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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **ITA 371/2005**

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

versus

DENSO INDIA LIMITED ..... Respondent
Through: Mr. Prakash Kumar, Advocate.

With
\+ **ITA 372/2005**

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

versus

DENSO INDIA LIMITED ..... Respondent
Through: Mr. Prakash Kumar, Advocate.

With
\+ **ITA 373/2005**

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

versus

DENSO INDIA LIMITED ..... Respondent
Through: Mr. Prakash Kumar, Advocate.

With

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THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

versus

DENSO INDIA LIMITED ..... Respondent
Through: Mr. Prakash Kumar, Advocate.

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Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

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DENSO INDIA LIMITED ..... Respondent
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THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

versus

DENSO INDIA LIMITED ..... Respondent
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THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

versus

DENSO INDIA LIMITED ..... Respondent
Through: Mr. Prakash Kumar, Advocate.

With

\+ **ITA 379/2005**

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

versus

DENSO INDIA LIMITED ..... Respondent
Through: Mr. Prakash Kumar, Advocae.

With

\+ **ITA 380/2005**

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

versus

DENSO INDIA LIMITED ..... Respondent
Through: Mr. Prakash Kumar, Advocate.

And

\+ **ITA 381/2005**

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Raghvendra Singh with Mr. Ashok Manchanda, Advocates.

versus

DENSO INDIA LIMITED ..... Respondent
Through: Mr. Prakash Kumar, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 31.08.2017

Dr. S. Muralidhar, J.

1. These are ten appeals by the Income Tax Department ('Department') under Section 260A of the Income Tax Act, 1961 ('Act') directed against the common order dated 2nd September 2004 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 3233 to 3242/Del/2003 for the Financial Years ('FYs') 1988-89 to 1997-98.

2. While admitting these appeals on 23rd August, 2006 this Court framed the following question of law for consideration:

> "Whether the Income Tax Appellate Tribunal was correct in law in holding that the Commissioner of Income Tax (Appeals) had in fact reviewed its earlier order dated 29th January 2003 while exercising jurisdiction under Section 154 of the Income Tax Act, 1961, which only permits rectification of error apparent on the fact of the record?"

3. The background facts are that the Respondent-Assessee was incorporated under the Companies Act, 1956. It has a manufacturing unit at Greater Noida (Uttar Pradesh). It is an admitted position that M/s. Denso

Corporation, Japan had, during the period under consideration, deputed technicians to work for the Assessee at its manufacturing unit. These, expatriate technicians are paid salary in rupees by the Assessee apart from the rent free accommodation. The salary paid was debited in the books of the Assessee after deducting tax.

4. A survey was conducted in the premises of the Assessee on 14th November 1998. According to the Department, the Assessee had paid substantial part of the salary and allowances etc. to its expatriate employees in Japan and had kept this amount out of the pale of taxation in India. It was therefore alleged that the Assessee did not comply with Section 192 of the Act under which there was an obligation to deduct tax at source. According to the Department, a sum of Rs. 5,74,10,405 had been failed to be deducted by the Assessee for the aforementioned AYs.

5. A show-cause notice ('SCN') dated 28th January 2000 was issued to the Assessee. In response thereto, the Assessee by its letters dated 2nd February and 8th February 2000 stated that after discussion with the Japanese Chamber of Commerce and Industry, CBDT, CCIT and CIT-VI, the Assessee had paid revised tax and interest under Section 201 (1) (a) of the Act. The Assessee stated that it had no intention of concealing any income or TDS. The Assessee stated that it had been advised that salary paid outside India was not liable to tax in India. The Assessee accordingly submitted that it was prevented by reasonable cause for not deducting tax at source on the sum paid outside India.

6. The Assessing Officer ('AO') passed an order dated 19th July 2000 under Section 271 C of the Act holding that the Assessee had not been prevented by any reasonable cause to comply with Section 192 of the Act and was, therefore, liable to penalty in the sum of Rs. 5,74,10,405.

7. Aggrieved by the above order, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) ['CIT (A)']. By an order dated 29th January 2003, the CIT (A), after referring to the decisions in the cases of M/s. Subros Limited and M/s. Hyundai Engineering & Construction Co. Ltd., held that "there is reason to hold the existence of reasonable cause in this case." The CIT (A) further held that "the quantum of short deduction has also undergone substantive change involving a variation of more than Rs. 2 crores which would indicate that the quantum of default itself was not known to the JCIT when the penalty was imposed." It was accordingly held that no penalty under Section 271 C was warranted.

