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

\+ **INCOME TAX APPEAL NOS. 182/2002 & 255/2003**

Reserved on : 5th September, 2014
Date of decision: 25th September, 2014

NEW HOLLAND TRACTORS (INDIA) PRIVATE LIMITED
..... Appellant
Through Mr. C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar, Advocate.

versus

THE COMMISSIONER OF INCOME TAX, DELHI-V
..... Respondent
Through Mr. N.P. Sahni, Sr. Standing Counsel.

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

SANJIV KHANNA, J.:

These two appeals by the assessee-New Holland Tractors (India) Private Limited relate to Assessment Year 1996-97. In ITA No. 182/2002, the issue raised is whether entire license fee of Rs.15,68,50,000/- received or paid under the agreement dated 14th July, 1995 is taxable in the year of receipt or it should be spread over three years. In ITA No. 255/2003, the appellant-assessee has challenged order of the Income Tax Appellate Tribunal (Tribunal, for short) upholding levy of penalty for concealment in respect of the aforesaid amount under Section 271(1)(c) of the Income Tax Act, 1961 (Act, for short).

2. To have clarity and in order to appreciate the controversy, we will be first taking up ITA No. 182/2002 as it pertains to quantum addition made in the assessment order.

ITA No. 182/2002

3. By order dated 24th September, 2002, the following substantial question of law was framed:-

> "Whether, in the circumstances of the case and on the true and correct interpretation of tripartite agreement dated 14.7.1995, the Tribunal was correct in law in concluding that the entire licence fee of Rs.15,68,50,000/-,received by the appellant company, for granting the right to use technical know how, could be taxed in the assessment year 1996-97?"

4. The facts are that **(a)** in 1969 Escorts Limited (Escorts, for short) and Ford Motor Company entered into a joint venture and established a company, i.e. Escorts Tractors Limited (ETL, for short), in India. **(b)** In 1990, the entire shareholding of Ford Motor was transferred to New Holland North America, U.K. (NHNA, for short), **(c)** By virtue of the joint venture relationship, technology for various Ford tractor models, including technology for Ford tractor model 3610 was to be made available to ETL till the termination of the joint venture, **(d)** Subsequently, NHNA transferred their rights in various engineering component and technical services, including the technology for Ford tractor model 3610 to its subsidiary/appellant-assessee herein, i.e., New Holland Tractors India Private Limited ('NH India' or the assessee, for short), **(e)** In July, 1995, NHNA and Escorts mutually agreed to terminate their joint venture, **(f)** A tripartite disengagement agreement dated 14th July, 1995 was executed between the NHNA, NH India and Escorts, whereby NHNA agreed to sell 25,50,000 shares in ETL to Escorts for a consideration for Rupees equivalent of US$ 98,00,000. **(g)** Further, the NH India (the appellant assessee) agreed to licence the right to use technology of the tractor model No. 3610, i.e., design engineering component for a period of three years for consideration of US$ 50,00,000, to be paid in Indian Rupees (Rs 15,68,50,000/- on conversion) on non-repatriable basis. **(h)** In order to facilitate transactions, the agreement stipulated an arrangement under which an escrow bank account was opened. **(i)** by specified dates

Escorts/ETL had to deposit payments in the escrow for the shares as w as technical fee. **(j)** Upon successful implementation of the said tripartite agreement, NH India received payment of Rs.15,68,50,000/- during the previous year relevant to the assessment year in question. **(k)** Rs.3,72,44,848/- was offered for taxation in the assessment year in question and Rs 5,22,83,333, 5,22,83,333 and 1,50,38,486 were offered to be taxed in the subsequent Assessment Years 1997-98, 1998-99 and 1999-2000, respectively.

5. The short question is whether the aforesaid amount of Rs.15,68,50,000/-, which was received in the previous year relevant to the assessment year in question, had accrued and, therefore, should be taxed in the Assessment Year 1996-97 relevant to receipt year or should be proportionately taxed over the period of three years, which would fall in the Assessment Years 1996-97 to 1999-2000. The Assessing Officer, Commissioner of Income Tax (Appeals) and Tribunal have held that the aforesaid amount of Rs.15,68,50,000/- was taxable in the year of receipt, i.e., Assessment Year 1996-97 as it had accrued and the accrual was not postponed to the subsequent Assessment years 1997-98 to 1999-2000.

