



* **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 in respect of the deduction of Rs.2,78,28,161/- paid in the 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 said amount be allowed in the year of payment of the assessment year 1999-2000, while considering the appeals relating to the assessment year 1998-99?”

2. The aforesaid question had arisen from the fact that 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 appellant was international trading in various items such as textiles, metals, etc.. The appellant commenced business in India after taking over the assets and liabilities of the Marubeni Corporation. The appellant also took over the services of the Liaisoning Office on deputation basis. The appellant continued in the dual employment of both the Japanese and Indian employees as the appellant. However, it was agreed that the salaries of the said employees were to be paid by the Japanese parent company in Japan. For their services to the appellant, the appellant paid a comparatively small amount of salary and perquisites.

3. It is the case of the appellant that the appellant



aforesaid employees by way of incentives, the taxes which pay in India in respect of the salary and perquisites received from the Japanese Company outside India. The said taxes amount to 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 not shown in the profit and loss account relating to the year 1999-2000 [period 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 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 between the employees had not been filed by the appellant; that liability for the amount was not ascertained; that the liability was a contingent liability both at the time of the closing of the accounts for the year under consideration and at the time of filing of the return. It was also stated that payment was actually made in the financial year 1998-99, relevant to the assessment year 1999-2000. The Assessing Officer also disallowed the claim on the ground that the amount of the payments made to the employees was not ascertained.



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 appeals on this point.

6. Aggrieved by the order of the CIT(A) approached the Income Tax Appellate Tribunal the appellant did not dispute that there was no liability on the expatriate employees, but relying upon the Supreme Court in *CIT, Bombay North vs. C* *Co. 38 ITR 601 (SC)*, the appellant sought to on the liability being undertaken in pursuance of the contract. The appellant contended that the said oral agreement was entered into under which the service of the employees were provided to the company to the appellant-company, and it was in the interest to pay the incentives and retain the services of the employees. The liability was not an unascertained liability but a definite liability at the moment the assessee took in the 18 expatriate employees. There was nothing contingent about it. There was no appeal in this case nor was any order passed against the appellant-company or (1A) in respect of the salary paid to the expatriate employees in India by the Japanese Company. The amounts payable to the appellant were thus paid voluntarily on the basis of expediency. Reliance was placed in this context on the decision of this Court in *CIT vs. Tej Quebecor Printing*



ending 31st March, 1999, the Department accepted and dropped the penalty proceedings initiated under Section 201 of the Income Tax Act. The case of the appellant was that if the perquisites were allowed for the assessment year 1998-99, the perquisites are also allowable as deductions for the assessment year 1999-2000 and to hold otherwise would lead to incongruity. The case of the appellant was that in case the amounts were not allowed for the years under appeal, directions should be issued to the Tribunal that they should be allowed in the year of payment of 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 amounts and as such the amounts could not be claimed as deductions for the assessment years under appeal. The Tribunal upheld the order of CIT(A) on the ground that it was difficult to believe that there was a formal written agreement as alleged by the appellant. The Tribunal further held that it was difficult to lay down that the assessee, being well advised in its income tax matters, would not claim the deductions under the return for the years filed on which the amounts were quite substantial. From the evidence on record, the Tribunal concluded that the assessee had been competent to take the decision in respect of the salaries of the employees received



company to settle the matter with the Income Tax Department in the context of the submission of the appellant that the amount was paid on the ground of commercial expediency, the Tribunal held 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 allowed. A sum of money expended not out of necessity and with a view to a direct and indirect benefit to the trade, but voluntarily and out of commercial expediency and in order to facilitate the carrying on of the business, money expended wholly and exclusively for the purpose of the company's business. The argument that the principle of commercial expediency may, however, accord with the facts of the case. We have already seen that there was no commercial liability undertaken by the assessee at the time when the services of the employees were provided to it by the Japanese company to pay the taxes in question as incentive to them and as part of the salary payable by the assessee company. If a commercial liability had been undertaken, it was not for the assessee to put forth its claim on the principle of commercial expediency at the time the company cannot, at the same time, say that there was a contract – oral arrangement – between the employees to pay the taxes and, at the same time, contend that the taxes were paid not under the oral arrangement but voluntarily on grounds of commercial expediency and indirectly to facilitate the carrying on of the business. **The amount is not deductible based on the principle of commercial expediency in any case available to the assessee on the year of payment i.e. AY 1999-2000. It is not that year that the amount was actually**

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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.

(Emphasis supplied)

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 principle of commercial expediency for the years under consideration,



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 for the assessment year 1981-82, while disposing of the appeal for the assessment year 1980-81, was only an incidental observation. This matter never arose for consideration. The payment was unauthorized and uncalled for. It is true that the Tribunal acted in the strict sense. Even so, the observation is unjustified. We are fortified in this view by other decisions: *ITO vs. Muralidhar Bha* *ITR 335 (SC)*; *P.J. Udani vs. Commissi* *(1967) 63 ITR 766 (A.P.)* and *Bakshish Sing* *ITR 178 (Calcutta)*. In this connection, it should be noted that the Tribunal was disposing of the appeal against the assessment made before it for the year 1980-81 and not against the assessment of the assessee. And there is no material or even a suggestion that an alternate plea or approach was mooted by the assessee. The claim made by it when the Tribunal adjudicated was, namely, that the amount is claimable for the year 1981-82 and that the alternate plea necessitated by the facts made, in which case, the ratio of the decision in *vs. CIT [1963] 50 ITR 249 (Bom.)* may be applicable. Such is not the case here.

