REPORTED

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

\+ **ITA No. 1329/2006**

Marubeni India Pvt. Ltd. .... Appellant
Through: Mr.M.S.Syali, Sr. Advocate, with Mr. Mayank Negi and Mr. Sumit Singh, Advocates.

versus

Commissioner of Income Tax ..... Respondent
Through: Mr. Sanjeev Sabharwal, Advocate.

and

\+ **ITA No. 1333/2008**

Marubeni Corporation ..... Appellant
Through: Mr.M.S.Syali, Sr. Advocate, with Mr. Mayank Negi and Mr. Sumit Singh, Advocates.

versus

Commissioner of Income Tax ..... Respondent
Through: Mr. Sanjeev Sabharwal, Advocate.

% Date of Reserve : August 05, 2010
Date of Decision : September 14, 2010

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

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

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

: REVA KHETRAPAL, J.

1. The appellant seeks adjudication of the following question of law in respect of the deduction of Rs.2,78,28,161/- paid by the appellant by way of incentives to its expatriate employees: -

> "Whether the Tribunal was right in law in holding that it did not have jurisdiction to direct that the amount be allowed in the year of payment, i.e., assessment year 1999-2000, while considering the appeals relating to the assessment years 1997-98 and 1998-99?"

2. The aforesaid question had arisen from the following facts. The assessee-company (the appellant herein) was incorporated as a private limited company on 21st May, 1996 as a wholly owned subsidiary of Marubeni Corporation of Japan. The main business of the assessee is international trading in various items such as textiles, chemicals, energy, metals, etc.. The appellant commenced business from 1st June, 1996, after taking over the assets and liabilities of the liaison office of Marubeni Corporation. The appellant also took over 18 employees of the Liaisoning Office on deputation basis. The employees were to continue in the dual employment of both the Japaneese company as well as the appellant. However, it was agreed that the salaries and perquisites of the said employees were to be paid by the Japaneese Company in Japan. For their services to the appellant, they were paid a comparatively small amount of salary and perquisites.

aforesaid employees by way of incentives, the taxes which they had to pay in India in respect of the salary and perquisites received by them from the Japanese Company outside India. The said taxes were to the tune of Rs.4,21,87,756 for the assessment year 1997-98 and Rs.2,78,28,161/- for the assessment year 1998-99. These amounts were claimed as deduction in computing the income for income tax purposes. The said deductions were not claimed in the original returns but were claimed in the revised returns. Further, the deductions were claimed in the profit and loss account relating to the year 1999-2000 [i.e. the year ending 31-03-1990] on payment basis, but the tax auditors of the appellant while preparing their report had disallowed the same on the ground that the payments related to the assessment year 1997-98 and 1998-99 and it was on this basis that the revised returns were filed for the aforesaid assessment years.

4. The Assessing Officer by his order dated 18th February, 2000 disallowed the claim on the ground that the copy of the Agreement with the employees had not been filed by the appellant; that liability to pay the amount was not ascertained; that the liability was a contingent liability both at the time of the closing of the accounts for the years under consideration and at the time of filing of the returns, as the payment was actually made in the financial year 1998-99, relating to the assessment year 1999-2000. The Assessing Officer also disallowed the

finalized and adopted by the Board of Directors and the shareholders, they could not be interfered with by the appellant after a lapse of three years.

5. The appellant preferred an appeal before the CIT (A). The CIT (A) held that the appellant did not make any payment of incentives to its employees in the relevant assessment years and what had actually happened was that the appellant had failed to deduct TDS on the salaries paid to its expatriate employees, despite the fact that Section 9 (1) (ii) specifically provided that any payment for the services rendered in India shall be regarded as income earned in India. In the financial year 1998-99 when the Department started enquiries in respect of some of the Japanese companies, to ascertain as to whether the TDS provisions were being complied with in regard to the payment of salaries/allowances, whether paid in India or abroad, the appellant-company discharged the liability of tax which it was required to deduct, and payment of tax was made to the Department under Section 201 of the Income Tax Act, 1961, which amount was sought to be disguised as payment of "incentive" to the staff while, in fact, it actually constituted discharge of statutory liability in terms of Section 201 of the Act. Relying upon the judgment of the Supreme Court in the case of ***Indian Aluminium Co. Ltd. vs. CIT, West Bengal-I, 79 ITR 514,*** the CIT (A) held that in the absence of any enforceable contractual liability, the amounts were not allowable as

deductions. In this view of the matter he dismissed the assessee's appeals on this point.

