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

\+ **ITA 168 OF 2011**
ITA 169 OF 2011
ITA 188 OF 2011
ITA 189 OF 2011
ITA 190 OF 2011
ITA 186 OF 2011

% **JUDGMENT RESERVED ON: 19.04.2011**
JUDGMENT DELIVERED ON:11.5.2011

(1) **ITA 168 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT
Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT
Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(2) **ITA 169 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT
Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(3) **ITA 188 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT
Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(4) **ITA 189 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(5) **ITA 190 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(6) **ITA 186 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

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 164 of 2011.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MAY 11, 2011
skb

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA 164 OF 2011
ITA 168 OF 2011
ITA 169 OF 2011
ITA 188 OF 2011
ITA 189 OF 2011
ITA 190 OF 2011
ITA 186 OF 2011

% JUDGMENT RESERVED ON: 19.04.2011
JUDGMENT DELIVERED ON:11.5.2011

(1) **ITA 164 OF 2011**

COMMISSIONER OF INCOME TAX ... APPELLANT
Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT
Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(2) **ITA 168 OF 2011**

COMMISSIONER OF INCOME TAX ... APPELLANT
Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT
Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(3) **ITA 169 OF 2011**

COMMISSIONER OF INCOME TAX ... APPELLANT
Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(4) **ITA 188 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(5) **ITA 189 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(6) **ITA 190 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

(7) **ITA 186 OF 2011**

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra, Advocate.

VERSUS

NHK JAPAN BROADCASTING CORPORATION ..RESPONDENT

Through: Mr. Salil Kapoor, advocate with Mr. Sanat Kapoor, Advocate.

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. The respondent assessee which is a Public Broadcasting Company of Japan (and, therefore, naturally a Non-Resident Company) is treated as an assessee in default under the provisions of Section 201 and 201 (1) and 201 (1A) of the Income Tax Act (hereinafter referred to as 'the Act').

2. Before we spell out the exact nature of default attributed to the assessee, we deem it apposite to recount the facts in brief.

The respondent, NHK Japan is a government owned public broadcasting company of Japan having news bureaus in many countries including India. The respondent had deputed expatriate

employees from Japan for working in its office in India. The expatriates were receiving salary in India and a portion of salary and allowances in Japan. Under the law in Japan, citizens/nationals of Japan are liable to levy of an annual municipal Citizen Tax also referred to as Inhabitant tax which is charged on account of being an inhabitant of Japan. In case a Japanese citizen is rendering services in an employment in Japan or abroad on a transfer from Japan for which he receives any salary in Japan, the citizen tax for a year in which he was in Japan on the first day of January of that year is required to be withheld by his employer from such employee's salary income in Japan and paid directly to the concerned Municipality. NHK, was accordingly, withholding and paying over to the concerned municipal authority in Japan, the citizen's tax levied under the Japanese law, from the salaries payable by it in Japan to its expatriate employees assigned by it to its news bureau in India. The citizen tax withheld from the salaries in accordance with the law in Japan was claimed to be excludible and deductible in the computation of salary income of the employees liable to tax in India.

The AO passed order under Section 201 (1) and 201 (1A) of the Act on 16th December, 1999 for the Financial year 1988-89 to 1998-99. The AO did not accept the claims of deduction and

made additions by working out the difference of additional tax and interest taking into account (i) number of work days outside India (ii) Citizen tax and (iii) Housing norm.

On appeal before the Commissioner of Income Tax (Appeals) it was held that citizen tax is a statutory levy in Japan on Japanese citizens and that such tax constitutes an overriding charge on the salary income and therefore the same had to be excluded in computation of taxable income. On the issue of assessee being held to be in default u/s 201 (1) and 201 (1A) and housing norm deduction, the matter was decided against the assessee. The CIT (A) decided the appeals for 11 financial years i.e. FY 1988-89 to 1998-99 by way of a common order dated 30th March, 2001.

Against the order of CIT (A), 11 appeals were filed by the assessee before the ITAT on the grounds of assessee being in default, housing norm deduction and an additional ground regarding orders for FY 1988-89 to 1994-95 being barred by limitation. 11 appeals were filed by the Revenue before the ITAT on issue of citizen tax deduction. All appeals were decided by a common order dated 10th March, 2006. The appeals of the assessee were allowed and those of the Revenue were dismissed. Orders for FY 1988-89 to 1994-95 were held as invalid on the ground of limitation and for FY 1995-96 to 1998-99 assessee was

held not to be in default. The Tribunal upheld the Commissioner's order on citizen tax issue.

