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

\+ **ITA No.487 of 2008 & ITA No.488 of 2008**

Reserved On: April 25, 2011
% Pronounced On: June 03, 2011.

1) ITA No.487 of 2008

MITSUBISHI CORPORATION . . . Appellant

VERSUS

THE COMMISSIONER OF INCOME TAX & ANR . . .Respondents

2) ITA No.488 of 2008

MITSUBISHI CORPORATION . . . Appellant

VERSUS

THE COMMISSIONER OF INCOME TAX & ANR . . .Respondents

Counsel for the Assessee: Mr. S. Ganesh, Sr. Advocate with Mr. Piyush Kaushik and Mr. Sanjay Kochhar, Advocates.

Counsel for the Revenue: Ms. Rashmi Chopra, Sr. Standing Counsel.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

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.

1. For orders, see ITA No.486 of 2008.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

JUNE 03, 2011.
pmc

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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?

Yes

A.K. SIKRI, J.

1. These three appeals preferred by the assessee pertain to the Assessment Years 1996-97, 1997-98 and 1998-99 involving common questions and emanate from common orders passed by the Income Tax Appellate Tribunal ('the Tribunal' for brevity). The common question of law which arises for consideration is as to whether the tax paid by the employer in respect of salary paid to the employees is "salary" under Rule 3 of the Income Tax Rules for the purpose of computing the value of perquisites in respect of rent free accommodation provided to the expatriate employees. However, another question touching the scope of powers of AO under Section 154 Income Tax Act (hereinafter referred to as 'the Act') also arises for consideration as, after the assessment, rectification order was passed by the Assessing Officer (AO) treating the aforesaid tax

paid by the employer as "salary" and legal validity of this rectification order was questioned by the assessee by filing appeal on the ground that there was no mistake "apparent from the records" which could give jurisdiction to the AO to pass the rectification order. The basic facts which are largely undisputed are as follows:

The assessee is a non-resident company incorporated in Japan. It has a liaison office at New Delhi. In this liaison office, Indian staff has been employed. In addition, however, Japanese expatriate staff (referred to as the 'rotating staff') was also deployed. These rotating staff, i.e., Japanese staff are the employees of the assessee company primarily working in Japan. However, during the relevant period, they were posted in India in the liaison office of the assessee in New Delhi. Certain salary allowances paid to the rotating staff in Japan were not taxed initially. An order under Section 201(1) and Section 201(1A) of the Act was passed on 30.03.2000 for the Financial Year 1988-89 to 1997-98. Thus, the original order dated 30.03.2000 was passed by the AO under Section 201(1) and 201(1A) of the Act. Vide this order, the AO created a demand on assessee on account of shortfall in tax and interest payment pertaining to

the salary payment to its expatriate employees. In computing the said shortfall on account of tax and interest on part of the assessee, the AO did not include tax payment by employer to exchequer on behalf of the employee as a part of salary for computing the value of rent free accommodation perquisite under the applicable Rule 3 of Income Tax Rules, 1962. The said order was contested by the assessee in appeal, which went upto the Tribunal. The Tribunal quashed the order of the AO for Financial Years 1995-96 to 1997-98 after grossing up income under Section 195A of the Act and directed the AO to recomput the tax liability for the said financial years.

2. An order giving effect to the Tribunal's direction was passed on 22.03.2004 in respect of Financial Years 1995-96 to 1997-98 with which we are concerned in these appeals. In the aforesaid order, as well as in the original order, the value of perquisite for each employee in respect of rent free accommodation was computed without including the element of tax perquisite in the gross salary.

3. A show cause notice was issued to the assessee requiring it to explain as to why the value of perquisite in respect of rent free

accommodation should not be recomputed after including the tax element in gross salary and therefore, order be rectified under Section 154 of the Act. The assessee was asked to file its submission by 29.03.2004.

