2011:DHC:19243-DB

* **HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 14th February, 2011

% Judgment Pronounced on: 25th April, 2011

\+ **WP(C) No. 12865/2009**

AREVA T&D, SA ..... Petitioner

Through: Mr. Ajay Vohra, Ms.Kavita Jha, Mr.Sachit Jolly, Mr.Somnath Shukla, Advocates

Versus

THE ASST. DIRECTOR OF INCOME TAX & ORS. ....Respondents

Through: Mr. N.P. Sahni, Standing Counsel for Revenue with Mr.Ruchesh Sinha, Advocate

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether reporters of the local papers be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

DIPAK MISRA, CJ

For orders, see WP(C) No.12859/2009.

CHIEF JUSTICE

SANJIV KHANNA, J.

APRIL 25, 2011
pk, kapil, dk

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+ **WP(C) No.12859, 12860, 12863, 12864, 12865, 12866 of 2009**

AREVA T&D, SA ..... Petitioner

Through: Mr. Ajay Vohra, Ms.Kavita Jha, Mr.Sachit Jolly, Mr.Somnath Shukla, Advocates

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3 Whether the judgment should be reported in the Digest? YES

DIPAK MISRA, CJ

Keeping in view the similitude of the question involved in this batch of writ petitions, they were heard together and are disposed of by a common order. For the sake of clarity and convenience, the facts of WP(C) 12859/2009 are enumerated herein.

2. The petitioner company was awarded four contracts encompassing Onshore supply, Onshore services and Offshore supply, one each for

Grid Corporation of India Ltd. (PGCIL). The contracts were awarded on 29.1.1998, 15.5.2000, 16.1.2001 and 20.1.2002. The contracts for Onshore supply and Onshore services were given on sub contract to Areva T&D Systems India Ltd. at the same price at which the said contracts were awarded to the petitioner by PGCIL.

3. The PGCIL had moved an application under Section 195(2) of the Income Tax Act, 1961 (for brevity 'the Act') with regard to the payments to be made to the petitioners. The revenue, vide orders dated 6.6.2000, 23.5.2001 and 28.12.2001, passed orders for tax deduction only in respect of the payments made to the petitioner on Offshore contract and Onshore services contract at 10% on gross basis in respect of the payment made for training charges and 10% on gross basis in respect of the payments made for maintenance and service charges respectively and on other payments, deduction was to be made at Nil rate. It is averred that the determination was preceded by an enquiry which included scrutiny of the relevant agreements whereunder payments were made to the petitioner, the relevant law including the past period, the provisions of the DTAA between India and France and the submissions of the petitioner. The other payments on which the tax deduction was to be made at Nil rate included payments made on supply of software consisting of scada software and information storage and retrieval, hardware consisting of processors, servers, hard discs, etc., mandatory spares and test equipments like digital multimeter, varmeter, etc.

4. As set forth, the petitioner had been regularly filing applications under Section 197(1) of the Act with regard to the payments to be made by PGCIL to the petitioner under the various contracts. The revenue had been issuing certificates under Section 197(1) for tax deduction at source. The revenue had posed an enquiry that the facts and circumstances of the case remained similar to those of the earlier years. It is pleaded that orders under Section 197(1) were also passed on 6.8.2002, 12.5.2003 and 21.4.2005. The orders passed under Sections 195(2) and 197(1) have been brought on record as Annexures B and C collectively.

5. Pursuant to the aforesaid orders, payments were made to the petitioner by PGCIL during the period for which the earlier certificates under Section 197 were valid by applying the rates of deduction prescribed by the revenue. For the period, as stated, covered by the contracts upto financial year 2006-07, that is, upto 31.3.2007, remittances were made by deducting tax at source at the directed rates. On 5.10.2007, for the financial year 2007-08, another application for issue of certificate under Section 197 of the Act was preferred and request was made for issue of a certificate on similar lines issued in the past for payments under the very same contract. On receipt of the application, the first respondent, vide letter dated 9.10.2007, called upon the petitioner to furnish various details, namely, details of employees visiting the country, details of payment made or received from group companies in India, date of commencement and completion of activities in India and completion certificates received from PGCIL. Reply to the above