8. About three months thereafter, on 1st May 2003, the CIT (A) *suo motu* passed an order under Section 154 of the Act. The opening lines of the said order stated: "in this case action for rectification of mistakes in the appeal order passed on 29th January 2003 was initiated under Section 154 of the Act." The CIT (A) proceeded to observe that subsequent to the order passed on 29th January 2003, eight appeals of the Assessee relating to FYs 1989-90 to 1992-93 and 1994-95 to 1997-98 were taken up for hearing on 8th April 2003. The Assessee did not attend the hearing but the AO who attended the hearing was asked to bring all files relating to the case. The CIT (A) proceeded to list out the facts revealed from the files *inter alia* to the effect

that the Assessee had not disclosed its tax liability under VDIS fully and correctly; grossing up of tax was not correctly done and the statement of the Managing Director recorded on 10th December 1998 was totally 'evasive'. In para 12 of its order, the CIT (A) set out in a tabular form the obvious mistakes that had occurred when the earlier order dated 29th January 2003 was passed by the CIT (A). *Inter alia* it was noted that the case of the Assessee was not similar to Marubeni Corporation or Mitusi & Co. The CIT (A) therefore, felt it necessary to rectify the mistakes apparent from the record. It was observed by the CIT (A) as under:

> "16. The findings given earlier would undergo complete change because the facts mentioned above show that this case did not qualify the first three tests laid down by the Delhi High Court in the case of ***Azadi Bachao Andolan*** (mentioned in para 5 above) and the facts of this case are not similar to the facts of the cases cited by the Appellant. These are two important points on which I had decided that the Appellant had a reasonable cause and imposition of penalty was not justified. Another important point in favour of the Appellant was that the shortfall in tax deduction had been varied by Rs. 2 crores approximately and now this also has been proved to be a mistake. Further, it is obvious that the penalty amount was quantified correctly on the basis of figures of short deduction of tax calculated by the company. These mistakes go to the root of the order and will change the entire basis for cancellation of penalty. The effect of rectifying the mistakes will be to uphold the order imposing the penalty by the JCIT and after incorporating the facts mentioned above I rectify my order of 29th January 2003 and confirm the penalty of Rs. 5,74,10,405 levied.
>
> 17. After noticing the mistakes from the records, I cannot restrain myself from commenting that the case was presented earlier in such a way as to show that the facts were entirely similar to the facts of Munjal Showa Limited, Fuji Bank Limited, Mitsui & Co., Subros Limited and Marubeni Corporation. It was only because of the later appeals filed in this case that I had the occasion to see the survey file

of the AO which revealed the mistakes that had cropped up earlier."

9. Accordingly, the CIT (A) confirmed the penalty of Rs. 5,74,10,405 levied by the AO.

10. The Assessee filed appeals being ITA Nos. 3233 to 3242/Del/2003 against the order passed by the CIT (A) on 1st May 2003. Thereafter, the Department filed appeals before the ITAT against the earlier order dated 29th January 2003 of the CIT (A). These appeals were numbered as TDSA Nos. 4151 to 4159/Del/2004 for the Assessment Years ('AYs') 1989-90 to 1997-98.

11. The ITAT, by the impugned order dated 2nd September 2004, allowed the Assessee's appeals against the order dated 1st May 2003 of the CIT (A). The ITAT held that the order of the CIT (A) was without jurisdiction. Since the CIT (A) did not have the power to review its own orders, it cannot do so indirectly. If aggrieved by the order dated 29th January 2003 of the CIT (A), the right course was for the Department to adopt was to challenge it before the ITAT. The CIT (A) could not possibly rehear the same appeal over and over again.

12. The ITAT has in its impugned order dated 2nd September 2004 specifically noted that "the Department as informed by the learned DR during the course of the hearing of the appeal, has already filed appeal against the original order of the CIT (A)."

13. Against the said order dated 2nd September 2004 of the ITAT, the

Revenue filed these appeals which came up for hearing first on 8th July 2005. Interestingly, on 20th October 2005 Mr. C.S. Aggarwal, learned Senior counsel appearing for the Assessee/Respondent in these appeals and informed the Court that: 'The Revenue has preferred an appeal against the original order passed by the Commissioner deleting the penalty levied upon the Assessee." The said appeal, according to Mr. Aggarwal, was coming up for hearing before the ITAT on 3rd January 2006. In those circumstances, the Court considered it appropriate to adjourn the hearing of these appeals till such time the said appeal was disposed of by the ITAT.