4. The assessee filed its objection to the said show cause notice issued under Section 154 of the Act contending that this is not a mistake apparent from record. The AO did not find favour with this contention and rejected the same on the ground that "record consists of all the material facts and figures available; no fresh facts had been gathered; and the mistake related to determining the base figure for calculation of perquisites as per law". The AO referred to the judgment of this Court in the case of ***T.P.S. Scott and Ors. Vs. Commissioner of Income Tax*** **[232 ITR 475]**, wherein it was held that tax perquisite is the part of gross salary. On that basis, order dated 22.03.2004 was rectified by recomputing perquisites for rent free accommodation by including tax element in the gross salary.

5. The assessee preferred appeal thereagainst challenging the assumption of jurisdiction by the AO under Section 154 of the Act. The order was challenged on merits as well. After

considering the rival submissions before him, the CIT (A) pointed out that the definitions of both the terms "salary" and "perquisite" are inclusive in nature. Any monetary payment by whatever name called by an employer is a part of the salary. The tax paid by the employer is not included in the definition of perquisite. Therefore, by simple logic, tax being a monetary payment admittedly paid to meet the tax liability of the employees is a part of salary and cannot by any stretch of imagination be regarded as perquisite. He also referred to the submission made before him that the salary received abroad became taxable because of the deeming fiction and in absence thereof, the amount could not have been taxed in India. In this connection, it was pointed out that the submission is not only hypothetical but also bereft of any merit. The assessee never came clean on fact as to whether the payments made abroad were in respect of services rendered in India or outside India. Therefore, no legal fiction was involved when such payments were brought to tax in India. However, he granted part relief to the assessee in respect of computation of interest, by directing it to be made in accordance with the rates provided in the Act.

6. The assessee carried the matter further by filing appeals in respect of each of the assessment year before the Tribunal. The challenge laid before the Tribunal by the assessee was to the effect that the original order of the AO had merged with the order of the Tribunal to which effect was given on 22.03.2004. In view thereof, the AO did not have jurisdiction to rectify the order under Section 154 of the Act as such jurisdiction vested only in the Tribunal. The assessee specifically referred to Para 34 of the order dated 22.03.2004 passed by the Tribunal, wherein the Tribunal had dealt with arguments of the Revenue to the effect that the AO had failed to include the tax perquisite in computing the salary for the purpose of computing the value of rent free accommodation. It was argued that on this basis, submission was made by the Revenue for remanding the case back to the AO to recompute the perquisite in respect of rent free accommodation after including the tax in the salary. However, the Tribunal had not accepted this contention of the Revenue. Thus, the argument of the assessee was that when the Tribunal refused to accept the contention and it was not even the subject matter before the AO while giving appeal effect, the AO could not tinker with such an order passed much

thereafter that too invoking the powers under Section 154 of the Act.

7. The Tribunal has not accepted the aforesaid contention of the assessee. The order of the Tribunal would reveal that it has referred to the discussion contained in Para 34 of its earlier order dated 22.03.204 and on the basis thereof, it has concluded that no such issue was discussed earlier and the Tribunal had refused to go into this issue raised on an earlier occasion as it had no power to do so. Thus, when the Tribunal on an earlier occasion was sitting as Appellate Authority over the decision of the AO/CIT(A) and the question had not arisen for consideration at that time, the question of merger of the order of the AO into the order of the Tribunal did not arise. After repelling this preliminary objection of the assessee, the Tribunal went into the merits of the issue and concurred with the view taken by the AO as well as CIT (A).

8. Mr. Ganesh, learned Senior Counsel appearing for the appellant questioned the rationale behind the impugned order passed by the Tribunal making myriad submissions which can be compartmentalized as follows:

(i) The decision of the Tribunal in concluding that the issue involved viz. whether the tax payment by an employer is to be included in the gross salary for the purpose of computation of rent free accommodation perquisite can be a subject matter of proceedings under Section 154 of the Act (empowering the AO to rectify a 'patent mistake apparent from record') is utterly fallacious.