6. We need not refer to the case law on the subject, what is income or accrual of income, except by referring to the authoritative pronouncement of this Court in ***Commissioner of Income Tax versus Dinesh Kumar Goel,*** (2011) 331 ITR 10, wherein earlier judgments of the Supreme Court in ***E.D. Sassoon and Company Limited versus Commissioner of Income Tax,*** (1954) 26 ITR 27 and ***Calcutta Company Limited versus Commissioner of Income Tax, West Bengal*** (1959) 37 ITR 1 were elucidated and explained. In ***Dinesh Kumar Goel (supra)***, the respondent-assessee, a coaching institute, following mercantile system of accounting had received the total fee for the entire course on enrolment or at the time

of admission, which could be for a two years duration. Question answer was, whether the entire fee on receipt should be treated as income of the current year or could be spread over/divided, depending upon the tenure or period of the course for which payment was made? The question was decided in favour of the assessee but for reasoning and findings, which do not support the appellant-assessee in the present case. In fact the ratio is contrary and against the appellant-assessee.

7. Section 5(i) of the Act on the scope of total income of an resident states that it includes income of any previous year of a person, from all sources derived; (a) received or deemed to be received in India, (b) accrues or arises or is due to accrue or arise to the person in India, and (c) accrues or arises to him outside India during such year. In ***Dinesh Kumar Goel*** (supra) it was observed that when an assessee was following mercantile system of accountancy, receipt of a particular amount in the relevant year would be relevant at the time of accrual or arisal for the purpose of taxation. This would make the income chargeable to tax in the particular year, and not mere receipt of the amount. Thus, when income accrues or arises, actual receipt of amount may not be there and it would be chargeable to tax in the said year and equally receipt or right to receive a particular sum under an agreement would not be sufficient, unless the right had accrued by rendering of services and not by promising for services. In the latter cases, the income would accrue on rendering of services. The following quotation from ***E.D. Sassoon and Company Limited*** (supra) was highlighted:"-

> "Mukerji J. has defined these terms in Rogers Pyatt Shellac and Co. v. Secretary of State for India (1925)1 I.T.C. 363, 371:
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> > 'Now what is income? The term is nowhere defined in the Act..... In the absence of a statutory definition we must take its ordinary dictionary meaning - 'that which comes in as the periodical

produce of one's work, business, lands or investments (considered in reference to its amount and commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation" (Oxford Dictionary). The word clearly implies the ideal of receipt, actual or constructive. The policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. 'Accrues,' 'arises' and 'is received' are three distinct terms. So far as receiving of income is concerned there can be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning plainer than the word 'receiving' itself. The words 'accrue' and 'arise' also are not defined in the Act. The ordinary dictionary meanings of these works have got to be taken as the meanings attaching to them. 'Accruing' is synonymous with 'arising' in the sense of springing as a nature growth or result. The three expressions 'accrues,' 'arises' and 'is received' having been used in the section, strictly speaking 'accrues' should not be taken as synonymous with 'arises' but in the distinct sense of growing up by way of addition or increase or as an accession or advantage; while the word 'arises' means comes into existence or notice or presents itself. The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed out by Fry L.J. in Colquhoun v. Brooks (1888) 21 Q.B.D. 52 , [this part of the decision not having been affected by the reversal of the decision by the House of Lords (1889) 14 App. Cas. 493 that both the words are used in contradistinction to the word "receive" and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate.'

One other matter need be referred to in connection with the section. What is sought to be taxed must be income and it cannot be taxed unless it has arrived at a stage when it can be called 'income.