said queries was duly filed on 28.11.207. After the reply was sent, the respondent No.1 considered the matter afresh and came to the conclusion that the contract for Offshore supply was not a case of simple sale but also involved providing other services to PGCIL. It was also observed that the property and the goods did not pass to PGCIL immediately and the petitioner remained in possession and control of the goods and further that the petitioner was responsible for supply of the whole system to be put in place by the petitioner and, therefore, the permanent establishment (PE) of the petitioner would be constituted in India and the profits attributable to the PE can be brought to tax in India. That apart, the first respondent came to hold that in respect of payments for Offshore supply, tax should be deducted at 1.055%. Keeping the same analysis in view, the first respondent directed the said rate to be applicable not only to payments yet to be received but also for payments received in the earlier assessment years for which Nil rate of tax deduction had been prescribed and which had been received by the petitioner without any deduction of tax at source. Thus, the earlier orders stood reviewed or modified to that extent.

6. Aggrieved by the said order dated 11.12.2007, the petitioner approached this Court under Articles 226 and 227 of the Constitution of India contending, inter alia, that the order passed under Section 197(1) of the Act could not have retrospective operation nullifying the earlier orders issued after due application of mind. This court, by order dated 7.5.2008, disposed of the petitions filed by the petitioner holding that the order dated

11.12.2007 passed by the respondent No.1 would apply prospectively, that is, only for the financial year 2007-08.

7. When the matter stood thus, the petitioner received notice dated 19.5.2008 issued under Section 148 of the Act alleging that the income of the petitioner for the assessment year 2005-06 had escaped assessment and there was a proposal to assess/re-assess the same. By the said notice, the petitioner was required to file return of income. Pursuant to the said order, the petitioner filed a return of income for the assessment year 2005-06 and requested the first respondent to furnish the reasons recorded for re-opening of the assessment. The reasons for re-opening were communicated vide Annexure 'F' to the writ petition. The petitioner, by its letter dated 11.9.2009, objected to the initiation of re-assessment proceedings initiated under Section 148 of the Act contending, inter alia, that the re-opening of the assessment is unsustainable in law, beyond jurisdiction and void ab initio and further the same was based on mere change of opinion. The first respondent, by order dated 14.9.2009, rejected the objections raised by the petitioner.

8. A counter affidavit has been filed by the answering respondents contending, inter alia, that the respondents have followed the due process of law while initiating proceedings under Section 147 / 148 of the Act. It is asserted that PGCIL, a public sector company, had awarded a turnkey project to Areva T&D SA, the petitioner herein, and it was responsible for

contracts. Its contracts were subcontracted to its Indian subsidiary and the Indian subsidiary worked on behalf of Areva T&D SA, i.e., for the petitioner only. The employees of the petitioner have been frequently visiting India in connection with the completion of the contract, though the petitioner's scope of work was stated only to be offshore supply. It is averred that the petitioner had undertaken the contractual obligations and responsibilities in terms of erection, testing and commissioning thereof and there is a clear cut case of splitting up of turnkey contract with a view to avoiding correct payment of taxes in India. Various other asseverations have been made to justify the issuance of notice and how there has been an escapement of turnover to invite action under Sections 147 and 148 of the Act. It is also put forth that a draft order under Section 144C has been passed and the same has been duly served and communicated to the petitioner and he has right to file an appeal before the Income Tax Appellate Tribunal and to urge all contentions and not entitled to invoke the writ jurisdiction under Article 226 of the Constitution especially when the revenue while dealing with the objection of the assessee has dealt with the same in detail and ascribed elaborate reasons. It is the stand of the respondents that the basic contention of the petitioner that the notice under Section 148 has been issued only on change of opinion is totally untenable inasmuch as authorization / certificate issued under Section 195 / 197 of the Act is provisional in nature and cannot be equated with regular assessment or other proceedings under the Act. The certificate has been issued as an interim measure on the request of the

liability by making an assessment under Section 143(3) of the Act. It is put forth that in the case of the petitioner, no regular assessment has been carried out as he never filed the return of income and, therefore, the question of change of opinion does not arise. It is contended that the order passed under Section 197 does not connote/convey that it is a final order and in fact, the order dated 6.8.2002 passed under Section 197(1) clearly mentions that "considering the urgency expressed by the assessee, in view of the sub-contractor being in acute need of funds and the contracts being time bound this interim order is being passed". The interim order was to remain in force till 30.9.2002. Thus, the very nature of the provision and also the character of the order passed would not remotely suggest that it is a final order.