6. Aggrieved by the order of the CIT(A), the appellant-company approached the Income Tax Appellate Tribunal. Before the Tribunal, the appellant did not dispute that there was no contract in writing with the expatriate employees, but relying upon the judgment of the Hon'ble Supreme Court in ***CIT, Bombay North vs. Chandulal Keshavlal and Co. 38 ITR 601 (SC),*** the appellant sought to urge that there was no bar on the liability being undertaken in pursuance of an oral arrangement. The appellant contended that the said oral arrangement was the one under which the service of the employees were seconded by the Japanese company to the appellant-company, and it was in the appellant's own interest to pay the incentives and retain the services of the employees. The liability was not an unascertained liability as it had got crystallized the moment the assessee took in the 18 expatriate employees and there was nothing contingent about it. There was no survey in the appellant's case nor was any order passed against the appellant under Section 201(1) or (1A) in respect of the salary paid to the expatriate employees outside India by the Japanese Company. The amount of taxes paid by the appellant were thus paid voluntarily on the ground of commercial expediency. Reliance was placed in this context upon the judgment of this Court in ***CIT vs. Tej Quebecor Printing Ltd. 281 ITR 170***. It was

ending 31st March, 1999, the Department accepted the same and also dropped the penalty proceedings initiated under Section 271 (c) of the Act. The case of the appellant was that if the perquisites are part of the salary and if the salary relates to the assessment years 1997-98 and 1998-99, the perquisites are also allowable as deductions in those years and to hold otherwise would lead to incongruity. The alternative prayer of the appellant was that in case the amounts were not found in law to be allowable for the years under appeal, directions should be issued by the Tribunal that they should be allowed in the year of payment, namely, the assessment year 1999-2000.

7. After hearing the parties, the Tribunal concluded that the appellant-company was under no contractual liability to pay the amount and as such the amounts could not be claimed as deductions for the assessment years under appeal. The Tribunal upheld the order of the CIT(A) on the ground that it was difficult to believe that there was no formal written agreement as alleged by the appellant-company. It further held that it was difficult to lay down that the appellant-company, well advised in its income tax matters, would not claim the liability as deductions under the return for the years filed originally, since the amounts were quite substantial. From the evidence on record, the Tribunal concluded that the assessee had been compelled to pay the tax in respect of the salaries of the employees received by them from the

company to settle the matter with the Income Tax Department. In the context of the submission of the appellant that the amount had been paid on the ground of commercial expediency, the Tribunal observed as follows: -

> "12. That takes us to the question whether the amounts can be allowed on grounds of commercial expediency. We do not see how they can be so allowed. A sum of money expended not out of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purpose of the company's business. The argument based on the principle of commercial expediency does not, however, accord with the facts of the case. We have already seen that there was no contractual liability undertaken by the assessee at the time when the services of the employees were seconded to it by the Japanese company to pay the tax in question as incentive to them and as part of their salary payable by the assessee company. If such a liability had been undertaken, it was not necessary for the assessee to put forth its claim on the principle of commercial expediency at all. The company cannot, at the same time, say that there was a contract – oral arrangement – with the employees to pay the taxes and, at the same time, contend that the taxes were paid not under any oral arrangement but voluntarily on grounds of commercial expediency and indirectly to facilitate the carrying on of the business. **The argument based on the principle of commercial expediency is in any case available to the assessee only in the year of payment i.e. AY 1999-2000. It is only in**

> **this argument is open to the assessee to be raised only in that year. We, therefore, do not see how the amounts can be allowed as a deduction on the principle of commercial expediency for the years under consideration. Actually Mr.Kapila, perhaps realizing this difficulty, prayed only for a direction to be issued that the amounts should be allowed as a deduction in the AY 1999-2000. That year is not before us and therefore, we are unable to accede to the prayer**.
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> (Emphasis supplied)
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> 13. For the aforesaid reasons, we are unable to allow the amount of taxes paid by the assessee as incentive, as a deduction in the assessment years 1997-98 and 98-99."

