of 2008
ITA No. 1103 of 2006
ITA No. 1285 of 2006
ITA No. 309 of 2007
ITA No. 217 of 2008

% *Decided on: December 16, 2009*

1. ITA No. 1308/2008

Commissioner of Income Tax . . . Appellant

through : Ms. Prem Lata Bansal with
Ms. Anshul Sharma, Advocates

VERSUS

Dr. Percy Batlivala . . . Respondent

through : NEMO.

2. ITA No. 1103/2006

Commissioner of Income Tax . . . Appellant

through : Ms. Prem Lata Bansal with
Ms. Anshul Sharma, Advocates

VERSUS

Mr. Subhash Yashwant Bal . . . Respondent

through : Mr. Pratyush Jain, Advocate

3. ITA No. 1285/2006

Commissioner of Income Tax . . . Appellant

through : Ms. Prem Lata Bansal with

4. ITA No. 309/2007

Commissioner of Income Tax . . . Appellant

through : Ms. Prem Lata Bansal with
Ms. Anshul Sharma, Advocates

VERSUS

Garima Eaton . . . Respondent

through : Mr. Dipeep Poolakkut, Advocate

5. ITA No. 217/2008

Commissioner of Income Tax . . . Appellant

through : Ms. Prem Lata Bansal with
Ms. Anshul Sharma, Advocates

VERSUS

Franciscus Martinus . . . Respondent

through : NEMO.

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. All these appeals raise common question of law. The assessees in all these appeals are foreign nationals who came to India for specific

nature of salaries earned by them, they filed their returns a taxes thereon as well. Dispute has arisen in respect of *'hypothetical tax'*, which term is used by the employer while fixing the salary of these assessees during their tenure in India. To demonstrate this, we take note of the nature in which salary of the assessee in ITA No. 1308/2008 was fixed by his employer.

2. The assessee Dr. Percy Batlivala is employed in the United States getting particular amount of salary from his employer. When he was to come to India on an arrangement with Indian company by his employer in US and the question of fixation of salary during the period of stay in India was discussed between the employer and employee, the employer assured that the net amount of salary to be received by the assessee, after payment of taxes, would be the same which the assessee was received in the US. The assessee was paying certain amount of tax in US on the salary earned by him there. The employer, after deducting that tax, calculated the net amount receivable by the assessee. Thereafter, it considered as to how much tax would be payable by the assessee on the income earned by him while his stay in India. Since the tax payable in India was lesser, difference in tax was assigned the terminology of *'hypothetical tax'* and that amount was not given to the assessee thereby assuring the net amount which the assessee was supposed to receive in US.

amount receivable by the assessee in US would be Rs.75/-. I suppose in India tax payable is Rs.15/-. Since, the assessee is assured net amount receivable in US, he would get Rs.75/- and the difference of Rs.10/- is treated as *'hypothetical tax'*.

4. The assessee claimed the deduction of this hypothetical tax, which was rejected by the Assessing Officer (AO). The ITAT has, however, allowed the same. From the example which we have given above, it is clear that insofar as the assessee is concerned, he had received only Rs.90/- (that is Rs.75/- + Rs.15/-; Rs.10/- was not received at all in view of the nature of arrangement between the employer and the employee). Therefore, there was no question of addition of this hypothetical tax to the income of the assessee and asking the assessee to pay tax thereupon. There is no dispute that the assessee has paid tax on the actual salary received by him in India. Thus, even on the application of first principle and adopting commonsense approach, it is clear that the addition made by the AO on account of so-called hypothetical tax was unsustainable and the ITAT rightly deleted the said addition observing as under :-

> "Tax equalization policy framed by the company provides that the company shall bear assessee's tax liability arising out of his foreign assignment. But company's liability will be restricted only to the extent of additional liability over and above that would have arisen had the assessee been in USA. Thus, if the assessee had no foreign assignment in India, for which he is to be compensated by net of tax salary. Total tax on salary comes to pay Rs.1500/- then as per Tax equalization Policy,

proper to pay that Rs.1500/- as tax but only Rs.1000/- accrued to the assessee as salary. Hence it was perfe justifiable to remove the element of Rs.500/- from the total income as it never accrued to the assessee. We are not concerned as to what the assessee does in the US according to tax laws there. Whether he takes the credit of Indian taxes there or not, as was suggested by the Ld DR. is not really our concern,. Our concern is whether he is paying the tax on income accruing and arising in India or not. In our opinion, the income arising in India in the present case is actual salary plus the incremental tax liability arising on account of Indian assignment. The question whether it is an application of income in quite redundant because Rs.500/- in the illustration above never accrued to the assessee. Thus in our considered opinion, assessee was justified in removing the element of hypothetical tax amounting to Rs.14,94,047/-."

5. No question of law, therefore, arises. We accordingly dismiss all these appeals.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

December 16, 2009
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