(ii) The decision of the Tribunal in concluding that the AO was competent to pass order under Section 154 of the Act even after giving appeal effect to the original order of the Tribunal dated 29.11.2002 on the premise that the rectification under Section 154 is with respect to the original order passed by the AO under Section 201(1)/201(1A) of the Act is grossly incorrect and against the settled principles of law.

(iii) The decision of the Tribunal in concluding on merits that the tax payment by an employer is to be included in the gross salary for the purpose of

computation of rent free accommodation perquisite is incorrect against the intention of law.

We will take note of the detailed submissions made on the aforesaid propositions while dealing with the same.

9. On the first proposition, advanced by the learned senior counsel for the appellant/assessee, it was argued that under Section 154 of the Act only a glaring or an obvious mistake of law can be rectified. If an issue requires investigation or an issue of law requires interpretation, that cannot be the subject matter of Section 154 proceedings. Reference to the judgments of the Supreme Court in the case of ***Balram (T.S.), ITO Vs. Volkart Brothers*** **[82 ITR 50 (SC)]** and ***Commissioner of Income Tax Vs. Hero Cycles Pvt. Ltd.*** **[228 ITR 463]** was made. In addition two judgments of this Court were also relied upon, viz., ***Commissioner of Income Tax Vs. Eurasia Publishing House (P.) Ltd.*** [232 ITR 381] and ***Commissioner of Income Tax Vs. Jindal Stainless Limited*** (in ITA No.1500 of 2010, decided on 06.10.2010).

10. It was pointed out that the issue as to whether the tax payment by an employer is to be included in gross salary for the purpose of computation of rent free accommodation perquisite had been admitted for adjudication as a 'substantial question of law' in various cases by this Court, which itself proves beyond doubt that the issue raised is debatable. The learned Senior counsel also referred to the decisions of various High Courts on the taxability on the inclusion of tax payment by the employer in the gross salary for the purpose of rent free accommodation perquisite. To bolster his submission that this also manifests that the issue involved was not free from doubt he has argued that varied opinions existed at the relevant time when proceedings under Section 154 of the Act were initiated by the AO. To this submission, Mr. Ganesh further added that in the instant case itself, the Tribunal by a process of 'interpretation', had come to the conclusion that tax payment by the employer was to be included in the salary for the computation of rent free accommodation perquisite. The very fact that the Tribunal had to undergo this laborious exercise militated against the stand of the Department that it was an apparent mistake which was sought to be rectified by the AO.

11. Ms. Rashmi Chopra, learned counsel appearing for the Revenue, countered the aforesaid submissions with the plea that in the first round of litigation when the Tribunal refused to consider such a submission of Departmental Representative on merit, it was because of the reason that no such question had arisen for consideration and the Tribunal, therefore, could not have dealt with the same. She argued that in these circumstances, in the impugned order passed by the Tribunal in which second round, it rightly held that the doctrine of merger would not apply and the question was still at large, which enabled the AO to invoke the provisions of Section 154 of the Act. She further submitted that the Tribunal rightly concluded in the instant case that the issue was not debatable and it was an apparent case of patent mistake of law and to rectify such a mistake, the AO was empowered by the provisions of Section 154 of the Act. She also referred to the judgment of Bombay High Court in the case of ***Emil Webber Vs. Commissioner of Income Tax*** **[200 ITR 483]** and also of this Court in ***T.P.S. Scoot and Others Vs. Commissioner of Income Tax*** [232 **ITR 475]** in support of the submission that tax perquisite is a part of gross salary. Her precise argument based on the aforesaid submission was that in the aforesaid judgments

including the judgment of the Supreme Court when it was clearly laid down that tax is a part of gross salary, there was no question of any doubt about the same and the legal mistake in this behalf is apparent.