8. It is in the aforesaid backdrop that this Court has been called upon to decide whether the Tribunal did not have the jurisdiction to direct that the deductions be allowed in the year of payment i.e. the assessment year 1999-2000. Mr. M.S. Syali, the learned Senior Counsel appearing on behalf of the appellant, relied upon a number of decisions to submit that the powers of the Tribunal in dealing with appeals are expressed in the widest possible terms, and it was open to the Tribunal to render a finding that the deduction sought for by the appellant, though not admissible for the assessment years 1997-98 and 1998-99, could be granted for the assessment year 1999-2000. More so, when the Tribunal had clearly opined that the said amounts could not be allowed as deduction on the

actually paid, i.e. in the assessment year 1999-2000. The following are the decisions referred to on behalf of the appellant:

1. ***Commissioner of Income Tax vs. Ajay Forgings (P.) Ltd.*** ***257 ITR 572;***

2. ***Commissioner of Income Tax vs. Chackola Spinning and Weaving Mills Ltd.*** ***188 ITR 532;***

3. ***Motilal Bawalal vs. Commissioner of Income Tax, Bombay City I (1963)50 ITR 249;***

4. ***Income Tax Officer, A-Ward, Sitapur vs. Muralidhar Bhagwan Das*** ***(1964) 52 ITR 335;***

5. ***Commissioner of Income Tax, New Delhi (Central) vs. Edward Keventer (Successors) P. Ltd*** ***(1980) 123 ITR 200;***

6. ***Rajinder Nath vs. Commissioner of Income Tax, Delhi*** ***(1979) 120 ITR 14*** and

7. ***M Corp Global P. Ltd. vs. Commissioner of Income-Tax*** ***(2009) 309 ITR 434 (SC).***

9. In the case of ***Chackola Spinning and Weaving Mills Ltd.*** (supra), while dealing with the question whether the Tribunal was justified in law in directing that a payment would be an admissible deduction in the assessment year 1981-82 in an order relating to the assessment year 1980-81, it was held by the Court as follows:

> "We answer question no. 2 to this effect:

the observation that the payment will be deductable for the assessment year 1981-82, while disposing of the appeal for the assessment year 1980-81, was only an incidental one; such a matter never arose for consideration. The observation was unauthorized and uncalled for. It is true that there is no finding in the strict sense. Even so, the observation aforesaid is illegal and unjustified. We are fortified in this view by the following among other decisions: ***ITO vs. Muralidhar Bhagwan Das*** ***(1964) 52 ITR 335 (SC)***; ***P.J. Udani vs. Commissioner of Income Tax*** ***(1967) 63 ITR 766 (A.P.)*** and ***Bakshish Singh vs. ITO*** ***(1974) 93 ITR 178 (Calcutta)***. In this connection, it should be remembered that the Tribunal was disposing of the appeal filed by the Revenue before it for the year 1980-81 and not an appeal filed by the assessee. And there is no material or even a whisper to show that an alternate plea or approach was mooted by the assessee for the claim made by it when the Tribunal adjudicated the appeal, namely, that the amount is claimable for the subsequent year 1981-82 and that the alternate plea necessitated the observations made, in which case, the ratio of the decision in ***Motilal Bawalal vs. CIT*** ***[1963] 50 ITR 249 (Bom.)*** may call for application. Such is not the case here.

The reference is answered as above."