The Revenue filed 22 appeals in this Court against the above mentioned orders of the ITAT, which were all dismissed. This Court vide orders dated 30th March, 2007 in 11 appeals by the revenue on citizen tax issue dismissed the same basing its decision on the judgment of the Supreme Court in the case of *CIT* Vs. ***Sitaldas Tirathdas*** [1961] 41 ITR 367. Vide a separate orders dated 23rd April, 2008, other 11 appeals filed by the Revenue on the issue of order under Section 201 (1) and 201 (1A) were dismissed on the ground that action was barred by limitation. The Revenue went in appeal before the Supreme Court in two batches. In the 1st batch, it agitated the citizen tax issue and in the 2nd batch, it challenged the issue of limitation. The Supreme Court vide orders dated 16th March, 2008 in the 1st batch of appeals directed the Tribunal to consider the matter afresh in accordance with law as regard citizen tax issue. It would be pertinent to quote the exact direction given by the Supreme court in the aforesaid order as much turns on those directions:-

> "Without going into the merits of the case, suffice it to state that in the present case, in our view, the Commissioner (Appeals) ought to have examined the scope of the Japanese

law, namely, Citizens Individual Inhabitant Tax Act. In the letter of appointment issued, there is a reference to the words. The relevant Clause reads as under:

> "Tour emoluments shall be subject to deduction of taxes as per applicable laws and the tax liability on host country (India) shall be borne by NHK-JapanBroadcasting Corporation."

Analysing the said Clause one finds that the emoluments paid by the assessee was subject to deduction of tax as per applicable laws. Therefore, in our view, Commissioner (Appeals) ought to have examined the provisions of Citizens Individual Inhabitant Tax Act which is a Japanese law and it ought to have analysed the provisions of that law, particularly, when it was required to decide the question as to nature of the levy being an overriding charge on the salary income, as stated hereinabove. The controversy in the present case is that citizens tax is a statutory levy in Japan on the Japanese citizens constituting an overriding charge. If it is an overriding charge then of course the Commissioner (Appeals) was right in saying that it would not be an income. However, in our view, since the provisions of the Act have not been examined, the matter needs to be considered afresh by the Tribunal. Accordingly, we remit the matter to the Tribunal for fresh consideration in accordance with law. We express no opinion on the merits of the case."

It is clear from the above that the Supreme Court was of the view that issue at hand could not be decided without going into the specific provisions contained in Citizens Individual Inhabitant Tax Act (hereinafter referred to as 'the Citizens Tax Act') of Japan

and analyzing those provisions. Since the scope of aforesaid Japanese law was not examined, the Supreme Court remitted the case back to the Tribunal for fresh consideration "in accordance with law" and to ascertain from the provisions of the Citizens Tax Act as to whether the statutory levy in Japan constituted an overriding charge. The Supreme Court made it clear that if it was an overriding charge, then it would not be an income.

3. When the matter reached back to Tribunal, the parties were directed to place on record copy of the aforesaid Citizens Tax Act duly translated into English vide orders dated 16th March, 2009. The Counsel for the assessee filed the copy of the aforesaid Act alongwith its English translation but did not take the responsibility with respect to the authenticity of its English translation. In such a situation, the order dated 9th December, 2009 was passed by the Tribunal directing the Departmental Representative of the Revenue to place on record the copies of the provisions translated into English. Even after seeking adjournments, the Revenue failed to file the translated copy of the relevant provisions of the said Act. This posed a dilemma in the minds of the Tribunal. On the one hand, there was a direction given by the Supreme Court to decide the issue with reference to the provisions of the Citizens

Tax Act and on the other hand, the Tribunal felt helpless as it was unable to proceed unless the authenticated copy of the English translation version of the said Act was produced before it. The Tribunal was conscious of the directions given by the Supreme Court which is specifically taken note in para 8 of the impugned order. However, two reasons prevailed in the mind of the Tribunal which led to passing of the impugned order dismissing the appeal of the Revenue namely:

> (i) As already pointed out above, the department failed to place on record the English version of the Citizens Tax Act in the absence of which it became impossible for the Tribunal to decide the issue.
>
> (ii) Another aspect which heavily weigh with the Tribunal was the subsequent decision of the Supreme Court itself whereby it had upheld the quashing of the orders passed under Section 201 (1) and 201(1A) of the Act. From this, the Tribunal concluded that it would be a futile exercise to determine the issue namely whether the Citizens Tax Act had an overriding charge over the salary income of the assessee or not.