12. We may first deal with the aspect as to whether it was open to the AO to pass such an order under Section 154 of the Act after giving appeal effect to the order passed by the Tribunal. As pointed out above, the proprietory of this step taken by the AO is questioned on the premise that the Departmental Representative had specifically argued this aspect in the quantum appeal on the first occasion, which was repelled by the Tribunal and therefore, the AO was precluded from venturing into the same field taking umbrage of Section 154 of the Act. The Tribunal has not accepted this preliminary submission of the assessee on the ground that the Tribunal had not adjudicated upon this issue at all and had brushed aside the arguments because of the simple reason that in those proceedings, this question had not arisen for consideration. The exact discussion of the Tribunal after quoting Para 34 of the order dated 22.03.2004 on this aspect runs as follows:

> "On reading this part of the order, we find that the Tribunal refused to go into the issue raised by the learned D.R. for the first time before it, which was to the effect that the tax should be included in salary for working out perquisite in respect of rent free accommodation, by pointing out that

> the Tribunal did not have power to enhance the assessment and if the argument is accepted, then the provisions of cross appeal and cross objection would become redundant. Since the Tribunal did not go into the question at all, there was no question of the merger of the order of the Assessing Officer into the order of the Tribunal in this regard. Thus, it was not a case of derivative jurisdiction of the A.O. and, therefore, the case relied upon by the learned counsel have no bearing on determining the matter. Further, sub-Section (4) of Section provides that where an amendment is sought to be made under this Section, the order shall be passed in writing by the Income Tax Authority concerned, which means that the author who passed order can amend the order provided the mistake sought to be rectified is a mistake apparent from record. The subject matter of rectification in this case was not the order of the Tribunal, which refused to go into the matter at all, but the original order of the Assessing Officer. We are of the view that the Assessing Officer was competent to pass such an order, as his order did not merge into the order of the Tribunal."

We are entirely in agreement with the aforesaid approach of the Tribunal.

13. Coming to the scope and ambit of Section of Section 154 of the Act, this provision has been interpreted by the Apex Court in number of judgments. Principle of law which has been authoritatively embedded in various judgments including the judgments cited by the counsel for both the parties is that a glaring or an obvious mistake of law can be rectified under Section 154 of the Act. Insofar as factual mistake is concerned, it should be apparent on the record and exercise requiring investigation to find the mistake of fact, impermissible as when

investigation is required to find mistake apparent on record. Likewise, the issue of law which can be rectified invoking the provisions of Section 154 of the Act should be an established principle of law. If such an issue requires interpretation, it cannot be the subject matter of Section 154 proceedings.

14. We are therefore, of the opinion that doctrine of merger would not apply. As held by this Court in ***Eurasia Publishing House (P.) Ltd. (supra)*** that the doctrine of merger is not a doctrine of rigid and universal application. Whether there is fusion or merger of the order of the inferior Tribunal into an order by a superior Tribunal shall have to be determined by finding out the subject matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute.

15. Next, it is to be examined as to whether in the instant case, the issue involved was debatable requiring interpretation of the relevant provisions? Law on this aspect has been settled by plethora of judgments. Such an issue came up before the Supreme Court in ***Emit Webber (supra)*** in the following terms:

"6. The facts found by the Tribunal thus show that the assessee-appellant was paid certain salary free of tax but that the tax payable in that behalf was to be and was in fact-paid by Ballarpur. The assessment was made upon the assessee directly. The question is whether the said tax component paid by Ballarpur can be included within the income of the assessee. The first contention of the learned Counsel for the assessee is that the amount paid by Ballarpur by way of tax cannot be treated as 'income' of assessee at all. His second contention is that the assessee did not receive the said amount and, therefore, it cannot constitute his income. Indeed, the learned Counsel sought to argue that Ballarpur was under no obligation to pay the said tax amount relating to the salary amount received by the assessee. We find it difficult to agree with the learned Counsel.

