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

Dated of decision: 3rd August, 2012

\+ ITA 111/2006

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms. Rashmi Chopra, Sr. Standing Counsel.

versus

MR.SAKAKIBARA YUTAKA ..... Respondent
Through: Ms. Kavita Jha with Mr. Somnath Shukla, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V.EASWAR

S. RAVINDRA BHAT, J.: (OPEN COURT)

1. We have considered the record filed by Counsel for the parties. On 21.02.2007, this Court framed following questions of law: -

> "*1. Whether the Income Tax Appellate Tribunal was right in holding that the rent free accommodation provided by Maruti Udyog Ltd. to the Assessee, an employee of Suzuki Motors Corporation (Japan) is not a perquisite in the hands of the Assessee under Section 17(2) of the Income Tax Act, 1961 and if the answer to this is in the negative whether the Assessee is entitled to the benefit of the exemption provided by Section 10(14) of the Act?*
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> *2. Whether the Income Tax Appellate Tribunal was right in holding that the salary earned by the Assessee was taxable as salary for the entire year under consideration?*"

2. The assessee individual was a permanent resident of Japan and during the year the tenure and consideration, he was employed by M/s. Suzuki Motors Corporation (Japan). By virtue of a collaboration agreement between M/s. Suzuki Motors, Japan

and M/s. Maruti Udhyog Ltd., India the assessee was deputed to India to offer guidance and technical assistance in accordance with the terms and conditions of that agreement. The salary was paid by M/s. Suzuki Motors Corporation (Japan) to the employee during this period in India and the amount was ₹5,86,847/-. The assessee was in addition provided accommodation in Samrat Hotel. His rent for that period was borne on to the extent of ₹1,80,660/-. The Assessing Officer prposed to assess the rent paid by M/s. Maruti Udhyog Ltd. at the hands of the assessee as a perquisite. Since no perquisite value was and shown by him in his return, the assessee was asked to offer his explanation. When the assessee responded stating that the M/s. Maruti Udhyog Ltd. by virtue of its agreement with M/s. Maruti Udhyog Ltd. was obliged to provide him accommodation and there was no employer and employee relationship between the assessee and M/s. Maruti Udhyog Ltd. The respondent Sakakibara Yutaka also stated that in any case the rent paid was exempt by virtue of Section 10 (14). The Assessing Officer, however, rejected the assessee's contention and held that tax was payable on the said rental amounts. He also took into consideration the daily allowance and other monetary benefits given to the assessee by Suzuki holding that in terms of Article 15 of Double Taxation Avoidance Treaty between India and Japan, the assessee was liable to tax in respect of the salary received by him in Japan for his exployment with Suzuki Motors Corporation. The assessee's appeal was partly accepted by the Commissioner of Income Tax (Appeals). As a result both the assessee and the Revenue preferred the appeals to the ITAT. The ITAT rejected the Revenue's appeal and allowed the assessee's appeal pertaining to inclusion of amount paid as daily allowance and also the rented accommodation. The reasoning adopted by the ITAT was that in terms of Section 5(1)(c) read with Section 6(6) of the Income Tax Act, 1961 the assessee was a person "not ordinarily resident" in India and that the salary earned in Japan for employment under Suzuki Motors Corporattion cannot be assessed in his hands in the assessment made in India. The Tribunal also rejected the contention of the revenue based on Article 15 on the ground that on a proper

interpretation of Section 90(2) of the Act, there was no question of giving primacy to double taxation treaty. The Tribunal reasoned that since the assessee did not fall within the purview of Income Tax Act, 1961. There was therefore no question of bringing any amount paid to him by his foreign employer to taxation. The Tribunal's reasoning is to be found in the following extracts of its order: -

