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

\+ **ITA No.326/2009**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. SNC Lavalin International Inc. ..... Respondent
Through: Mr. Ajay Aggarwal, Ms. Mallika Joshi, Mr. Amit Aggarwal and Mr. Rajan Narain, Advocates.

and

\+ **ITA No.529/2009**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. SNC Lavalin International Inc. ..... Respondent
Through: Mr. Ajay Aggarwal, Ms. Mallika Joshi, Mr. Amit Aggarwal and Mr. Rajan Narain, Advocates.

and

\+ **ITA No.1026/2009**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. SNC Lavalin International Inc. ..... Respondent
Through: Mr. Ajay Aggarwal, Ms. Mallika Joshi, Mr. Amit Aggarwal and Mr. Rajan Narain, Advocates.

and

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. SNC Lavalin International Inc. ..... Respondent
Through: Mr. Ajay Aggarwal, Ms. Mallika Joshi, Mr. Amit Aggarwal and Mr. Rajan Narain, Advocates.

% **DATE OF DECISION: September 22, 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?

J U D G M E N T (ORAL)
22.09.2010

: A.K.SIKRI, J.

1. Admit.

2. With the consent of the parties the matter is taken up for final hearing. Accordingly, we have heard the learned counsel for the parties.

3. The following two questions of law are proposed by the Revenue in this appeal:

> "1. Whether amount received by the assessee from providing services was taxable under 9(1) of the Income Tax Act or Articles 12 of the Indo-Canadian Treaty?
>
> 2. Whether the Income Tax Appellate Tribunal erred in

4. The issue relating to the payment of interest on advance tax under Section 234B of the Act has been decided by this Court in a recent judgment of this Court in ***ITA No. 491/2008*** and other connected matters ***dated 30th August, 2010*** entitled ***Director of Income Tax vs. M/s. Mitsubishi Corporation*** in favour of the assessee and against the Revenue and accordingly the question relating to chargeability of interest under Section 234B of the Income Tax Act, 1961 would not arise in view of our answer to the aforesaid question.

5. The brief facts in this case are that the assessee is a non-resident company engaged in the business of providing consultancy for infrastructure projects. It had entered into an agreement with National Highway Authority of India (NHAI) and under the said agreement the assessee was to provide technical drawings and reports to NHAI to enable them to use the said technology for its infrastructure projects, which was funded by the World Bank. The scope of the work was to carry out detailed project report as a consultant. The assessee had to investigate the availability and viability of various modern technologies to ensure most economical cost estimate without affecting the quality of work. The entire report was to be submitted for widening of NH-2 from Km 115 to 317, from existing two lanes and four lanes and for NH-5. The scope of services included preparation of the detailed project report,

existing carriage ways and required structures. It also included the study of environmental resettlement and rehabilitation needs as per the guidelines of the Government of India.

6. The assessee was receiving charging fees for providing the aforesaid services. The contention of the assessee was that the fee received from NHAI is to be treated as "fees for included services" as prescribed in Article 12(4) of the Double Taxation Avoidance Agreement (DTAA) between India and Canada. In terms of this Article, the tax chargeable is @15%. The Assessing Officer, however, was of the opinion that the fee charged for the aforesaid project did not include "fee for included services". He accordingly was of the opinion, that the income which was derived as fee for technical service was chargeable to tax as per the provisions of Section 9 (1) (vii) read with Section 115A of the Act. As per this Section, the tax chargeable is @ 20%. The Tribunal has, however, accepted the contention of the assessee and has held that the tax payable by the assessee on the aforesaid fee would be @ 15%.

7. The question, in these circumstances, that arises for consideration is as to whether the services provided by the assessee would be covered by sub-clause (4) of Article 12. This provision reads as under: -

> "4. For the purposes of this Article, 'fees for included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including

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(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) Make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or technical design."

8. It is not in dispute that the assessee has rendered technical or consultancy services. However, in order to get covered under this sub-clause, it is also to be proved, that the services were such which would fall under paragraph (a) and (b) in the said sub-clause. The case of the assessee was that it falls in paragraph (b). As per paragraph (b) of sub-clause (4), the services had to be of the following nature, namely, (i) making available technical knowledge, experience, skill, knowhow or processes or; (iii) services consisting of development and transfer of a technical plan or technical design. It cannot be disputed that these technical/consultancy services provided by the assessee falls under the second category, i.e., development and transfer of technical plan or technical design.

9. The submission of Mr. Sabharwal, the learned counsel appearing for the Revenue, however, is that paragraph (b) is not to be segregated in the manner indicated by us above. He submits that the opening words of this paragraph i.e. "make available" qualify the rest of the services which are stipulated therein. His submission, thus, is that unless the

available, the assessee would not be covered under sub-clause (4) of Article 12. In continuation, he argues that the two designs provided by the assessee were for the specific purpose namely, only the said project relating to NH-2 and NH-5 respectively and could not be made available for any other projects/purposes.

10. The aforesaid contention of Mr. Sabharwal cannot be accepted having regard to the language of paragraph (b). In fact, Mr. Sabharwal wants us to design paragraph (b) in the following manner (i) make available technical knowledge, experience, skill, knowhow or processes or consisting of development; and (ii) transfer of a technical plan or technical design. He thus, wants disjunction of the sentence with the word 'and' whereas according to us, after understanding it properly, it is inferred 'or' where the sentence would be disjuncted. If we read para (b) in the manner, Mr. Sabharwal wants us to read, then the words "consist of development" will have no meaning and would lead to ambiguity. Our interpretation is supported by the example given in the DTAA entered into by India and USA. Sub-clause (4) of Article 12 of the said Treaty is also identically worded. For better appreciation and understanding of the said clause, examples are also provided. Second example concerns paragraphs 4 (b) of Article 12. It *inter alia* states "as per this example, the difference in the two services which are stipulated in paragraph 4(b) are:

"either the development and transfer of technical plans or technical designs

or

making technology available as described in paragraph 4 (b)"

11. The Tribunal has relied upon the aforesaid Treaty in support of its conclusion and rightly said so. We, thus, held that the term 'transfer' as used in Article 12(4) does not refer to absolute transfer of right of ownership. It refers to transfer of technical drawings or designs by the resident of one State to the resident of the other State, which is to be used by or for the benefit of the resident of the other state. The said Article 12(4) (b) does not contemplate transfer of all rights totally or interest in such technical design or plan. Even where the technical design or plan is transferred for the purpose of mere use of such design or plan by the person of the other contracting State and for which payment is to be made, Article 12 (4) (b) would be attracted.

12. We, thus, answer the question in favour of the assessee and against the Revenue.

A.K. SIKRI
(JUDGE)

REVA KHETRAPAL
(JUDGE)