7. The definition of 'income' in clause (24) of Section 2 of the Act is an inclusive definition. It adds several artificial categories to the concept of income but on that account the expression 'income' does not loss its natural connotation. Indeed, it is repeatedly said that it is difficult to define the expression 'income' in precise terms. Anything which can properly be described as income is taxable under the Act unless, 'of course, it is exempted under one or the other provision of the Act. It is from the said angle that we have to examine whether the amount paid by Ballarpur by way of tax on the salary amount received by the assessee can be treated as the income of the assessee. It cannot be overlooked that the said amount is nothing but a tax upon the salary received by the assessee. By virtue of the obligation undertaken by Ballarpur to pay tax on the salary received by the assessee among others, it paid the said tax. The said payment is, therefore, for and on behalf of the assessee. It is not a gratuitous payment. But for the said agreement and but for the said payment, the said tax amount would have been liable to be paid by the assessee himself. He could not have received the salary which he did but for the said payment of tax. The obligation placed upon Ballarpur by virtue of Section 195 of the Income Tax Act cannot also be ignored in this context. It would be unrealistic to say that the said payment had no integral connection with the salary received by the assessee. We are, therefore, of the opinion that the High Court and the authorities under the Act were right in holding that the said

> tax amount is liable to be included in the income of the assessee during the said two assessment -years."

16. Even the Bombay High Court had occasion to deal with this issue in the case of ***Commissioner of Income Tax Vs. H.D. and Others*** **[135 ITR 1]**. Perusal of that judgment would show that two questions were referred to for the opinion of the High Court by the Tribunal and Question No.(1) was as under:

> "1. Whether, on the facts and in the circumstances of the case, the amount of tax borne by the employer, including tax on tax, on behalf of the employee, constitutes 'salary' as defined in explanation (2) to rule 3 of the I.T. Rules, 1962, for the purpose of determining the value of rent perquisite in terms of section 17 of the I.T. Act, 1961?"

17. The High Court took note of Sections 15 to 17 of the Act as well as Rule 3 of the Income Tax Rules and from the reading of these provisions, it concluded that definition of "salary" in Rule 3 is an inclusive one and therefore, it is not restricted to what is included in the said definition. The device of inclusive definition is employed by the Legislature with a view to enlarge the meaning of the ordinary words and hence the rule of interpretation of such definition adopted by the Courts is to read the word defined so as to enlarge its meaning and not to restrict it to the works included in its inclusive part unless the context otherwise requires. The interpretation sought to be

placed by the learned counsel for the assessee was not accepted giving the following reasons:

> "Firstly, we have already pointed out that the definition is inclusive and it is a well-settled rule of interpretation of inclusive definition that it is not controlled or confined to the words or expressions which are included in the said definition. On the contrary, it is intended to enlarge the scope of the concept which is sought to be defined. Secondly, the purpose of r. 3 is to lay down the mode of valuation of the perquisite for the purpose of computing the income chargeable under the head "Salaries" under s. 15 of the Act. The definition of the word "salary" given in s. 17, as the section itself shows, is for the purposes of ss. 15 and 16 of the Act. It is, therefore, legitimate to presume that the Legislature did not intend to give a different meaning to the word "salary" in r. 3 from that given in s. 17 of the Act. Therefore, the two definitions will have to be construed as co-extensive in their scope except so far as there is an express exclusion of some of the payments which otherwise go with the word "salary". Thirdly, the purpose of giving a separate definition of salary in r. 3 appears to be to exclude certain kinds of payments which are otherwise covered by the word "salary". This is obvious from the fact that the definition of salary given in the said rule excludes from its ambit only certain allowances, viz., dearness allowance or dearness pay, unless it enters into the computation of superannuation or retirement benefits of the employee; employer's contribution to the provident fund account of the assessee and allowances which are exempted from the payment of tax."