> "9. *We have considered the rival submissions and also perused the relevant material on record. As pointed out on behalf of the assessee before the authorities below as well as before us, the residential status of the assessee as per the provisions of Section 6(6) of the Income Tax Act, 1961 was "not ordinarily resident" for the year under consideration and this position has not been disputed either by the Assessing Officer or by the learned CIT (A) nor even by the learned DR before us. It is observed that the Assessing Officer as well as learned CIT (A), however, relied on the provisions of Article 15 of the DTAA between India and Japan to tax the salary of the assessee earned outside India during the year under consideration in India holding that the provisions of DTAA override the provisions of taxing statute. As rightly pointed out by the learned counsel for the assessee, the provisions of Section 90(2) of the Income Tax Act, 1961 are clear in this regard according to which the provisions of the said Act shall be applicable to the extent they are more beneficial to the assessee to whom the relevant DTAA applies. Since in the present case, the provisions of Section 6(6) read with Section (5)(1)(c) and Section 9(1)(i) of the Act were beneficial to the assessee as explained by the learned counsel for the assessee, the same should have been preferred by the authorities below over DTAA and the income earned by the assessee outside India during the year under consideration ought to have been held to be not taxable in India as per the said provisions. We are, therefore, of the view that the income of the assessee earned in India alone was taxable in his hands in India and the income earned by him outside India was not taxable in India as rightly claimed. In that view of the matter, we reverse the impugned order of learned CIT (A) on this issue and direct the Assessing Officer to delete the addition made on this count. Ground No.2 of the assessee's appeal is accordingly allowed.*
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14. We have considered the rival submissions and also perused the relevant material on record. It is observed that the stand taken by the assessee before us that the amount of daily allowance was never received by him from SMC was taken before the authorities below as is evident from the copies of written submissions placed on record. The contention of the learned DR as raised before us in this regard thus is factually incorrect and it is not the new plea raised by the assessee before the authorities below was supported by evidence in the form of certificate issued by SMC and we find it worthwhile to extract the same from a copy placed at page No.5 of the assessee's paper book: -

> *"This is to certify that in terms of License Agreement dated 14-12-1992 entered into between SMC and MUL as per Clause No.3.08(b)(3), Maruti is required to pay SMC daily allowance for the Despatchees of SMC Personnel an amount of US$ 150 FOR NON-Managers and US$ 225 for Managers and above for their period of stay in India.*
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> *None of the above amount paid by MUL to SMC has been paid to the individuals."*

15. As is evident from the aforesaid certificate, it was confirmed by SMC in very clear terms that the amount of daily allowance received by it from MUL in terms of license agreement was not paid by it to any individuals including the assessee. It is pertinent to note here that nothing has been brought on record either by the Assessing Officer or by the learned CIT (A) to dispute this position even by the Assessing Officer or by the learned CIT (A) to dispute this position even though submission to this effect was made by the assessee before the Assessing Officer as well as before the learned CIT (A) in the statement of facts filed alongwith the appeal. Even the learned DR has not been able to controvert this assertion made by the assessee and there being nothing available on record to show that the amount of daily allowance paid by MUL to SMC for the stay of the assessee in India was actually received by the assessee from SMC, we are of the view that this addition made by the Assessing Officer merely on assumption and surmises was not sustainable. In that view of the matter, we set aside the impugned order of learned CIT (A) on this issue and direct the Assessing Officer to delete the addition made on this count. Ground No.3 of the assessee's appeal is accordingly allowed."

3. This Court also notices that the view adopted by the Tribunal is in tune with the decision of the Allahabad High Court in *Morgenstern Werner v. CIT and Anr.*, (1998) 233 ITR 751, which was approved by the Supreme Court in its decision reported as *CIT v. Morgenstern Werner*, (2003) 259 ITR 486 (SC). In this view of the matter and having regard to the, undisputed facts and the fact that the status of the assessee was that of "not ordinarily resident" in India, having worked in India for 273 days in the relevant previous year and not being "resident" in India in any of the nine out of ten previous years, the order of the Tribunal impugned by the Revenue is unexceptionable. The appeal is to, therefore, fail. The substantial questions of law framed in this appeal are answered in favour of the assessee and against the Revenue. The appeal is, therefore, dismissed.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

AUGUST 03, 2012
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