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

Date of Decision: September 05, 2014

\+ **ITA 178/2002**

COMMISSIONER OF INCOME TAX DELHI XVII

..... Appellant

Through: Mr.Rohit Madan, Standing Counsel

versus

M/S.BABCOCK POWER
(OVERSEAS PROJECTS) LTD. ..... Respondent

Through: Nemo

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

V. KAMESWAR RAO, J (ORAL)

1. The present appeal by Revenue filed under Section 260A of the Income-Tax Act, 1961 was admitted for hearing on the following substantial question of law:-

> "Whether the Tribunal was correct in law in directing the Assessing Officer to recomputed the interest payable by the assessee under Section 201(1A) of the Income Tax Act, 1961 after taking into consideration the advance tax and self-assessment tax paid by the employees concern?"

2. The facts as culled out from the record are as under:-

The respondent/assessee–M/s.Babcock Power (Overseas Projects) Ltd., a non-resident company incorporated in United Kingdom, during the

Assessment Years 1987-88 to 1989-90 had a project office in India and w engaged in execution of a contract of setting up a coal based thermal plant. The respondent-assessee to fulfil their contractual obligations, had engaged their foreign technicians who were deputed to work at the Indian project office. These employees were on pay roll of UK office of the respondent-assessee and salaries were paid in foreign currency in their bank accounts abroad. These contracts of employment were duly approved by the Ministry of Mines for the purposes of Section 10(6) of the Act.

3. Respondent-assessee did not deduct Tax at Source on the salary paid on the ground that tax was not required to be deducted. The Assessing Officer disagreed and also directed interest under Section 201(A) of the Act be charged.

4. The respondent-assessee challenged the order of the CIT (Appeals) before the Tribunal primarily on three grounds. The first one being that the provisions of Section 192 were not applicable to the respondent-assessee inasmuch as the assessee as well as the foreign technicians were non-residents; the remuneration was paid outside India; the contract of employment was also outside India. The second ground was that the assessee was under a bone fide belief that the provisions of Section 192 were not applicable to them and in support of this ground the respondent-assessee relied upon text by Jurist Mr.Nani A. Palkhivala in (Law and

Practice of Income-Tax) 8th Edn. Vol.1 and the judgment of the Supren Court in the case of ***Electronic Corporation of India vs. Commissioner of Income-Tax***, [1990] 183 ITR 43 (SC). The third ground was that no interest could be levied since demand of the tax itself has been deleted by the Tribunal.

5. The Tribunal rejected the first two grounds raised by the respondent-assessee. As regards the third ground the Tribunal found error in the order of the authorities below on the time period for which interest was payable. The Tribunal was of the view that the concerned foreign technicians had paid the tax by way of advance tax as well as the self-assessment tax and levy of interest cannot be for a period beyond the said dates, as tax stood paid/deposited. The Tribunal modified the order of the CIT(Appeals) and directed the Assessing Officer to recompute the levy of interest for the period commencing from the first day of April following the end of the relevant financial year till the date of actual payment that is the date of self-assessment tax by the concerned employees. Further, it held that no interest would be payable on the amount of advance tax paid by the respective foreign technicians.

6. This issue is no more *res integra* having been decided by this Court with respect to the same respondent-assessee in ITA No.82/2000 wherein on the issue of levy of interest this Court has dismissed the appeal

by answering the substantial question of law against the appellant Reven

in the following manner:-

> "3. The respondent/assessee - M/s. Babcock Power (Overseas Projects) Ltd. is a non-resident company incorporated in United Kingdom, which during the Assessment Years 1987-88 to 1989-90 had a project office in India for execution of a contract. The respondent to fulfil their contractual obligations had engaged foreign technicians who were deputed to work at the Indian project office. These employees were on pay roll of UK office of the respondent/assessee and salaries were also paid in foreign currency in their bank accounts abroad. These contracts of employment were duly approved by the Ministry of Mines for the purposes of Section 10(6) of the Act.
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> 4. A question arose, whether the respondent/assessee was liable to deduct tax at source under Section 192 of the Act on the salaries paid to the foreign technicians. Tribunal, by the impugned order, has rejected the contention of the respondent assessee that they were not liable to deduct tax at source. Tribunal further upheld levy of interest and observed that interest was payable under Sections 201(1) and 201(1A). Interest has been referred to as the legitimate amount of tax due for delayed payment. However, the Tribunal did not accept and agree with levy of interest for the period commencing from 1st April following the Financial Year till the date of the order of levy of interest under Section 201(1A) observing that this was erroneous and cannot be sustained. This finding/direction is questioned.
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> 5. The admitted position is that the foreign employees of the respondent/assessee had paid tax in India either by way of advance tax or self assessment tax. Tribunal has further observed that the Assessing Officer had himself not levied interest commencing from the period of deductibility of tax till the end of the Financial Year. Accordingly, the Tribunal was not inclined to enlarge the period for which the interest was payable. In the subsequent paragraphs, Tribunal has held and directed the Assessing Officer to re-compute levy of interest for the period commencing from the first date of April following the end of the relevant Financial Year till the date of actual payment i.e. the date of payment of self assessment tax, if payable by the employees, or after taking into consideration the advance tax and self assessment tax paid by the employees. No further interest, it has been directed, would be payable. The view taken by the Tribunal is in consonance with the decision of a Division Bench of this Court dated 21.12.2011 in ITA No.74/2003 titled Commissioner of Income Tax TDS vs. M/s. American Express Bank Ltd., in which it has been held as under:
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> Insofar as the second question is concerned i.e., with regard to the interest payable under Section 201(1A) of the said Act, that is a mandatory provision, as already held by a Division Bench of this Court in

the case of CIT v. ITC Limited, ITA No.475/2010, dated 11.05.2011. The said Division Bench observed as under:-

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However, levy of interest under section 201(1A) is neither treated as penalty nor has the said provision been included in Section 273B to make 'reasonableness of the cause' for the failure to deduct a relevant consideration. Section 201(1A) makes the payment of simple interest mandatory. The payment of interest under that provision is not penal. There is, therefore, no question of waiver of such interest on the basis that the default was not intentional or on any other basis. (See Bennet Coleman and Co. Ltd. v. V.P.Damle, Third ITO, [1986] 157 ITR 812 (Bom.) and CIT v. Prem Nath Motors (P). Ltd., [2002] 120 Taxman 584 (Delhi).

Therefore, the second question is also answered in favour of the Revenue and against the assessee

"6. It has been further observed in American Express Bank Ltd. (supra) that if the employees (i.e. payee) had paid taxes as per the individual return/assessment, no amount as tax would be payable to that extent and the liability for interest would be only for the period commencing from the date of such tax was deductible to the date on which tax was actually paid. [CIT vs. Adidas India Marketing (P) Ltd. (2007) 288 ITR 379 Delhi and CIT – XVII vs. Trans Bharat Aviation (P) Ltd. (2010) 320 ITR 671.].

7. In view of the aforesaid position, the question is answered against the appellant Revenue and in favour of the respondent/assessee. The order of the Tribunal does not call for any interference."

5. For parity of reasons we answer the substantial question of law against the appellant Revenue and in favour of the respondent-assessee. The appeal is accordingly dismissed. No costs.

(V. KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

SEPTEMBER 05, 2014/HP