The observations of Lord Justice Fry quoted above by Mr. Mukerji J. were made in Colquhoun v. Brooks (1888) 21 Q.B.D. 52while construing the provisions of 16 and 17 Victoria Chapter 34 Section 2 schedule 'D'. The words to be construed there were 'profits or gains, arising or accruing,' and it was observed by Lord Justice Fry at page 59:

> 'In the first place, I would observe that the tax is in respect of 'profits or gains arising or accruing.' I cannot read those words as meaning 'received by.' If the enactments were limited to profits and gains 'received by' the person to be charged, that limitation would apply as much to all Her Majesty's subjects as to foreigners residing in this county. The result would be that no Income-tax would be payable upon profits which accrued but which were not actually received, although profits might have been earned in the kingdom and might have accrued in the kingdom. I think, therefore, that the words 'arising or accruing' are general words descriptive of a right to receive profits.'

To the same effect are the observations of Satyanarayana Rao J. in Commissioner of Income tax Madras v. Anamallais Timber Trust Ltd. [1950] 18 ITR 333 (Mad) and Mukherjea J. in CIT v. Ahmedbhai Umarbhai and Co. [1950]181 ITR 472 (SC) where this passage from the judgment of Mukerji J. in Rogers Pyatt Shellac & Co. v. Secretary of State for India 1 I.T.C. 363 , is approved and adopted. It is clear therefore that income may accrue to an Assessee without the actual receipt of the same. If the Assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expresses debitum in presenti, solvendum in future; See W.S. Try Ltd. v. Johnson (Inspector of Taxes) [1946]1 A.E.R. 532 , and Webb v. Stenton and Ors. Garnishees 11 Q.B.D. 518 . Unless and until there is created in favour of the Assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income had accrued to him."

8. In the said case, the students were required to make deposit of the whole fee for the entire course, but it was held that the amount deposited also included "deposit" or "advance" and it cannot be said that the entire fee had become "due" at the time of deposit. The fee was paid in advance presumably as there should not be any default in payment by the

students during the term of the course. The Assessing Officer had used t term "deposit" and "due" but the said words did not mean that the income had accrued at the time of deposit itself. The said deposit was only an advance as all services were not to be rendered in the year in question but were to be rendered in the subsequent years. Referring to ***Calcutta Company Limited*** (supra) it was observed that advance should not be treated as income, as otherwise an anomalous situation would arise, as expenses were required to be deducted to arrive at net income but such expenses were yet to be incurred in the assessment year for they had to be incurred in future years. Taxation of the entire receipt in such situations would lead to a highly derogatory situation for the assessee. Expression "profits or gains" had to be understood in a commercial sense. There cannot be any computation of "profits and gains", until the expenditure necessary for the purpose of earning of receipts was deducted. In other words, the Court applied the principle of matching between the receipts and the expenditure to determine the time of taxation or principle of accrual.

9. In the same decision while dealing with ITA Nos. 1093/2008 and other connected appeals, the Division Bench referred to Section 145 of the Act and Section 211 (3C) of the Companies Act, 1956 relating to Accounting Standards recommended by the Institute of Chartered Accountants of India and it was observed that companies, were required to follow the said Accounting Standards notified by the Central Government in consultation with the National Advisory Committee. In Accounting Standard -1 – Disclosure of Accounting Policies, the definition of the word "accrual" had been made in the following manner:-

> " (b) 'Accrual' refers to the assumption that revenues and costs are accrued that is, recognised as they are earned or incurred (and not as money is received or paid) and recorded in the financial statements of the period to which they relate."

On reading the aforesaid definition, the Court observed that the term "accrual" relates to revenue earned with costs incurred. Therefore, revenue should stand earned but would not accrue unless, expenses or costs were incurred. The aforesaid principle recognises the matching concept, i.e., matching of income with expenditure to arrive at net income. Thereafter, reference was made to ***CIT versus Woodward Governor of India (P) Limited***, (2009) 312 ITR 254, ***CIT versus Bilahari Investment (P) Limited***, (2008) 299 ITR 1 and ***JK Industries versus Union of India***, (2008) 297 ITR 176 on the matching concept.