14. What was perhaps not informed to this Court was that those appeals were in fact disposed of by the ITAT on 13th May 2005 itself. By the said order, the ITAT noted that after the survey was conducted, the Assessee voluntarily filed revised its computation of tax and interest on 13th January 1999 without raising any dispute and without waiting for any demand or penalty notice. The ITAT held that in view of the decisions of this Court in ***Azadi Bachao Andolan (2001) 252 ITR 471 (Del)***), and the decisions of the ITAT in ***Mitsui & Co. 65 TTJ 1*** and ***Fuji Bank Limited 121 Taxman 25*** in which the penalty under Section 271C had been deleted in similar circumstances, there was no legal infirmity in the order of the CIT (A). Consequently, the appeals of the Department dismissed.

15. The Department filed appeals being ITA Nos. 357 to 359 of 2006, 361 of 206, 364 to 366 of 2006, 368, 369 and 2006 in this Court against the order dated 13th May 2005 of the ITAT. This Court by its order dated 24th March 2006 referred to its orders in the case of Mitsui & Co. and observed in para 2

of the order, as under:

> "In the circumstances, therefore, and keeping in view the fact that the Tribunal and this Court have in similar other cases involving non-deduction of tax from the salaries paid to expatriate employees in countries outside India held that the failure to make the deduction at source was for a reasonable cause, we see no reason to interfere. Following the view taken by this Court in the cases mentioned above and the orders passed in ITA No. 355/2006 and connected matters decided on 22nd March 2006, these appeals fail and are accordingly dismissed."

16. For some reason, when the said appeals of the Department were heard by this Court on 24th March 2006, the Court was not informed of the pendency of the present appeals against the ITAT's order dated 2nd September 2004 although, as already noticed hereinabove, the vice-versa happened, viz., the Court hearing these appeals was informed on 20th October 2005 of the appellate proceedings emanating of the order dated 29th January 2003 of the CIT (A).

17. When these appeals were thereafter heard on 23rd August 2006, this Court too was not informed that the Department's appeals against the order dated 13th May 2005 of the ITAT [which affirmed the order dated 29th January 2003 of the CIT (A)] stood dismissed by this Court on 24th March 2006. Why the Department failed to do so is indeed a mystery.

18. The Department then carried the order dated 24th March 2006 passed by this Court in appeal to the Supreme Court. The said appeals of the Department were heard along with a batch of other appeals and were decided by a common judgment in ***Commissioner of Income Tax v. Eli Lilly and Co. (India) P. Ltd. (2009) 312 ITR 225 (SC).*** Learned counsel for

the Assessee has placed before the Court a copy of the aforementioned judgment which shows that the appeal concerning the present Assessee was CA No. 1634 of 2006. The case status available on the website of the Supreme Court shows that the said appeal was disposed of on 25th March 2009.

19. The Supreme Court noted the issue involved in para 8 of its judgment as under:

> "8. To complete the chronology of events, we may state that in some of the cases herein the Department has levied penalty under Section 271C of the 1961 Act for failure to deduct tax under Section 192(1) from out of Home Salary paid outside India by the Head Office ("HO") to the expatriates deputed to the Branch Office(s) in India which penalty was set aside on the ground that the expatriates exercised dual employment and that there was no obligation on the Branch Office to deduct tax under Section 192(1) on the Home Salary paid by the HO outside India. It was further held that the said Home Salary paid by the HO was not on account of or on behalf of the Branch Office since no deduction was claimed for the salaries paid outside India in computing the income of the Employer and accordingly it was held that no penalty was leviable under Section 271C of the 1961 Act. Against deletion of penalty under Section 271C, the Department has come to this Court by way of these Civil Appeals."

20. While the issues concerning Section 201 (1) and Section 201 (1A) were decided in favour of the Department, specific to the issue concerning penalty under Section 271C of the Act, the Supreme Court held as under:

> "36. Section 271C *inter alia* states that if any person fails to deduct the whole or any part of the tax as required by the provisions of Chapter XVII-B then such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct. In these cases we are concerned with Section 271C(1)(a).

