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

\+ **ITA No. 179/2001**

**Reserved on: 25th July, 2014**
**% Date of Decision:28th August, 2014**

**Commissioner of Income Tax, Delhi II ....Appellant**
Through Mr. Balbir Singh, Sr. Standing Counsel with Mr. Abhishek Singh Baghel, Adv

Versus

**M/s Kohinoor Impex P. Ltd. …Respondent**
Through None

**CORAM:**
**HON'BLE MR. JUSTICE SANJIV KHANNA**
**HON'BLE MR. JUSTICE V. KAMESWAR RAO**

**SANJIV KHANNA, J.**

This appeal by the Revenue which relates to assessment year 1986-87, was admitted for hearing vide order dated 8th January, 2002 on the following substantial questions of law:

> "(A) Whether the ITAT was correct in law in allowing the deduction in respect of amount of Rs.19,94,704/- paid to the non-resident foreign company without having deducted tax at source u/s. 195 of Income Tax Act?
>
> (B) Whether the ITAT has correctly interpreted the provision of 40(a)(i), Sec. 95 (sic 195) and 9(1)(v) of the Act?
>
> (C) Whether the ITAT as correct in law in holding that the amount of Rs.19,94,704/- does not represent the interest but the sale consideration and no tax is required to be deducted?"

2. The respondent assessee had imported brush less motors fr M/s Kashpo International Ltd., U.K. and had made payment of Rs.19,94,704/-, which was claimed as expenditure. In the assessment order framed on 31st March, 1989, the Assessing Officer determined the net total income of the assessee but did not disturb or disallow this expenditure.

3. Commissioner of Income Tax (Central) – II, by order dated 27th March, 1991, in exercise of power under Section 263 of the Income Tax Act (Act, for short), partly set aside the assessment order and directed the Assessing Officer to make fresh assessment after deciding whether assessee had failed to deduct tax at source under Section 195 of the Act and, therefore, provisions of Section 40(a)(i) of the Act were attracted. He observed that the said aspect has not been examined by the Assessing Officer. He also referred to Section 9(1)(v) of the Act, which refers to the interest payment and observed that the Assessing Officer's order was erroneous as he had not examined whether the amount paid to Kashpo International Ltd., U.K. was interest paid on delayed payments, attracting Section 195 and in default under Section 40(a)(i) of the Act. It was observed that the amount had been shown to be interest by the respondent assessee. Assessing Officer was required to hear the respondent assessee before adjudication and taking the final decision.

4. In the assessment order passed under Section 143(3) read with Section 263 of the Act, the Assessing Officer observed that no evidence had been led to conclusively establish that the payment of interest on delayed payment was relatable to purchase and constituted purchase price paid to the foreign supplier and these were two integral

limbs of the same transaction. Sale of goods required payment of goods supplied to the foreign supplier at the purchase price and as there was a failure to pay the price, the Indian assessee has paid a sum of Rs.19,94,704/-. In this manner, payment of Rs.19,94,704/- constituted interest. He rejected the argument that the Bank which had made the payment had acted as the principal, observing that the bank was an agent as the respondent assessee instead of making the payment directly had utilized the services of said banker to make payment. The Assessing Officer deemed it appropriate to invoke Section 9(1)(i) of the Act and held that income of Rs.19,94,704/- was taxable in India in India and as tax at source has not been deducted, Section 40(a)(i) was attracted. He also reworked computation of deduction under Section 80HHC in view of the said finding.

5. Commissioner of Income Tax (Appeals) ('CIT (Appeals)', for short) held that Rs.19,94,704/- was not paid as interest but was payment made for settlement of the claim of the Kashpo International Ltd., U.K. He held that the Assessing Officer has either made incorrect or untenable factual assertions. Section 9(1)(i) of the Act had been wrongly invoked on the premise that the U.K. based company had business connection in India. He held that Rs.19,94,704/- was a part and parcel of the purchase price for the goods supplied by the U.K. company and, therefore, was not interest. Before CIT (Appeals), in view of the written submissions made, comments of the Deputy Commissioner of Income Tax were called and he had submitted a report. Report of the Deputy Commissioner accepted that the assessee had not paid interest in respect of borrowing made from U.K. based party. He also accepted that the amount paid

was not interest but it was paid in settlement of claim of interest. percentage of interest had been quoted and, therefore, the assessee was justified in stating that the amount paid was towards sale price of the goods purchased and also for settlement of delayed payment.

6. Aggrieved, Revenue preferred an appeal before the Tribunal who have, by the impugned order dated 12th March, 2001 dismissed the said appeal. Tribunal, in the impugned order, have held that interest payment outside India was covered and chargeable to tax but the issue was whether Rs.19,94,704/- paid was interest or was sale consideration. Sale consideration paid to the foreign company for supply of goods would not be taxable in India. The appeal was dismissed observing that the Deputy Commissioner of Income Tax had agreed that the amount paid to the Kashpo International Ltd., U.K. did not relate to payment of interest and it represented the cost price finally settled for the material imported by the assessee. It was part of the purchase price and, therefore, no tax was required to be deducted.