9. A rejoinder affidavit has been filed on behalf of the petitioner that the petitioner can challenge the draft assessment order and it is not an alternative and efficacious remedy as the DRP cannot annul the legality of assumption of jurisdiction under Section 147/148 of the Act and under no circumstances can nullify the order of draft assessment. Various averments have been made referring to the order passed by the assessing officer who has made queries and issued the certificate under the statutory provisions. It is further asserted that the assessing officer was always aware of the nature of the transactions between the petitioner and PGCIL. Various averments have been put forth how the petitioner is not liable to pay any tax as no part of offshore supply could still be brought to tax in India unless such profits are attributable to the permanent establishment in India. Various documents

have been referred to. The satisfaction reached by the assessing officer for initiation of proceeding under Section 147 of the Act is severely criticized on the ground that it has been founded on a mere change of opinion which is not permissible. It is urged that the certificate is granted after detailed scrutiny resulting in formation of an opinion and it cannot be disregarded by treating it as an interim opinion or prima facie opinion.

10. We have heard Mr. Ajay Vohra, learned counsel for the petitioner, and Mr. N.P. Sahni, learned counsel for the respondents.

11. At the very outset, it is obligatory on our part to state with certitude that though the petitioner has made numerous averments and contentions with regard to the aspect that in the case at hand there is no liability on the part of the petitioner to pay any tax if the nature and character of the contract and the transaction in entirety is scanned, and the revenue has resisted the said stand and stance with immense vehemence bringing on record certain facts that the tax liability exists in law and the same has escaped, yet we think, regard being had to the lis in question and the nature of the order we are going to pass, we would refrain from adverting to the same. We shall only confine ourselves to dwell upon the initiation of proceeding under Section 147 of the Act and the legal substantiality of the order of rejection or the objections filed by the assessee – petitioner.

12. The submission that has been proponed by Mr. Vohra is that there has been a change of opinion and a mere change of opinion does not confer

jurisdiction on the authority to initiate a proceeding under Section 147 of the Act. It is canvassed by him that the reason to believe has its own sanctity and it is imperative that before any action is taken by the assessing officer, he should record his satisfaction and the said satisfaction has to be in the realm of objective analysis of fact within the statutory boundaries which would not include change of opinion. The learned counsel has commended us to the decision in ***Commissioner of Income-Tax v. Kelvinator of India Ltd.*, [2010] 320 ITR 561 (SC).** With regard to fresh information, the learned counsel has also drawn inspiration from the decisions rendered in ***Shipra Srivastava and another v. Assistant Commissioner of Income-Tax*, [2009] 319 ITR 221 (Delhi), *Commissioner of Income-Tax v. Batra Bhatta Company*, [2010] 321 ITR 526 (Delhi), *Prashant S. Joshi v. Income-Tax Officer and another*, [2010] 324 ITR 154 (Bom), *Commissioner of Income-Tax v. Chakiat Agencies Pvt. Ltd.*, [2009] 314 ITR 200 (Mad)** and ***Tamil Nadu Petroproducts Ltd. vs. CIT and another* – Madras HC**.

13. Quite apart from the above, the learned counsel for the petitioner would submit that the High Court of Bombay in ***Mckinsey and Company Inc. v. Union of India and others*, [2010] 324 ITR 367 (Bom)** held that the assessing officer can take a contrary view in subsequent proceedings but he must bear in mind that the departure has to be based on the basis of valid and cogent reasons. Mr.Vohra has also commended us to ***Laresen and Tourbo Ltd. and another v. Assistant Commissioner of Income-Tax (TDS) and others*, [2010] 326 ITR 514 (Bom)** to highlight that the rejection of an

application under Section 197 by the assessing officer is an order and, hence, revisable under Section 264 by the Commissioner. The learned counsel has laid emphasis on the term 'order' for the purpose that there has been formation of an opinion and on change of opinion, a proceeding under Section 147 is not tenable.