18. Even this jurisdictional High Court had considered the identical issue way back in the year 1998 in ***T.P.S. Scott (supra)***. In that case, the assessees were employees of the British Council which having functioned till 1992, merged thereafter in the British High Commission with effect from March 10, 1992. The relevant accounting period in respect of these assessee was 01.04.1991 to 09.03.1992. The tax liability of the asessees

referable to this period was paid by the British High Commission on 29.03.1992, in India. The assessees contended that the tax was paid by the British High Commission, which was not the employer of the assessees during the relevant accounting period and therefore the said payment made by the British High Commission could not be deemed to be a "perquisite" in terms of Section 17(2)(iv) of the Act and therefore, could not be included in the gross salary of the assessees. The assessees also contended that the salaries were paid in sterling in the United Kingdom and, therefore, there was no obligation on the British Council to deduct tax at source in respect of the salary payment made to these employees during the relevant period.

19. This contention of the assessee did not find favour with this Court. Following the judgment of Bombay High Court in ***H.D. Dennis (supra)*** and that of the Madras High Court in the case of ***Commissioner of Income Tax Vs. Mackintosh*** **[1975] 99 ITR 419**, the Court held that the income tax paid by the employer on behalf of the employee as a part of salary of the assessee in a word "salary" would be in its natural import comprehend within it taxes paid on behalf of the employees.

20. In view of the aforesaid clear dicta which cover the field, it is too naïve on the part of the assessee to argue that the issue was contentious or debatable in nature. By showing that the issue has been admitted adjudication as a substantial question of law in some appeals by this Court are pending in this Court, the assessee cannot come out of the clear mandate of the aforesaid judgments. The admission of certain appeals may be on the basis of certain facts appearing in those cases. Even otherwise, when we find that the issue which is involved in the instant appeals was the same on which the aforesaid pronouncements existed at the time when the AO invoked its powers under Section 154 of the Act. It can clearly be treated as mistake in law which has been corrected.

21. We also do not find any merit insofar as the arguments of the learned counsel for the assessee that in the impugned order the Tribunal arrived at the conclusion that the tax paid by the employer to be included in the salary for the computation of rent free accommodation perquisite by the process of interpretation and therefore, the matter was debatable. Obviously, when the assessee argued, on merits, that such a tax payment should not be treated as a part of salary for

computation for rent free accommodation perquisite, it became incumbent upon the Tribunal to deal with this argument and give its reasoning as to why such a contention of the assessee would not hold any water. However, at the end of it all, the conclusion is rested upon the aforesaid judgments in order to demonstrate that this was not a debatable issue, but had been conclusively determined by the Courts on earlier occasion. The focus of the Tribunal was as to whether the issue was debatable or not which was negatived in the following manner:

> "4. The question that concerns us now is whether the issue is debatable or it is a patent mistake of law. We find that the learned counsel for the assessee was able to quote only the case of A.M. Awasthy (supra) in support of his contention. The judgments in the case of C.W. Steel and H.D. Dennis (supra) were there before the Assessing Officer when he passed the original order. In view of the two decisions of Hon'ble High Courts, the order of the Tribunal will stand superseded. Further, the definition of the term "salary" in Rule 3 before 1.4.2001 makes it amply clear that there is no scope to exclude the tax from "salary" because it is pay and it is not specifically excluded by any of the exclusionary clauses mentioned therein. This becomes more clear when a conscious decision was made to amend the rule and a clause (d) was introduced for the purpose of excluding the value of perquisites specified in clause (2) of Section 17. To our mind, there is only one interpretation which can be placed on the term and the same is clear from its definition in Rule 3 as it existed for the relevant years. Therefore, the mistake was apparent from record and flows from the plain reading of Rule 3, Explanation-I."

22. The aforesaid discussion of ours takes care of proposition nos. 2 and 3 as well, finding the same devoid of any merit.

23. We are, therefore, of the opinion that it was a legal error apparent on record which could be corrected by the AO in exercise of his power under Section 154 of the Act. Accordingly, questions of law framed are answered in favour of the Revenue and against the assessee, as a result of which these appeals are dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

JUNE 03, 2011.
pmc