$~60, 61 & 64

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

Date of Order: February 19, 2019

\+ ITA 169/2019, CM APPL. 7722-7723/2019
PR. COMMISSIONER OF INCOME TAX DELHI - 2
..... Appellant

versus

BLUE SCOPE STEEL INDIA PVT. LTD.
..... Respondent

\+ ITA 170/2019, CM APPL. 7726-7727/2019
PR. COMMISSIONER OF INCOME TAX DELHI -2
..... Appellant

versus

BLUE SCOPE STEEL INDIA PVT. LTD.
..... Respondent

\+ ITA 173/2019, CM APPL. 7747-7748/2019
PR. COMMISSIONER OF INCOME TAX DELHI - 2
..... Appellant

versus

BLUE SCOPE STEEL INDIA PVT. LTD.
..... Respondent

Counsel for the appellant:
Mr. Zoheb Hossain, Senior Standing Counsel

Counsel for the respondent:
None.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

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S. RAVINDRA BHAT, J. (ORAL)

CM APPL. 7722-7723/2019 CM APPL. 7726-7727/2019 & CM APPL. 7747-7748/2019 (condonation of delay)

By these applications, the appellant seeks condonation of delay in filing/re-filing of the accompanying appeals.

For the reasons stated in the applications, the same are allowed and the delay in filing/re-filing is condoned.

Applications stands disposed of.

ITA 169/2019, ITA 170/2019 & ITA 173/2019

1. The principal issue urged with respect to the assessment year 2007-2008, 2008-2009 and 2009-2010, in these appeals under Section 260A of the Income Tax Act (hereinafter the Act), by the Revenue is whether the salaries paid to the assessee's Australian AE, were towards reimbursement of expenses or they were unwarranted.

2. The brief facts are that the assessee renders business support services and is the subsidiary of an Australian company. The assessee's inability to carry out the task assigned to it led to creation of a joint venture (JV company), which took over the part of the duties. A tripartite arrangement whereby the JV performed, some task which the assessee could not discharge out of the functions, required

of its AE and the balance which were performed by the assessee became the subject matter of ALP determination, and scrutiny by the Transfer Pricing Officer (TPO) under Section 92CA of the Act. The TPO held that the salary expenses, incurred by the assessee were unwarranted, premised upon the decision that the salaries were really paid to employees seconded to it by the Australian AE. The AO confirmed the TPO's order; the assessee successfully appealed to the Appellate Commissioner [CIT(A)]. The CIT (A) reversed the finding of the AO. The Revenue's appeal was rejected by the ITAT.

3. The Revenue contends that the ITAT fell into error in overlooking that the real beneficiary of the Australian entity's employees was not the JV but the AE and that in effect the arrangement was secondment, resulting in expenditure that could not be deducted. Learned counsel relied upon the finding of the TPO that the JV arrangement and the agreement entered into between the assessee and the third party company nowhere indicated that the employees of the AE were necessary to discharge or carry out any task or function. It was thus contended that the ITAT erroneously overlooked the material circumstances.

4. On this specific aspect urged, i.e., the justification for the expenditure, this court finds that the CIT(A) examined the correct position and noted that the methodology with respect to the Comparable Uncontrolled Prices (CUP) method under Rule 10B. The CIT(A) observed as follows:

"Apart from the above position, the same expatriate employees were also involved in providing services to the AE as well as to joint venture company (JV). In other words, the income side of the appellant has two components, namely, receipts from its AE and receipts from the JV. The same set of employees are responsible for these two receipts. The salary of the employees were paid by the AE. This was because the employees were on secondment from the Australian AE. Their salaries were paid in Australia. The appellant was reimbursing these salaries. The AO treated the arm's length price of the reimbursement of salary expenses as NIL. On the other hand, the AO has accepted the income generated by these' employees. This itself is a contradiction. Nowhere in the assessment order, the AO has doubted the income received from rendering business support services by the appellant. In the same way, the receipt of income from support services rendered to JV was also not disputed by the AO. Once the AO accepted the receipt of income as genuine, the AD is duty bound to provide for the deduction on account of the expenses incurred towards earning the same income. The appellant being a service company, the main component of, the expenditure is towards employee cost. As narrated earlier, the employee cost consists of local expenditure and salary expenditure reimbursed to its AE. There is no rational to accept only the local expenditure and deny the expatriate salary paid by the AE and reimbursed by the appellant.