10. The Bombay High Court in the aforesaid case, i.e., ***Motilal Bawalal (supra)*** was dealing with a case the facts of which were as follows: For the assessment year 1945-46, certain cash credits in the assessee's account books in March 1944, and certain amounts with which an account was opened in that month in the name of the assessee's wife, in all amounting to Rs.84,000/-, were assessed to tax as income from undisclosed source after rejecting the assessee's explanation. In his appeal to the Appellate Tribunal, the assessee, *inter alia*, took the plea that if the amount was found liable to be taxed then the appropriate assessment year, was not the assessment year 1945-46, but the assessment year 1944-45. Accepting the appeal, the Appellate Tribunal held that although the assessee had failed to account for the sources of the amount, it could not be brought to tax as the income for the assessment year 1945-46 but ought to be brought to tax as income for the assessment year 1944-45, and observed that if so advised the income tax officer might take suitable action for the assessment year 1944-45. On further appeal, a Division Bench of the jurisdictional High Court held that, in view of the contention raised by the assessee, the Tribunal was justified in proceeding to decide in respect of which assessment year the amounts should be assessed and the Tribunal was justified in making the observations in its appellate order. It further held that if a court or a Tribunal chooses to decide all the issues arising in the case before it,

it cannot be said that the court was not justified in deciding all the issues; nor can it be said that in deciding all the issues the court had acted without jurisdiction.

11. In the case of ***Ajay Forgings*** *(supra)*, also relied upon by the appellant, a Division Bench of the Calcutta High Court was dealing with a reference where the Tribunal had held that the date of receipt falls in the accounting year relevant for the assessment year 1986-87 and directed the Assessing officer to consider the claim of the assessee for the assessment year 1986-87. The Department submitted that as the Tribunal was considering the claim of the assessee for the assessment year 1985-86, it had no jurisdiction to give any direction to the Assessing Officer for quite another assessment year, viz., 1986-87. The Division Bench however held as follows: -

> "We find from the direction given by the Tribunal that it did not order the Assessing Officer to allow the claim in regard to the debit note for the assessment year 1986-87. It only directed the consideration of the matter by the Assessing Officer in that assessment year.
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> In view of the reasoning of the Tribunal's judgment given in regard to the debit note, two points clearly emerge: -
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> (i) That the debit note could not be claimed for the

(ii) that the debit note fell appropriately for consideration in the assessment year 1986-87, whether it be actually allowed in that year or not.

Saying both these things in the order of the Tribunal, it did nothing more than render completeness to its order. If nothing had been said about the falling of the debit note appropriately into the assessment year 1986-87, the result of the Tribunal's order would still be the same but it would be just a little more vague and just a little less certain.

We are of the opinion that no judicial authority exceeds its jurisdiction by merely clarifying and stating succinctly what its decision is, provided its decision is substantially within the jurisdiction.

The question is accordingly answered in favour of the assessee and in the negative."

12. A Division Bench of this Court in the case of ***Edward Keventer*** (supra), relied upon by the appellant, while dealing with the question whether the Tribunal was justified in coming to the conclusion that the Department was precluded from agitating the disallowance of Rs.2,77,691/- (though it had not filed any appeal against the same, in view of the fact that the net result of the decision of the Appellate

said interest was enhancement of Rs.6,36,309/-), held that the subject matter of the appeal should be understood not in a narrow and unrealistic manner, but should be so comprehended as to encompass the entire controversy between the parties which is sought to be adjudicated upon by the Tribunal. It further held as under:

> "But in a case where there are interconnected grounds of appeal and they have an impact on the same subject matter, the scope of the appeal should be broadly considered in the correct perspective. While the appellant should not be made to suffer and be deprived of the benefit given to him by the lower authority, where the other side has not appealed, equally the procedural rules should not be interpreted or applied so as to confer on an appellant a relief to which he cannot be entitled if the points decided in his favour on the same matter by the lower court are also considered as requested by the respondent."