“The reference is answered as above.”



10. The Bombay High Court in the aforesaid case of *Bawalal (supra)* was dealing with a case the facts of which are as follows: For the assessment year 1945-46, certain cash and securities in the assessee's account books in March 1944, and certain bank deposits, 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 as income from undisclosed source after rejecting the assessee's explanation. On appeal to the Appellate Tribunal, the assessee, *inter alia*, contended that if the amount was found liable to be taxed then the 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 amount, it could not be brought to tax as the income of the assessment year 1945-46 but ought to be brought to tax as the income of the assessment year 1944-45, and observed that if so advised the assessing 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 High Court was justified in proceeding to decide in respect of which assessment year the amounts should be assessed and the Tribunal was justified in its observations in its appellate order. It further held that the Appellate Tribunal chooses to decide all the issues arising in the case.



it cannot be said that the court was not justified in deciding
nor can it be said that in deciding all the issues the court
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 cited
as a reference where the Tribunal had held that the date of filing of the
the accounting year relevant for the assessment year 1985-86.
directed the Assessing officer to consider the claim of the assessee for
the assessment year 1986-87. The Department submitted that since 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.
Division Bench however held as follows: -

“We find from the direction given by the Tribunal that the Assessing Officer
did not order the Assessing Officer to allow the debit note for the assessment year
regard to the debit note for the assessment year 1985-86. The Tribunal
only directed the consideration of the debit note by the Assessing Officer
Assessing Officer in that assessment year.

In view of the reasoning of the Tribunal, the Assessing Officer's direction
given in regard to the debit note, two points are raised:

(i) That the debit note could not be considered for the assessment year



- (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
 the subject-matter of the appeal. Though
 dealing with an appeal are very wide
 Sabharwal, in this context, relied upon the
 of :- *Natwarlal and Co. vs. Commissioner of Income Tax, Bombay*
(1963) Vol. L, 783 and in the case
Commissioner of Income Tax, Bombay
XLIX 293.

14. Before embarking upon the matter, it is deemed expedient to refer to the provisions of the Income Tax Act, 1961 [Section 33(4) of the 1922 Act] which may be passed by the Appellate Tribunal 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 as may seem fit.”

15. Section 254 (1) thus provides that the Appellate Tribunal may, after giving both the parties to the appeal, ‘**pass such orders**’ as may seem fit. Thus, on a plain reading of the relevant provisions, it is clear that the Appellate Tribunal may pass such orders as the Tribunal thinks fit in relation to the matters that arise in the



does not form the subject matter of the particularly significant and has been in and the Supreme Court to circumscribe the subject matter of the appeal, which grounds of appeal and such additional leave of the Tribunal.

16. A look now at the law laid down in the ambit of the powers exercisable by the Tribunal decades ago, a three-Judge Bench

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while delineating the powers of the Tribunal conferred by Section 33(4) of the Act of 1922 (the Act) is wide, “but it is still a judicial power in respect of the matters that arise in the appeal before the Tribunal in deciding an appeal before it on law and fact which arise out of the order of the Income Tax Officer and the order of the Commissioner. It cannot assume powers which are not expressly provided for in the express provisions of the Act or its schedule. It had no jurisdiction in the appeal for the Tribunal to reopen the assessment for the year 1952-



(7)

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 appeal and such additional ground/grounds as may be allowed by the Tribunal.

23. In the instant case, a reading of paragraph 12 of the Tribunal's order makes it abundantly clear that the Tribunal allowed the assessee to raise the ground of commercial expediency in place of the ground to the ground that it had made the payment to its employees on account of its contractual liability. The Tribunal further opined that the principle of commercial expediency applies 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 in which the amount was actually paid without any pre-existing liability that the argument is open to the assessee to be raised only in that year. The Tribunal rightly did not accede to the prayer of the assessee for a direction to be issued that the amounts should be allowed as deductions in the assessment year 1999-2000. In other words, the Tribunal's order of the Tribunal given in regard to the deductions in the assessment year 1999-2000 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 not have been claimed by the appellant, if at all.



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

24. We endorse the above view of the Tribunal. In its dissenting opinion, the Tribunal rightly did not accede to the appellant's request to allow the deductions for the assessment year 1999-2000. The Tribunal was considering the appeal relevant to the assessment year 1998-99 for which years the appellant was claiming the deductions in question. In doing so, the Tribunal incidentally found in favour of the argument of the appellant that it had made payments for the salaries of its expatriate employees, though such payments were not available for the assessment years under consideration of the Tribunal. The fact that it did so in the year of payment, that is, the assessment year 1998-99. Such an incidental finding, without any detailed analysis of the facts of the matter, in our view, rightly did not prompt the Tribunal to give the direction that the same be allowed for the next assessment year 1999-2000. The Tribunal cannot be taken to have done the same.

25. The appeal therefore fails and is dismissed. No order as to costs.