7. Interest payments by a resident to a non-resident, if covered by Section 9(1)(v) is deemed to be income of the non-resident in India. Interest paid to a foreign party/seller for delayed payment of goods was dealt with Gujarat High Court in ***Commissioner of Income Tax vs. Vijay Ship Breaking Corporation*** [2003] 261 ITR 113, and it was held to be taxable under Section 9(1)(v) of the Act. The assessee had then preferred an appeal before the Surpeme Court which was admitted and disposed of by judgment reported as [2009] 314 ITR 309 (SC). However, the Supreme Court did not examine the issue on merits in view of the Explanation 2 to Section 10(15)(iv)(c) of the Act applicable to ship breaking industry, to the effect that usance interest

payable outside India by the company engaged in business of s[illegible] breaking was treated as debt incurred in foreign country in respect of purchase outside India. We also have a decision of the Delhi High Court in ***J.K. Synthetics Ltd. Vs. ACIT*** [1990] 185 ITR 540, in which reference was made to Section 9(1)(v) and it was held that payment of interest made to the foreign supplier would be covered under the said Section. However, in the facts of the present case, the finding recorded by the Tribunal on the basis of the report of the Deputy Commissioner of Income Tax is that the amount paid represented the purchase price finally settled for the material/goods imported and it did not represent interest. Order passed by the Assessing Officer did not refer to Section 9(1)(v) of the Act but he had relied upon Section 9(1)(i) of the Act. This is inspite of the fact that the Commissioner in his order under Section 263 had specifically referred to Section 9(1)(v) and also stated that the assessee had shown the amount in his accounts as interest. This creates doubt in our mind whether Rs.19,94,704/- paid was in fact interest for delayed payment or as stated by the Tribunal, the purchase price itself which was finally settled. If it was interest, then another aspect which required examination was whether the amount would be covered and exempt from payment of tax under Section 10(15)(iv)(c) of the Act, in which case tax at source was not required to be deducted.

8. Revenue is the appellant before us and has not placed the relevant documents under which the payments were made or relating to the settlement. Revenue has not placed before us even copy of the report given by the Deputy Commissioner of Income Tax. Full particulars and details regarding the purchase price, whether there was

specific stipulation regarding delayed payment, consequences there , when did the title in the goods pass to the respondent assessee etc. are not on record and not discussed in the assessment order. A remand after a gap of more than 25 years would not be justified.

9. In the absence of the said details and documents and keeping in mind the findings of fact recorded by the Tribunal, it is difficult for us to answer the questions and issues. In these circumstances, we do not think that it will be appropriate to answer the questions of law against the respondent assessee, if we accept the factual finding given by the Tribunal that amount paid was part of the purchase price which was payable. Decision of the Tribunal may not be correct, if the amount paid represented interest payment as possibly the amount would then be covered under Section 9(1)(v) of the Act. But the said provision was not specifically invoked by the Assessing Officer. Further taxability would depend on whether the said income was exempt under Section 10(15)(iv)(c) of the Act. Another issue which would arise would be whether the interest was taxable as per the provisions of the Double Taxation Avoidance Agreement, again an issue which has not been raised, and examined.

10. This apart another aspect would arise for consideration. Central Board of Direct Taxes had issued Circular No. 23 dated 23rd July, 1969, the relevant portion of which reads as under:-

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> 3. The following clarifications would be found useful in deciding questions regarding the applicability of the provisions of section 9 in certain specific situations:

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(6) Sale by a non-resident to Indian customers either directly or through agents. –

(a) Where a non-resident allows an Indian customer, facilities of extended credit for payment, there would be no assessment merely for this reason provided that (i) the contracts to sell were made outside India and (ii) the sales were made on a principal-to-principal basis.

XXXXXXXX"

The said circular has been withdrawn with effect from 22nd October, 2009 vide Circular No. 7 of 2009. The withdrawal does not affect impugned transaction as the same took place in the previous year relevant to the assessment year 1986-87. Thus, it could be argued that no liability would have arisen under Section 9(1)(i) read with Section 195 of the Act in terms of the Circular No. 23 of 1969 (supra). The Assessing Officer and Revenue did not plead and contend that the sale transaction was not on principal-to-principal basis or the sale contract was made in India and not outside India. The assessment order is woefully silent and quiet on the said material aspects. This possibly explains the stand and stance taken by the Deputy Commissioner of Income Tax in his response accepting that the amount paid was in settlement of delayed payment for the goods purchased and was not paid in respect of any borrowing made from the Kashpo International Ltd.

11. In view of the aforesaid position, the questions of law mentioned above, are not answered for failure to place

papers/documents on record for proper and just adjudication of the questions raised. The appeal is, accordingly, disposed of.

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**(SANJIV KHANNA)**
**JUDGE**

-sd-
**(V. KAMESWAR RAO)**
**JUDGE**

**August 28, 2014**
**kkb**