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% 10.03.2011

Present: Mr. Harish Salve, Sr. Advocate, Mr. S. Ganesh, Sr. Advocate with Ms. Anuradha Dutt, Ms. Ekta Kapil, Mr. Anish Kapur, Mr. Kuber Dewan, Ms. Preeti Yadav Mr. Pratyush Miglani, Advocates for the appellant/assessee.
Mr. Sanjeev Sabharwal, Sr. Standing Counsel for the respondent/Revenue.

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ITA 2029/2010
ITA 2030/2010
ITA 2031/2010
ITA 2040/2010
ITA 2041/2010
ITA 2042/2010
ITA 2043/2010

(COMMON ORDERS)

Admit on the following substantial question of law:-

> "Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the amount paid to the Appellant by its customers represented income by way of royalty as the said expression is defined in Explanation 2 to Section 9 (1) (vi) of the Income Tax Act?

With the consent of the learned counsel for the parties, these appeals are taken up for final disposal at this stage.

This very question had cropped up for consideration in the case of the appellant/assessee itself titled ***Asia Satellite Telecommunications Co. Ltd.*** Vs. ***Director of Income Tax,*** **[ITA 131/2003 & ITA 134/2003)** and has been decided in favour of the assessee vide judgment dated 31st January, 2011 wherein it is specifically held that the amount paid to the appellant by its customers

would not amount to the royalty as defined in Explanation 2 to Section 9 (1) (vi) of the Income Tax Act.

We may note that learned counsel for the Revenue had argued that there was an amendment to Section 9 of the Act by Finance Act, 2001 w.e.f. 1st April, 2002 vide which Clause (iva) has been added to Explanation 2 of the Act which reads as under:-

> "the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in Section 44BB".

Predicated on that, submission of Mr. Sanjeev Sabharwal, learned Counsel for the Revenue is that in so far as these appeals relating to the assessment years 2002-03 onwards are concerned, even mere use of any industrial, commercial or scientific equipment would be covered by the term "royalty".

Mr. Salve, learned Sr. Counsel appearing for the appellant has pointed out that the AO did not base his conclusion applying the aforesaid provision in the assessment order passed and this issue was never raised till the Income Tax Appellate Tribunal and because of this reason, there is no discussion on this aspect. He thus argued that in this Court, for the first time, the Revenue cannot raise this argument that the deduction could have been levied upon the assessee on the basis of the aforesaid clause. That apart, it is argued that even this aspect is covered by the aforesaid judgment dated 31st January, 2011 in the case of the assessee itself. He has drawn our attention to the detailed discussion contained in the said judgment wherein it is

specifically held that the assessee had not allowed its customers to use or give right to use the satellite or the process in the satellite. We find sufficient force in the argument of Mr. Salve on both the counts.

Following the aforesaid judgment, this issue is answered in favour of the assessee and against the Revenue. Accordingly orders of the Tribunal in respect of these assessment years are set aside and these appeals are allowed.

A.K. SIKRI, J.

M.L.MEHTA, J.

MARCH 10,2011
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