10. When we apply the aforesaid legal principles to the factual matrix of the present case, it has to be held that the decision of the Tribunal affirming the orders of the tax authorities is correct and as per law. The parent company of appellant-assessee and Escorts had entered into joint ventureship in 1969 and by virtue of the said joint ventureship had during the period 1991-94 provided "technology" for tractor model 3610. The said technology was acquired or provided on or before 14th July, 1995, when the tripartite agreement was executed. The appellant-assessee prior to 14th July, 1995 had already incurred expenditure to create the said technology, which was being used by ETL for manufacture of tractor model No. 3610. As the appellant-assessee and Escorts/ETL were parting ways with termination of their joint venture, ETL had agreed to pay Rs.15,68,50,000/- in order to enable ETL to use the said technology for a period of three years or upto 31st December, 1996. Clearly and certainly no services or know-how/technology was to be supplied during the next three years. It is not a case where technical services or other services were to be provided during the period of three years.

11. Appropriate, would be to reproduce the relevant clauses of the agreement dated 14th July, 1995, which read:-

"WHEREAS, New Holland's related company New Holland U.K. Limited has assigned the right to the design engineering component of Technical Services, which includes technology used in the tractor model 3610 developed between 1991 and 1994, to NH India which will extend to Escorts the right to use such design engineering component hereinafter referred to as "Design Engineering Services"); and

ARTICLE 1
DISENGAGEMENT

1.01 XXXXX

1.02 Assignment of Design Engineering Services and Payment Therefore

As of the Binding Date (defined in 4.01) NH India hereby assigns to Escorts for a period of three years the right to use the technology used in the tractor model 3610 provided to ETL by New Holland U.K. Limited (Formerly New Holland Ford Limited) between 1991 and 1994, subject to 2.02(b)(i), (ii), (iii) and (iv). In consideration of the foregoing, Escorts agrees to pay a technical fee in Indian rupees equivalent to US$ 5,000,000 at the date of deposit in the Escrow Account as provided in 1.04(d) below ("Technical Fee"), currently equivalent to approximately Rs.15,30,00,000/-, after deducting TDS, on a non-repatriable basis to NH India.

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ARTICLE II
TECHNICAL & PRODUCT INFORMATION

2.01 Production and Distribution of Ford Tractors

Escorts on its own and on behalf of ETL agrees not to dispute the right of New Holland and its associated companies to produce, distribute and sell in India the "Ford" brand tractors.

2.02 Product Differentiation

It is a basic concept of this Agreement that Escorts and its associated companies including ETL will not manufacture tractors which will be confused with Ford tractors. Confusion can be caused only by four factors: use of the same brand name; colour; series identification; and styling (hereinafter "Confusion Factors").

2.02(a) Up until 31 December 1996, New Holland will not object to ETL continuing to produce Ford tractors under the following conditions:

(i) product quality be maintained to Ford standards by the

retention by ETL of a resident engineer appointed by New Holland;

(ii) the present styling, paint, colour, brand name and series identification to be maintained as they are at the date of this Agreement and to be utilised only together in combination.

(iii) If before 31 December 1996 ETL is required to, or chooses to, drop the use of the Ford brand name, the conditions of paragraph 2.02(b) will apply.

2.02(b) After 31 December 1996, or at such earlier date as provided in 2.02(a)(iii), the Confusion Factors will be handled as follows:

(i) Brand Name: Escorts, ETL and their affiliated companies shall not use the brand name Ford and in any case shall comply with the limitations contained in Article 10.3 of the Registered User Agreement dated 14 December 1990 between For Motor Company of Canada Limited and Escorts Tractors Limited.

(ii) Colour: In order to distinguish the colour of products manufactured by EL, ETL or any affiliated company from those to be manufactured by New Holland and its affiliates, EL, ETL and its affiliated companies shall only use colours which are not blue; or Bureau of Indian Standards (September 1994) ISC nos. 101, 102 or 174; or Bureau of Indian Standards (September 1994) blue colours with a Munsell value between 0 and 2.5 or with a Munsell value between 7.5 and 10 (included within these two preceding ranges of blue shades are Bureau of Indian Standards (September 1994) ISC nos. 105, 106, 108 and 177 which are permitted). In the preceding specifications of blue colours, they are mutually exclusive; id est the permitted shades of blue cannot be mixed with any other colour or shade of blue to form a colour which would fall within the range of colours defined by Bureau of Indian Standards (September 1994) as a blue colour with a Munsell value of greater than 2.5 and less than 7.5.

(iii) Series Identification: Neither Escorts nor ETL nor any of their affiliated companies shall use the same series identification as those used on Ford tractors.