13. Mr. Sanjeev Sabharwal, the learned counsel appearing on behalf of the Revenue, contended that the Tribunal would have no jurisdiction nor would the Tribunal be justified in giving directions in respect of a matter pertaining to an earlier or later assessment year. The words "pass such orders thereon" in Section 254 of the Income Tax Act, 1961 [Section 33(4) of the Income Tax Act, 1922], he contended, referred to

required to give directions in respect of a matter which did not constitute the subject-matter of the appeal. Though the powers of the Tribunal in dealing with an appeal are very wide, they are not absolute. Mr. Sabharwal, in this context, relied upon the decisions rendered in the case of :- ***Natwarlal and Co. vs. Commissioner of Income Tax, Bombay (1963) Vol. L, 783*** and in the case of ***Pokhraj Hirachand vs. Commissioner of Income Tax, Bombay City II, page293 (1963)Vol. XLIX 293.***

14. Before embarking upon the merits of the controversy, it is deemed expedient to refer to the provisions of Section 254 of the Income Tax Act, 1961 [Section 33(4) of the 1922 Act] which relate to the orders which may be passed by the Appellate Tribunal. The said Section reads as under : -

> ""***Orders of Appellate Tribunal***
>
> **254.** (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

15. Section 254 (1) thus provides that the Tribunal may, after hearing the parties on the appeal, '**pass such orders thereon**' as it thinks fit. Thus, on a plain reading of the relevant provision of law, the power to pass such orders as the Tribunal thinks fit can be exercised only in

does not form the subject matter of the appeal. The word '**thereon**' is particularly significant and has been interpreted by many High Courts and the Supreme Court to circumscribe the jurisdiction of the Tribunal to the subject matter of the appeal, which is constituted of the original grounds of appeal and such additional grounds as may be raised by the leave of the Tribunal.

16. A look now at the law laid down with regard to the scope and ambit of the powers exercisable by the Tribunal. More than four decades ago, a three-Judge Bench of the Supreme Court in ***Commissioner of Income Tax vs. Manick (1969) 74 ITR page 1 (SC),*** while delineating the powers of the Tribunal held, that the power conferred by Section 33(4) of the Act of 1922 (Section 254 of the new Act) is wide, "but it is still a judicial power which must be exercised in respect of the matters that arise in the appeal and according to law. The Tribunal in deciding an appeal before it must deal with the question of law and fact which arise out of the order of assessment made by the Income Tax Officer and the order of the Appellate Assistant Commissioner. It cannot assume powers which are inconsistent with the express provisions of the Act or its scheme." It held that the Tribunal had no jurisdiction in the appeal for the assessment year 1953-54 to reopen the assessment for the year 1952-53.

17. In ***Radhey Lal Mannilal vs. Commissioner of Income Tax, U.P. and V.P*** (***1960) 39 ITR 587***, a Division Bench of the Allahabad High Court was called upon to give its opinion on the following question:

> "Whether income received as compensation for closure of the rolling mill would be assessable in the year of assessment 1945-46, relevant to the accounting year during which the mills were closed down or would be assessable in the assessment year 1947-48, relevant to the accounting year in which the money was actually received?"

The Allahabad High Court, after observing that the Appellate order of the Tribunal out of which the reference arose was made in the proceedings for assessment for the assessment year 1945-46, held that the Tribunal in the appeal was, therefore, not called upon to pronounce at all as to whether this amount can be included in the assessment for the year 1947-48. In the circumstances, the Allahabad High Court held that they were not called upon to answer the second part of the question and a reference of that question to the Court was, therefore, "inappropriate".

18. In ***V.Ramaswamy Iyengar vs. Commissioner of Income Tax, Madras (1960) 40 ITR 377***, a Division Bench of the Madras High Court held that the jurisdiction of the Appellate Tribunal should, in the absence of express words in the statute, be governed and circumscribed by the subject-matter of the appeal - the subject-matter of the appeal being that

contained in the original grounds of appeal together with such other ground as may be raised by the assessee by leave of the Tribunal.