4. In so far as first reason given by the Tribunal is concerned, no doubt, the Tribunal felt helpless to determine the issue as per direction of the Supreme Court for no fault of its own. Normally, in such a situation, it could have asked the other party namely the assessee to approach the Supreme Court for variations of the

directions given by the Supreme Court in its order dated 16th March, 2009 inasmuch as, the Tribunal is bound to carry out such directions. However, if the second ground given by the Tribunal has merit, there may not be any fault with the impugned order passed by the Tribunal, therefore, we proceed to examine the veracity of the second ground taken by the Tribunal.

5. As pointed out above, there were two batches of appeals before the Supreme Court. 1st batch was concerned with the Citizens Tax Act in which directions dated 15th March, 2009 were passed by the Supreme Court, as noted above. The 2nd batch of appeals was concerned with the issue of limitation. As noted above, the orders in respect of financial year 1988-89 to 1994-95 were held to be invalid on the ground of limitation by the Tribunal which order was upheld by this Court and Special Leave Petition was filed against that order. This batch of appeals was still pending.

6. In the meantime, the question of non deduction of tax at source on overseas payments to expatriate employees came up for consideration before the Supreme Court in the case of ***Commissioner of Income Tax Vs.*** **Eli Lilly & Co. Pvt. Ltd.**

(2009) 312 ITR 22. These cases included the appeal pertaining to the present assessee also. When the 2nd batch of appeals came up for hearing before the Supreme Court, going by the aforesaid orders dated 25th March, 2009 in ***Eli Lilly & Co.*** (supra), the Supreme Court passed the following orders dated 20th January, 2010:-

> "Delay condoned.
>
> Leave granted.
>
> The following substantial question of law arises for consideration in this batch of civil appeals:-
>
> > "Whether the Income Tax Appellate Tribunal was correct in law in holding that the orders passed under Sections 201(1) and 201(1A) of the Income Tax Act, 1961 are invalid and barred by time having been passed beyond a reasonable period."
>
> Having heard learned counsel on both sides, we are of the view that, on the facts and circumstances of these cases, the question on the point of limitation formulated by the Income Tax Appellate Tribunal in the present cases need not be gone into for the simple reason that, at the relevant time, there was a debate on the question as to whether TDS was deductible under the Income Tax Act, 1961, on foreign salary payment as a component of the total salary paid to an expatriate working in India? This controversy came to an end vide judgment of this Court in the case of Commissioner of Income Tax Vs. Eli Lilly & Co. (India) Pvt. Ltd., reported in (2009) 312 ITR 2235. **The question on limitation has become academic in these cases because, even assuming that the Department is right on the**

> **issue of limitation still the question would arise whether on such debatable points, the assessee (s) could be declared as assessee9s) in default under Section 192 read with Section 201 of the Income Tax Act, 1961.** Further, we are informed that the assessee have paid the differential tax. They have paid the interest and they further undertake not to claim refund for the amounts paid. Before concluding, we may also state that, in Eli Lilly & Co. (India) Pvt. Ltd. (supra) vide paragraph 21 this Court has clarified that the law laid down in the said case was only applicable to the provisions of Section 192 of the Income Tax Act, 1961.
>
> Leaving the question of law open on limitation, these civil appeals filed by the Department are disposed of with no order as to costs."

It is thus clear that the same Bench of the Supreme Court which issued direction on 16th March, 2009 passed the aforesaid order making it emphatically clear that even the issue of limitation had become academic as the assessee could not be declared as assessee in default under Section 192 read with Section 201 of the Act. The fallout of the aforesaid order dated 20th January, 2010 is that the Supreme Court has held that the assessee for the assessment years in question, cannot be treated as assessee in default. The consequence would be to quash the proceeding initiated by the AO treating the assessee to be in default under Section 201 (1) and 201 (1A) of the Act.

7. We, thus agree with the Tribunal that the issue had become academic in nature and there was no reason left to decide this issue. This happened because of the subsequent order of the Supreme Court itself. This resulted as a consequence of the orders passed by the Supreme Court, that too, in the case of this very assessee pertaining to the appeals of the assessment years on the same question. We thus find no merit in these appeals which are dismissed on this ground alone.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MAY 11, 2011
skb