(iv) Styling i.e. Grill: The tractors produced by ETL/Escorts and/or any of their affiliated companies shall use front grills which are different from the ones presently used on Ford tractors manufactured by ETL.

2.02(c) Until 31 December 1996 or such earlier date as

> provided for in 2.02(a)(iii) above New Holland will not interfere with, object to, or take any action that could lead to, an early termination of the Registered User Agreement referred to in 2.02(b)(i). New Holland will instead cooperate with ETL in seeking termination of the Registered User Agreement as from 31 December 1996. Notwithstanding the above, ETL shall always be free to manufacture tractors under any other brand name provided the tractors produced by ETL conform to the conditions of 2.02(b)."

12. The aforesaid clauses unerringly state that no new technology, upgradation or service in any form was to be provided on or after 14th July, 1995. The "technology" in question had already been provided and was already in use for manufacture of tractor model 3610. It was provided and made available between 1991 to 1994. What was permitted and allowed to ETL was the right to continued use of such design engineering component for a period of three years, in spite of disengagement and termination of the joint venture agreement.

13. The initial amount of Rs.15.30 crores stated in the tripartitate agreement dated 14th july, 1995 got enhanced, possibly due to exchange rate fluctuation to Rs.15,68,50,000/-. The said payment had to be deposited in the escrow account and upon successful completion of the legal formalities and mutual obligations, the deposit was to be received and appropriate by the appellant-assessee. The accepted and admitted position is that the payment was received. Upon receipt, the amount paid was no longer a deposit or an advance but the amount which stood appropriated as income earned. In fact, the tripartite agreement dated 14th July, 1995 provided for termination of the said agreement in certain contingencies, before payment was made to the appellant-assessee from the escrow account. In the present case the agreement was not terminated and was duly implemented and as a consequence payment was received. Thus it has to be held that decision in the case of ***Dinesh Kumar Goel*** (supra) and the ratio and the legal position as expounded in ***Calcutta Company Limited***

(supra) and ***E.D. Sassoon and Company Limited*** (supra) support t contention of the Revenue and not the submissions of the appellant-assessee. The income had duly accrued or arising during the assessment year in question. The appellant-assessee did not have any obligation or responsibility to carry out further activity or perform any new task, after the agreement dated 14th July, 1995, towards know-how or technology and on account of receipt of the licence money of Rs.15,68,50,000/-. The assessee did not have to perform any future obligation or task. Thus, unlike the factual matrix in ***Dinesh Kumar Goel*** (supra) where only advance deposit was received, but in the present case the appellant-assessee had received the entire consideration and not an advance deposit. The amount paid was not an advance relating unperformed obligation which had to be performed or undertaken. What the agreement postulated was that the ETL could use the technology already made available to them for a period of three year. This would not make the payment or deposit an advance. Neither was the payment inchoate nor made subject to final decision on appropriation. There was no stipulation to return or refund. A payment would be an advance or deposit if the said amount was repayable or the person receiving the deposit as advance had to perform and render services post deposit in future as was the case in ***Dinesh Kumar Goel*** (supra).

14. When we apply the principle of matching, again the issue has to be decided in favour of the respondent-Revenue and against the appellant-assessee as the appellant-assessee or its affiliates or group concerns had already incurred the expenditure on developing the technology.

15. In the present case, we are not concerned about the tax treatment in the hands of ETL and whether the said amount should be spread over three years. We are concerned with the year of taxation in the hands of the

appellant-assessee, the recipient, who has already performed the obligations.

16. In these circumstances, the appellant-assessee adopted another line of argument. It was submitted that the appellant-assessee would have been liable for damages in case of defective technology. Therefore the amount received had not accrued or arisen and it would have accrued or arisen only after end of three years. Adjunct to this argument was the submission that there was an inbuilt or rather deemed obligation that the appellant-assessee would ensure that the technology remained workable.