14. Mr.N.P. Sahni, learned counsel for the revenue, per-contra, contended that at the time of issuance of a certificate under Section 197 of the Act, the opinion that is formed is tentative and cannot be equated or substituted for an order of assessment. The learned counsel has also referred us to the order passed in the case at hand. It is urged by him that if the submission of the assessee is accepted, the entire scheme of the Act would fail as far as the grant of certificate of the tax deducted at source is concerned. He has commended us to the decisions rendered in ***Dodsal Pvt. Ltd. v. Commissioner of Income-tax*, [2003] 260 ITR 507 (Bom), *Commissioner of Income-tax v. Elbee Services P. Ltd.*, [2001] 247 ITR 109 (Bom), *Aggarwal Chamber of Commerce Limited v. Ganpat Rai Hira Lal,* 33 ITR 245 (SC)** and ***Commissioner of Income-tax v. Tata Engineering and Locomotive Co. Ltd.*, 245 ITR 823 (Bom.).**

15. To appreciate the rivalised submissions at the Bar, it is apposite to reproduce Sections 195 and 197 of the Act. Section 195, which occurs in Chapter 17 – collection and recovery of tax, reads as follows: -

"195. **Other sums**

(1) Any person responsible for paying to a non-resident not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode:

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O.

Explanation: For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising

deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the Assessing Officer before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

(6) The person referred to in sub-section (1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board."

16. Section 197, which deals with Certificate for deduction at lower rate, is as follows: -

"197. **Certificate for deduction at lower rate.**

(1) Subject to rules made under sub-section (2A) where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA and 195, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such

> (2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.
>
> (2A) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (1) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith."

17. In this context, we may refer to the reasons recorded by the assessing officer for reopening of the assessment. On a scrutiny of the same, it is manifest that the assessing officer has referred to the four contracts awarded to the assessee by PGCIL. The PGCIL has entered into contracts with the assessee in connection with the set up of EMS / SCADA package under system coordination and control project for Northern Region, North-East Region and Eastern Region. He has referred to the orders passed by him under Section 197 of the Act from time to time. He has also referred to the various correspondences made by the assessee and the assessing officer. Thereafter, he has culled out the conclusions and, being prima facie satisfied, issued notice. For the sake of completeness, we think it apposite to reproduce the same:

> "From these limited facts available, the following inferences / conclusions are drawn:
>
> (i) PGCIL awarded all the contracts to Areva T&D SA and it was responsible for completing the offshore,

amply demonstrated by the contents of taking over certificate.

(ii) Areva T&D SA, in turn subcontracted the onshore supply and onshore services to its Indian subsidiary. Therefore, the subcontractor worked for Areva T&D SA and the functions performed by the Indian subsidiary are on behalf of Areva T&D SA only.

(iii) The employees of the assessee have frequently visited in connection with completion of the contract, if the assessee's scope of work was only offshore supply, then it should have been issued the completion certificate with regard to offshore supply only and why should it undertake the contractual obligations and responsibilities in terms of erection, testing and commissioning thereof. It was not a case of "sale simplicitor".

(iv) The applicant was required to provide the service relating to port handling, customs clearance, inland transit insurance, handling and transportation to the site, storage, preservation, insurance, testing and commission etc.

(v) As per the taking over certificate, the PGCIl has taken over the equipment only when it issued the final taking over certificate. The equipments forming part of offshore supply were not at all taken over by the PGCIl before the ultimate commissioning and testing thereof.

(vi) The goods always remained in the possession and control of the assessee or its subcontractor and it was responsible for delivering the facilities as per the contract.

(vii) In no circumstances, three different suppliers could have performed the part of one contract. The assessee's part of the contract did not get over at the time of loading the equipments on the mode of transport.

