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

\+ **ITA No.13 of 2008**

% Decision Delivered On: 13th September, 2010.

COMMISSIONER OF INCOME TAX, Delhi II . . . Appellant

through : Mr. Sanjeev Sabharwal, Advocate

VERSUS

KARL STORZ ENDOSCOPY INDIA (P) LTD. . . .Respondent

through: Mr. V.K. Sabharwal, Advocate

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

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. This appeal pertains to the Assessment Year 2001-02. The issue relates to the treatment which is to be given to the amount of ₹ 6,59,416 paid by the assessee to its parent foreign company, i.e., Karl Storz Vertriebs GMBH & Company. The assessee had claimed that the parent company had deputed one of the employees, viz., Mr. Peter Laser to the Indian Company/assessee and the aforesaid amount represented reimbursement of the salary, which was payable to Mr. Peter Laser. The Assessing Officer (AO), however, was of the opinion that since no agreement between the assessee

and the parent company was produced and even the agreeme between the parent company and its employees, Mr. Peter Laser on the basis of which he was purportedly deputed to the Indian Company was produced, this amount should be treated as payment towards technical fee.

2. The Income Tax Appellate Tribunal has, however, accepted the contention of the assessee treating the amount as reimbursement of salary of Mr. Peter Laser.

3. Learned counsel for the respondent-assessee has pointed out that this was not the first year in which such a claim was made. He stated that the Indian Company was incorporated during the Assessment Year 1998-99 and for the establishment of this company which is subsidiary to the aforesaid foreign company, Mr. Peter Laser was deputed, the amount paid from the Assessment Year 1998-99 onwards were always treated as salary and accepted as such. Learned counsel for the respondent has produced the copy of the orders dated 15.06.2005 passed by the ITAT, which relates to the Assessment Year 1998-99, i.e., the first year of the incorporation of the respondent-company. Perusal of this orders shows that this very issue is decided and the following findings were arrived at by the Tribunal holding that the aforesaid payment would be treated as salary to Mr. Peter Laser.

> "10. The foreign company had deputed one of its employees to look after the affairs of the Indian Company. The salary payable to this employee was to be borne by the foreign company. The Indian company was to reimburse this salary at cost, i.e. without any mark-up. Thus, it was merely the question of payment of salary to Mr. Peter Laser. There is no question of any technical fees being paid to the foreign company. Assuming for the sake of argument that it was in the nature of technical fees paid to the foreign company; then, as rightly pointed out by the learned counsel, Article 12.4 was applicable and not Article 13.4 as contended by the learned DR. Even if Article 12.4 was applicable, the said Article specifically excludes payments mentioned in Article 15. Article 15 states that salaries, wages and other similar remuneration derived by a resident of a Contracting State (Germany) in respect of an employment shall be taxable in the other Contracting State (Indian) only if the employment is exercised there. In other words, salaries paid to such personnel like Mr. Laser are taxable in India and they cannot be considered to be fees for technical services. Further, even as per Section 9 of the Act, the payment cannot be treated as fees for technical service. Explanation 2 to Section 9(1)(vii) gives the meaning of the expression "fees for technical services" as per which, *inter alia*, any consideration which would be income of the recipient chargeable under the head "salaries", then such payment will not be considered as fees for technical services. Thus, even as per the provisions of the Act, the payment in question cannot be treated as fees for technical services. Moreover, since it is paid as salary to Mr. Laser, tax has been deducted under Section 192 of the Act."

4. Learned counsel also submitted that thereafter in the Assessment Year 1999-00 as well as 2000-01, the amounts reimbursed in identical manner were treated as "salary" to Mr. Laser. He further states that no appeal was filed against the aforesaid order of the Tribunal by the Revenue.

5. In these circumstances, no substantial question of law arises. This appeal is dismissed accordingly.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

SEPTEMBER 13, 2010/pmc