17. The second argument as extended, it is apparent, is an afterthought as it was not raised before the authorities or the Tribunal. In fact, in the written submissions filed before the authorities it was accepted that parting of information and technology had taken place in one go, but the ETL had the right to use the technology for three years. The question of inbuilt or implied obligations is far-fetched as it is not discernible or mentioned in the agreement and it was not the case of the appellant-assessee that they had to provide technology in future or after 14th July, 1995. The appellant-assessee a signatory to the Tripartite agreement was aware that there was no such inbuilt obligation, thus no such contention was raised earlier. This negates the argument which we perceive is a mixed question of law and facts.

18. The first contention that if the technology was defective, the appellant-assessee would be liable to pay damages annihilates accrual, is again misconceived and legally unattainable. There is no specific stipulation in the agreement relating to damages in case the technology made available between 1991-94 was found to be defective. Clause No. 4.04 relied upon by the learned counsel for the appellant-assessee does not justify or merit the said argument. The said clause reads as under:-

"4.04 Release and Hold Harmless

As from the date the transfer of Shares and the payments of money to New Holland and/or NH India have been effected, Escorts for itself and in the name of and on behalf of ETL shall release any and all claims they have or may ever have against New Holland, NH India or any of their related companies arising out of or in connection with New Holland's investment in ETL and any other agreement entered into between or among New Holland or any of its related companies and Escorts, ETL or any of its related companies. Similarly, as from the date the transfer of Shares and the payments of money to New Holland and/or NH India have been effected, New Holland shall release any and all claims it has or may ever have against ETL, Escorts and its related companies arising out of or in connection with its investment in ETL and any other agreement entered into between or among New Holland or any of its related companies and Escorts, ETL and any of its related companies. These releases do not include any claims that may be brought as a result of the failure of a party to comply with the terms of this Agreement. Each party agrees that it will obtain the required corporate approval to enter this Agreement and will hold the other parties harmless for any consequences related to failure to obtain the required approval."

The aforesaid clause does not relate to the technology element. It relates to payment of money, transfer of shares, etc. Even assuming the aforesaid clause relates to damages on account of defective technology, still the receipt in question would not become an advance or a deposit. The contention and argument would be contrary to the principles of accountancy and the principle of accrual of income. It is not the case of the appellant-assessee that claim of damages is equivalent to claims for warranty, which can be allowed on the basis of principles of matching and on actuarial basis as held by the High Court in the case of ***Woodward Governor of India (P) Limited*** (supra) where it was held, anticipated losses in the shape of warranty claims based upon past data could be allowed as an expenditure. This was not the case that was promoted and projected by the appellant-assessee. Claim for damages under the law of

contract postulates a breach of contract and the limitation period mention under Article 23 of Schedule 1 to the Limitation Act, 1963 is three years. Unknown and off chance claim for damages in the present factual matrix is certainly not equivalent to claim for warranty, which are to be allowed only on the basis of past data, as products sold and consideration are taxable and, therefore, the expenses which have to be incurred to meet the warranty claims computed on scientific and actuarial basis, have a co-relation with the receipt. Learned counsel for the appellant-assessee has not pointed out even a single decision in which damages for breach of contract, effects and negates accrual of income.

19. Contingent liability is not an expenditure and, therefore, even when an assessee is following mercantile system of accounting, it cannot be allowed as a deduction under Section 37 of the Act. Unascertained liability on account of damages cannot be allowed as an expenditure was settled by Madras High Court in ***Senthikumara Nadar versus C.I.T***, (1957) 32 ITR 138. The present case is not of a statutory liability, and even no claim for damages etc. had been made. The submission, therefore, does not have any merit as it relates to unascertained liability, the happening of which was dependent on a doubtful and uncertain contingency in future. It could have never happened. Indeed it never happened.

20. Another contention raised before us was that the amount received was inchoate receipt as there was an obligation on the part of the appellant-assessee that the technology so made available remained capable of being used for a period of three years. The amount received was not an inchoate amount depending upon any contingency before it could be appropriated. The appellant-assessee was not under an obligation to refund the said amount under any of the clauses. Liability to pay damages under the law of contract for breach of a contract does not make the receipt an inchoate

receipt.