(viii) It was not a case of export of finished goods / raw materials from outside India to PGCIL who will be using the same as per their requirement, the PGCIL had awarded the whole composite contract to the assessee and it was splitted up as per the requirement of payments in various currencies. The imports could have been paid

mostly in Indian Rupee. These are as per the terms and conditions of the funding agencies like World Bank.

(ix) The full contract was awarded to the assessee and the substance of the transaction as reflected from the actual execution of the contract requires to be considered for deciding the taxability and not the form that the offshore supply is totally separate from the contract. If it was a separate contract, then what was the need of giving the contract performance security in respect of all the portions of the contract by the assessee? Why did it depute its employees again and again, in addition to its own persons working the subsidiary?

The assessee has been regularly doing business in India and has also been physically present, therefore, income accuring or arising to the assessee from its business in India or through business connection in India is taxable in India as per the provisions of Section 5(2) of the Act.

The employees of the assessee on visits to the project, might have been made available the office premises and support services by Areva T&D India Ltd. Areva T&D India was a subcontractor of the assessee and, therefore, the premises of Areva T&D India can be considered as fixed place of business of the assessee. As the installation and assembly projects continued for a period of more than 6 months in all the 4 contracts, therefore, the assessee had construction PE also in India. The time taken by the subcontractor in executing the project is also to be taken as the period of assembly / installation by the assessee.

Paragraph 18 of the commentary on OECD Model tax treaty provides that:

> "If an enterprise (general contractor) which has undertaken the performance of a comprehensive project subcontract parts of such a project to other enterprise (subcontractors), the period spent by a subcontractor working on the building site must be considered as being time spent by the general contractor on the building project."

Therefore, prima facie, I am of the view that the

subsidiary or subsidiary itself or as an installation PE, in respect of all the contracts. The offshore supplies have been made regularly and spread over a long period of time and the contracts with PGCIL were entered at different periods of time, therefore, the role of such PE in the tendering process, meetings with PGCIL, during the supply and execution is not ruled out. The PE had already established, therefore, as per the decision of Hon'ble Supreme Court in the case of Commissioner of Income Tax vs. Hyundai Heavy Industries Co. Ltd. (2007) 161 Taxmann 191 (SC), the profit attributable to such PE is taxable in India.

In the case, another issue is, how the contract price were splitted up into three parts i.e. offshore supply, onshore supply and onshore services. There is a possibility that the most of the profits are loaded to the offshore supply resulting into less than the normal profits to the Indian subsidiary.

In addition to the loading of profit to offshore supply, part of which is taxable in India, the profits attributable to the marketing / sales functions / after sale services by the PE in India are taxable in India. The ITAT, Delhi Bench, New Delhi in the case of Rolls Royce Plc. on similar facts has held that the profit accruing directly or indirectly in respect of the marketing activities in India shall be taxable in India. With regard to onshore supplies and services, also the profits earned by the assessee are taxable in India.

As mentioned above, the assessee has always obtained orders u/s 197 of the Act without disclosing the full facts relating to the contracts, some of these facts are discussed in these reasons and assessee has not filed its return of income for any of the assessment years.

5. The Areva T&D SA, has undertaken 4 contracts from PGCIL, which are executed during all the years starting 1998-99 and payments are still continuing. As mentioned above, the assessee has business connection as well as the PE in India as per the provisions of Article 5 of the tax treaty between India and France and the income attributable to the PE/ business connection is taxable in India. Since the assessee has not filed return of income in India to that extent the income chargeable to

> available and discussed above, I have reason to believe that income chargeable to tax has escaped assessment.."

18. The petitioner filed objections for reopening of the assessment and the same were rejected on 14.9.2009. On a perusal of the said order, it is evincible that the assessing officer referred to the previous findings and stated thus:

> "Reasons have been kept brief as the reasons are not expected to replace the assessment order and are also not expected to include all the arguments. What is required is material and the reasons to believe, and not the conclusive evidence. At the same time, the reasons recorded before the issuance of notice are sufficient. The word 'reason' in the phrase 'reason to believe' would mean cause or justification. If the Assessing Officer has a cause or justification to think that income had escaped assessment, he can be said to have a reason to believe that such income had escaped assessment. The words 'reason to believe' cannot mean that the Assessing Officer should have finally ascertained the facts by legal evidence.
>
> The facts regarding the complete role of the Indian subsidiary are still not on record. These can be known only during the detailed scrutiny. Proceedings u/s 197 of the Income-Tax Act 1961 were never carried out in such a manner to investigate the case to its depth. However these facts are in the knowledge of the assessee. The assessee could have disclosed the complete facts on its own."