19. A Division Bench of the Bombay High Court in the case of ***Pokhraj Hirachand (supra)***, relied upon by the counsel for the Revenue, while dealing with an appeal where the only question raised by the assessee before the Tribunal was whether the payment made by the assessee was capital in nature or a revenue expenditure, held that the Tribunal acted without jurisdiction in *suo moto* going into the question of quantum of payment and varying the finding of the Appellate Assistant Commissioner on that issue. It was held that the expression "**thereon**" occurring in sub-section (4) of Section 33 means "**on the subject matter of the appeal before the Tribunal**." The Bombay High Court relied upon its earlier judgments rendered in ***Commissioner of Income Tax vs. Hazarimal Nagji & Co. (1962) 46 ITR 1162*** and ***J.B. Greaves vs. Commissioner of Income-tax (1963) 49 ITR 107.***

20. A Division Bench of the Gujarat High Court in the case of ***Natwarlal and Co. (supra)*** while dealing with the powers of the Appellate Tribunal to direct the Income Tax Officer to take action in respect of the earlier assessment years made the following pertinent observations:

> "The words "pass such orders thereon" refer to the order that may be passed in the appeal. The Tribunal cannot be required to give

subject-matter of the appeal. What the Tribunal in effect was asked to do was to give directions in respect of a matter pertaining to an earlier assessment year and to direct the income tax officer to take action in respect of the completed assessment for the previous assessment year. This, the Tribunal would have no jurisdiction to do and the Tribunal was justified in not acceding to the request of the assessee in this connection. Our answer to the question no.1 is in the affirmative."

21. From a conspectus of the above decisions, it is clear to us that the consensus of judicial opinion appears to be that the jurisdiction of the Appellate Tribunal is confined to the passing of orders on the subject matter of the appeal, that is, those orders which are necessary for the disposal of the appeal. The Tribunal cannot give a finding in respect of the assessment of an year which is not the subject matter of the appeal before it. The Tribunal, thus can give a finding that the deduction/income does not belong to the relevant assessment year/years, but though it may incidentally find that the deduction/income relates to another assessment year, it cannot give a finding that the deduction/income belongs to another specified year. There is, however, an exception to the general rule that the jurisdiction of the Tribunal is confined to the subject matter of the appeal. The exception is where an

case, the subject matter of the appeal constitutes the original grounds of appeal and such additional ground/grounds as may be raised with leave of the Tribunal.

23. In the instant case, a reading of paragraph 12 of the order of the Tribunal makes it abundantly clear that the Tribunal had permitted the assessee to raise the ground of commercial expediency as an alternate ground to the ground that it had made the payment to the expatriate employees on account of its contractual liability. The Tribunal however opined that the principle of commercial expediency was available to the assessee only in the year of payment, i.e. the assessment year 1999-2000. The Tribunal further opined that it is only in that year that the amount was actually paid without any pre-existing liability and therefore, this argument is open to the assessee to be raised only in that year. The Tribunal rightly did not accede to the prayer of the appellant for a direction to be issued that the amounts should be allowed as a deduction in the assessment year 1999-2000. In other words, from the reasoning of the Tribunal given in regard to the deductions in question it clearly emerges that the Tribunal was of the view that: -

(i) the deductions could not be claimed for the assessment years 1997-98 and 1998-99.

(ii) the deductions on the ground of commercial expediency could have been claimed by the appellant, if at aal, for the assessment

(iii) in that event, it was not open to the appellant to rely upon the alternate ground of oral contract.

24. We endorse the above view of the Tribunal. In our considered opinion, the Tribunal rightly did not accede to the appellant's prayer to allow the deductions for the assessment year 1999-2000. The Tribunal was considering the appeal relevant to the assessment years 1997-98 and 1998-99 for which years the appellant was claiming the deduction in question. In doing so, the Tribunal incidentally remarked that the argument of the appellant that it had made payment by way of incentive to its expatriate employees, though was not available to it in the assessment years under consideration of the Tribunal, may be available to it in the year of payment, that is, the assessment year 1999-2000. Such an incidental finding, without any detailed examination of the matter, in our view, rightly did not prompt the Tribunal to issue a direction that the same be allowed for the next assessment year, i.e. the assessment year 1999-2000. The Tribunal cannot be faulted for the same.

25. The appeal therefore fails and is dismissed. No costs.

REVA KHETRAPAL
(JUDGE)

A.K. SIKRI