21. Similarly, the contention that in the books of account the amount so received had been bifurcated and divided into four assessment years does not carry any force. A wrong treatment given in the books of accounts contrary to the accountancy principles could be corrected. Income earned should be taxed in the right year and should not be diverted or treated as income of another years. What the accountants may opine, may not necessarily be a right and good law and in case of a dispute the issue has to be decided on merits and not on the basis of the treatment in the books of accounts. [see ***Tuticorin Alkali Chemicals and Fertilizers Limited versus Commissioner of Income Tax***, (1997) 227 ITR 172 (SC)].

22. At this stage, we may record that learned Senior Standing Counsel for the appellant-assessee has stated that if the entire amount of Rs.15,68,50,000/- is taxed in the Assessment Year 1996-97, then the said amount should not be taxed in the subsequent assessment years. Our attention was also drawn to the assessment order relating to Assessment Year 1998-99 wherein the Assessing Officer has observed that the entire receipt of Rs.15,68,50,000/- had been brought to tax for the Assessment Year 1997-98, but as the dispute was pending, necessary adjustment or correction would be made depending upon the final outcome. Senior Standing Counsel for the revenue accepts that if Rs 15,68,50,000 is taxed in the assessment year 1996-97, then the bifurcated differential amount should not be taxed in the assessment years 1997-98 to 1999-2000. The appellant-assessee would move necessary application before the Assessing Officer and in view of the statement made by the learned Senior Standing Counsel for the Revenue, necessary correction and adjustment will be made in respect of Assessment Years 1997-98 and 1999-2000 in addition to Assessment Year 1998-99. It would not be fair for the Revenue to tax

the same amount twice in view of the ongoing dispute.

23. In view of the aforesaid discussion, the substantial question of law mentioned in paragraph 3 above, is answered in favour of the Revenue and against the appellant assessee. The appeal ITA 182/2002 is, therefore, dismissed and we uphold the order of the Tribunal that the entire licence fee of Rs.15,68,50,000/- is taxable in the assessment year 1996-97.

ITA No. 255/2003

24. By order dated 17th September, 2003, the following substantial question of law was framed:-

> "Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that penalty under Section 271(1)(c) of the Income Tax Act, 1961, was exigible on the assessee?"

25. We have had the advantage of penning the judgment in the appeal preferred in relation to the quantum proceedings and have held that the assessee was wrong in not offering the whole or entire amount of the technical fee for tax in the year of receipt. But, it does not follow that penalty for concealment must be imposed as the quantum appeal is decided against the assessee. The findings in the assessment proceedings cannot be considered as conclusive and final for the purpose of imposition of penalty under section 271(1)(c) of the Act. As per opinion expressed by the Supreme Court in ***Commissioner of Income Tax, West Bengal I, and Anr. Vs. Anwar Ali [1970] 76 ITR 696 (SC)*** such findings may constitute good evidence in the penalty proceedings but it does not follow that penalty for concealment under Section 271(1)(c) is mandatory whenever an addition or disallowance is made. The language of Section 271(1)(c) has undergone substantial changes since the pronouncement of the aforementioned judgment, but the said legal position, still hold good. In assessment

proceedings, we are primarily concerned with the assessment of income i quantification and computation of total income as per the provisions of the Act, whereas in penalty proceedings we are primarily concerned with the conduct of the assessee. Penalty is imposed not because addition is made but because there is concealment or furnishing of inaccurate particulars by the assessee. This is apparent from language of Section 271(1)(c) and Explanation 1 which are reproduced below:-

> "271. Failure to furnish returns, comply with notices, concealment of income, etc.--(1) If the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person—
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> Xxxxxxxxxxx
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income,
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> xxxxxxxxxxxxxx
>
> Explanation 1.--Where in respect of any facts material to the computation of the total income of any person under this Act,--
>
> (A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) to be false, or
>
> (B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,
>
> then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