19. After so stating, he has addressed himself to the various decisions cited before him with regard to 'reason to believe' and has opined that there is prima facie material on the basis of which the revenue has reopened the case.

20. At this juncture, we may refer with profit to one of the orders passed

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> "The assessee, Alstom T&D S.A, France, has filed an application u/s 197(1) of the Income Tax Act, 1961 in regard to payments to be made by Power Grid Corporation of India Limited (PGCIL) under the Onshore Supply and Onshore Services Contracts relating to EMS/SCADA Package under System Co-ordination and Control Project for Northern Region. The assessee has also submitted the estimated Profit & Loss Accounts for the both the contracts showing the profitability at NIL. This is so as the sub-contracts had been awarded by the assessee at the same price, at which the contracts were awarded to the assessee by PGCIL. The assessee has submitted that there is total certainty that the profit shall be NIL for the above Onshore Contracts in view of the sub-contracts.
>
> The assessee has filed the last two orders passed u/s 195(2) of the Income Tax Act, 1961, in regard to the Onshore Supply and Onshore Services contracts for the financial years 2000-01 and 2001-02. In both these orders, the tax deduced at source was authorized at Nil rate for the onshore supply contract and for the onshore services contract at Nil rate except for maintenance and training charges which were to be subjected to 10% tax withholding.
>
> Considering the urgency expressed by the assessee, in view of the sub-contractor being in acute need of funds and the contracts being time bound, this interim order is being passed."

21. On a perusal of the order passed, it is clear as day that the same is interim in nature and in fact, the same could not have been anything else but interim in character as the scope of Section 197 is limited.

22. In this context, we may profitably refer to the decision in ***Dodsal Pvt. Ltd.*** (supra) wherein it has been held thus:

> "It is well settled that the orders passed under Section 195(2) of the Income-tax Act are provisional and tentative. These orders do not bind the Income-tax

> case, the orders passed by the Income-tax Officer under Section 195(2) state that the orders are provisional in nature and that they are subject to modifications in the regular assessment proceedings."

23. In ***Elbee Services P. Ltd.*** (supra), it has been held thus:

> "It is well settled that the orders passed under Section 195(2) of the Income-tax Act are not conclusive. They do not preempt the Department from passing appropriate orders of assessment. We have already taken a view in Income-tax Appeal No.217 of 2000 (CIT v. Tata Engineering and Locomotive Co. Ltd. [2000] 245 ITR 823 (Bom)), in which this court has laid down that the findings given under Section 195(2) of the Income-tax Act will not preclude the Department from taking a contrary view in the assessment proceedings."

24. At this juncture, we may refer with profit to the decisions of the Bombay High Court on which reliance has been placed by Mr. Vohra. In ***Laresen and Tourbo Ltd. and another*** (supra), the question was whether the determination under Sections 195 and 197 of the Act is an order or not and, hence, amenable to challenge under Section 264 of the Act. In our considered opinion, the said decision does not render any assistance to the assessee as we are concerned with a different factual matrix altogether. Mr.Vohra, the learned counsel for the petitioner, would contend that once it is given the status of an order, the opinion expressed therein is final but the said contention leaves us unimpressed because an order for granting certificate for the purpose of inviting interference or challenge under Section 264 has to be qua the steps taken therein and would not have any kind of impact on the formation of an opinion for the purpose of an assessment.