Thus Section 271C (1)(a) makes it clear that the penalty leviable shall be equal to the amount of tax which such person failed to deduct. We cannot hold this provision to be mandatory or compensatory or automatic because under Section 273B Parliament has enacted that penalty shall not be imposed in cases falling thereunder. Section 271C falls in the category of such cases. Section 273B states that notwithstanding anything contained in Section 271C, no penalty shall be imposed on the person or the Assessee for failure to deduct tax at source if such person or the Assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who do not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason. In each of the 104 cases before us, we find that non-deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under Section 192 was a nascent issue. It has not be considered by this Court before. Further, in most of these cases, the tax- deductor-Assessee has not claimed deduction under Section 40(a)(iii) in computation of its business income. This is one more reason for not imposing penalty under Section 271C because by not claiming deduction under Section 40(a)(iii), in some cases, higher corporate tax has been paid to the extent of Rs. 906.52 lacs (see Civil Appeal No. 1778/06 entitled *CIT v. The Bank of Tokyo-Mitsubishi Ltd*). In some of the cases, it is undisputed that each of the expatriate employees have paid directly the taxes due on the foreign salary by way of advance tax/self-assessment tax. The tax-deductor-Assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/HO and, consequently, we are of the view that in none of the 104 cases penalty was leviable under Section 271C as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source."

21. The conclusions reached by the Supreme Court as regards the above issue is to be found in para 39 of the said judgment, which reads as under:

> "39. For the reasons mentioned hereinabove, however, no penalty proceedings under Section 271C shall be taken in any of these cases as the issue involved was a nascent issue. Accordingly, we quash the penalty proceedings under Section 271C."

22. Specific to 104 cases which were before it, including that of the Respondent-Assessee, the Supreme Court was of the view that in "none of the 104 cases penalty was leviable under Section 271C as the Respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source." The resultant position as far as the order dated 29th January 2003 of the CIT (A) reversing the penalty order of the AO is concerned, it stood affirmed by the ITAT by its order dated 13th May 2005, then this Court by an order dated 24th March 2006 and finally by the Supreme Court by the judgment dated 25th March 2009.

23. This Court is unable to understand what prevented the Department from bringing the above developments, specific to the case of the present Assessee, to the notice of the Supreme Court before it delivered the above judgement dated 25th March 2009. It will be recalled that the Department did not point out to this Court the additional facts taken note of by the CIT (A) (while exercising *suo motu* powers of review) when it dismissed the Department's appeals on 24th March 2006.

24. Mr. Raghvendra Singh, learned counsel for the Department, suggested that the proceedings emanating from the order dated 1st May 2003 of the CIT (A) was separate. Those facts, according to him, were not present before the ITAT which heard the Department's appeals against the order dated 29th January 2003 of the CIT (A). He submitted that in any event since

these appeals have been admitted and the question framed, they have to be heard and disposed of on merits.

25. The Court fails to understand how, after the Supreme Court has by its judgment dated 25th March 2009 categorically held on facts that the Respondent-Assessee had discharged the burden of showing reasonable cause for the failure to deduct TDS, this Court can possibly pass an order in the present appeals which might have the effect of contradicting the aforementioned judgment of the Supreme Court.

26. It is strange that the Department allowed the proceedings to continue on two parallel tracks without making an effort, even before the ITAT, to have the two appeals – i.e. the Department's appeals against the CIT (A)'s order dated 29th January 2003 and the Assessee's appeals against the CIT (A)'s order dated 1st May 2003 - heard together. This has to be understood in the context of the fact that by the time the ITAT heard the Assessee's appeals against the CIT (A)'s order dated 1st May 2003, it had already before it the Department's appeals against the order dated 29th January 2003. When the Assessee's appeals were taken up for hearing, the Department should have pointed out to the ITAT that its appeals against the order dated 29th January 2003 were pending.

27. Again, when this Court was on 24th March 2006 hearing the Department's appeals against the order dated 13th May 2005 of the ITAT, it was not informed that the present appeals against the ITAT's order dated 2nd September 2004 which had been filed by the Department on 31st January

2005 itself. The Department ought to have requested this Court to hear both sets of appeals together.

28. In light of the fact that the Supreme Court has by its judgment dated 25th March 2009 held on merits that the Respondent-Assessee had discharged the burden of showing reasonable cause for the failure to deduct TDS, the Court is not persuaded to entertain the present appeals. The question that has been framed does not require to be answered for the simple reason that the decision of this Court cannot possibly be contrary to what has been held by the Supreme Court on merits on the question of the liability of the Assessee to pay penalty under Section 271C of the Act.

29. For the aforesaid reasons, the Court declines to answer the question framed. The appeals are dismissed with no order as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 31, 2017
Rm