4.5. The AO used the CUP method to determine the ALP of the salary reimbursement as NIL. It is to be pointed out that the AO has not used any independent comparable transactions to hold that such services were rendered by third parties in the market place as an arm's length transaction without incurring any salary costs. Therefore, the action of the AO cannot be sustained.

4.6. The argument of the AO that by making the "arrangement" of keeping expatriate employees on the

rolls of the assessee, even when, the project was sold to JV 'results into draining out of money from India and lowered taxes' has been countered by the assessee. In an illustrative example three different scenarios were worked out which was given to the AO during the assessment proceedings. The same is reproduced in the table below: .

Illustrative for Expat Salary & Business Support Services			
Particulars	*As per facts Salary paid by assessee*	*As per Show Cause salary paid by JV-No BS income*	*Alternative show cause working salary paid by JV – with BS income*

	Assessee	*JV*	*Assessee*	*JV*	*Assessee*	*JV*
Revenue						
-From AE	*38*	*N/A*	*-*	*N/A*	*38*	*N/A*
-From JV	*60*	*N/A*	*-*	*N/A*	*-*	*N/A*
From customer	*N/A*	*3000*	*N/A*	*3000*	*N/A*	*3000*
Total	*98*	*3000*	*N/A*	*3000*	*N/A*	*3000*
Expenses	*100*	*500*	*1*	*600*	*-*	*600*
-Salary Amount (reimburse on actual to AE by Assessee/JV						
-Other costs (amount of 10 assumed as non expat related cost)	*100*	*1500*	*10*	*1590*	*10*	*1590*
-Service charge from Assessee	*N/A*	*60*	*N/A*	*-*	*N/A*	*-*
Total	*200*	*2060*	*10*	*2190*	*10*	*2190*

Profit/(Loss)	*(102)*	*940*	*(10)*	*810*	*28*	*810*
Taxation (Assumed @ 30.90%)	*-*	*290*	*-*	*250*	*9*	*250*
Net profit/(Loss) after tax summary	*(102)*	*650*	*(10)*	*810*	*19*	*560*
Tax payment-India Foreign Exchange outgo – India		*290* *62*		*250* *100*		*259* *62*

As can be seen, the assumptions of the TPO are wrong and if the salary of the expatriate employees were paid by .TV, it would result into lower taxes in India and net foreign exchange outflow work have been higher.

4.7. I am also of the considered opinion that the TPO cannot-sit in judgment on the commercial decision taken by the appellant in employing the expatriates. There is no evidence brought on record to show that the expatriate employees did not work in India. The AE has also compensated for the' services received from the employees on the roles of the appellant. There is no basis to conclude that the expenses incurred are a sham transaction since the appellant has offered the income for taxation generated after incurring such expenses. The legitimate question to be asked is whether in an uncontrolled transaction, the parties to the similar transaction behaved in the same way as the appellant did? In the absence of any comparable uncontrolled transaction (CUP) 'price of a similar transaction, treating there imbursernents made by the assessee as unnecessary and the value of the transaction as NIL is unjustifiable. It is not open to the TPO to suggest where

> *from the employees' salaries should have been recovered by the appellant. Therefore, I hold that the decision of the TPO cannot be sustained. Therefore, the AO is directed to delete the addition made in this regard.*

5. This court is of the opinion that the view of the CIT (A) which also commanded itself to the ITAT was in the circumstances of the case justified. The CIT(A) noted correctly that the revenue nowhere could establish that its employee did not work in India and the AE has also compensated for the services of the employee on the roll of the assessee. The decision of the JV and the assessee clearly constituted a business or managerial decision which the revenue could not have, in the manner it did, interfered with holding that the employees of the AE were subjected to secondment, which resulted in non deductable expenditure.

6. With the above reasons, we find that no substantial question of law arises; therefore, the appeals filed by the appellant are dismissed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

FEBRUARY 19, 2019
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