25. In ***McKinsey and Company Inc.*** (supra) before the High Court of Bombay, the subject matter related to imposition of a withholding tax or of tax deducted at source in respect of payments made to the petitioner for firm function services. The petitioner had made an application under Section 197 for the assessment year 2010-2011 to the Deputy Director of Income-tax (International) seeking a nil tax withholding certificate in respect of payments received for firm function services rendered by the petitioner to the Indian branches of McKinsey and Company Inc. for the financial year 2009-2010. The petitioner had informed the second respondent that in the meantime, orders have been passed under Section 264 of the Act by the Commissioner and under Section 197 by the Assessing Officer for the assessment years 2007-2008 to 2009-2010 specifying tax withholding rates at 1.5% and 1.30%. By the impugned order dated 29th March, 2010, the application filed by the petitioner for a nil tax withholding certificate for the assessment year 2010-2011 was rejected and a direction was issued that the tax should be withheld at the rate of 15% on the gross amount to be paid or payable to the petitioner for the financial year 2009-2010. The Division Bench took note of the submissions canvassed by the petitioner and that of the revenue and came to hold as follows:

> "In disposing of an application filed by the assessee under section 197(1) for the grant of a certificate, the Assessing Officer has to make a determination which would constitute an order for the purposes of section 264. That a petitioner should exhaust the alternate remedies available is a self-imposed restraint which does not bar the exercise of the writ jurisdiction under Article 226. In

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considered determination made by a superior officer, it is necessary for this Court to step in to ensure that the discipline of the hierarchy imposed by fiscal legislation is duly observed. Unless a sense of hierarchical discipline is observed, while implementing fiscal legislation, the exercise of powers would be rendered arbitrary and subject to the whim and caprice of Assessing Officers. This would be impermissible and contrary to the norm of fairness which Article 14 of the Constitution embodies. The prescriptions of Article 14 must at all times infuse statutory interpretation and must rigorously apply to the exercise of statutory discretion. It is in these circumstances, that this Court has been constrained to exercise its writ jurisdiction under Article 226 to correct a manifest failure of justice. The Assessing Officer is correct in adopting the position that Section 197(2) will not preclude a departure or a contrary view being taken in assessment proceedings, in view of the judgments of this Court in CIT v. Tata Engineering and Locomotive Company Limited, [2000] 245 ITR 823 and CIT v. Elbee Services (P) Limited, [2001] 247 ITR 109. But the Assessing Officer must also bear in mind that a departure has to be made on the basis of valid and cogent reasons where there is material on record which would justify such a departure. There is an absence of material on record which would have justify a departure in the facts of the present case."

26. We have reproduced the facts and the law laid down therein. If the factual canvass is appreciated in a proper manner, it would be quite clear that it was not the issue pertaining to the initiation of a proceeding under Section 147 of the Act where no return is filed. Thus, the decision is distinguishable.

27. In the case at hand, we find that no return has been filed. We may refer to Section 147 of the Act:

147. **Income escaping assessment** - If the Assessing Officer has reason to believe that any income chargeable

he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereinafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

[**Provided further** that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

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(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but—

(i) income chargeable to tax has been under-assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

[*Explanation 3.* – For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.]

28. Explanation 2(a) of the aforesaid Section clearly takes care of the situation where no return has been filed. On a conjoint reading of Sections 195 and 197 of the Act, we are of the view that if any opinion is expressed at the time of grant of certificate it is tentative or provisional or interim in nature and the same would not debar the assessing officer from initiating a proceeding under Section 147 of the Act on the ground that there has been a

change of opinion. Thus, we are compelled to repel the submission though assiduously urged by Mr. Vohra, the learned counsel for the petitioner.

29. At this juncture, we think it is pertinent to state that as the present Writ Petition has been disposed of on the basis of explanation 2(a) to Section 147 of the Act, we are not required to examine other aspects and issues raised by the petitioner on the question whether or not there is any basis in the reason that the petitioner has any income chargeable to tax in India. In any case, it is well settled that at this stage only prima facie view is to be taken to determine and decide whether there are reasons to believe that income has escaped assessment. Whether or not any income of the petitioner is chargeable to tax in India, whether the petitioner has a permanent establishment in India, etc, are matters on merit which have to be decided in the assessment proceedings. We have not expressed any view in this regard. These issues are left open.

30. Consequently, the writ petitions, being devoid of merit, stand dismissed without any order as to costs.

CHIEF JUSTICE

SANJIV KHANNA, J.

APRIL 25, 2011
pk, kapil, dk