26. The word 'conceal' inherently and per-se refers to an element of

mens rea, albeit the expression "furnishing of inaccurate particulars" much wider in scope. The word 'conceal' implies intention to hide an item of income or a portion thereof. It amounts to suppression of truth or a factum so as to cause injury to the other. ***(See CIT vs. A. Subramania Pillai [1997] 226 ITR 403 (Mad)***. The word 'conceal' means to hide or to keep secret. As held in Law Lexicon, the said word is derived from the latin word 'concelare' which implies 'con' & 'celare' to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent discovery of; to withhold knowledge of. The word 'inaccurate' in Webster's Dictionary has been defined as 'not accurate; not exact or correct; not according to truth; erroneous; as inaccurate statement, copy or transcript'. The word 'particular' means detail or details of a claim or separate items of an account ***[see Commissioner of Income Tax vs. Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158(SC)].*** Thus the words "furnished inaccurate particulars" is broader and would refer to inaccuracy which would cause under-declaration or escapement of income. It may refer to particulars which should have been furnished or were required to be furnished or recorded in the books of accounts etc***. [See CIT vs. Raj Trading Co. (1996) 217 ITR 208 (Raj.)]*** Inaccuracy or wrong furnishing of income would be covered by the said expression, though there are decisions that adhoc addition per se without other or corroborating circumstances may not reflect "furnished inaccurate particulars". Lastly, at times and it is fairly common, the charge of concealment and "furnishing of inaccurate particulars" may overlap.

27. The present case is not of concealment of income, but furnishing of inaccurate particulars for assessment year 1996-97, as the entire receipt was not declared and accounted for in the return of income of the said assessment year. Rather, it was declared in the returns of the subsequent

assessment years.

28. As per clause (A) to Explanation 1 to section 271(1)(c), penalty is to be imposed if an assessee fails to offer an explanation or offers an explanation which is found by the Assessing Officer to be false. Clause (B) to Explanation 1 provides that where the assessee offered an explanation, but the same remained unsubstantiated, penalty should not be imposed if the explanation is bonafide and all facts relating to the same and material to the computation of his total income have been disclosed. Explanation 1 is an important adjunct and supplement to Section 271(1)(c) of the Act. It not only enacts and gives deeming effect when an addition or disallowance is made in the assessment/quantum proceedings, but also carves out an exception in clause (B) as to when penalty should not be levied. Onus under clause (B) to Explanation 1 is on the assessee.

29. We first refer to clause (A). Where no explanation is offered or the explanation is found to be false, then in view of the conduct of the assessee, penalty has to be imposed in terms of clause (A) to Explanation 1 to Section 271(1)(c). In the present case, clause (A) to the Explanation 1 would not apply as the assessee had offered an explanation and it cannot be said that the explanation was found to be false. Falsity in the context of the provision would refer to a wrong and untruthful assertion of a fact. It would cover cases where the assessee has lied and not spoken the truth of a fact known to him. It would not cover cases involving wrong interpretation of a legal position/provision or when the fact as asserted was not factually wrong and, therefore not false, but due to legal consequences, addition or disallowance stands made.

30. Thus, we have to examine clause (B) and whether the explanation offered was bona fide. Clause (B) of Explanation 1, applies when an assessee offer an explanation but it has not been able to substantiate it. In

the present case, the assessee had offered an explanation and ma submission as to why the receipt should be taxed over a period of three/four years and not in the year of receipt. The assessee was not able to substantiate the said explanation. Accordingly, in the quantum appeal, the question has been decided against the appellant assessee. The question will remain whether explanation offered by the assessee was bonafide and all facts relating to the same and material to computation of total income had been disclosed. As far as latter part is concerned, it cannot be doubted or even questioned that the appellant assessee had disclosed or stated all facts relating to the explanation and material for the computation of their total income. The quantum of receipt as mentioned by the appellant assessee has not been doubted. Tripartite agreement was not concealed and it is not case of the Revenue that any undisclosed income was received. Further, the amount received has been shown as taxable in the returns filed for the four assessment years. Therefore, the amount received was offered for tax, though not in the right or correct assessment year.

31. Primary issue which arises for consideration is whether the conduct of the assessee was bonafide. We have used very strong words like erroneous, fallacious, untenable etc. with reference to various contentions and submissions made by the assessee in the quantum appeal, but we do not think we will be contradicting ourselves when we hold that the conduct of the assessee was bonafide and the onus to show and establish bonafides has been discharged. The observations and adjectives used by us in the quantum appeal rejecting the submission of the assessee have been made after having advantage and benefit of the assessment order, appellate orders and hearing arguments of the counsel for the appellant assessee and the Revenue. Hindsight results in greater clarity and wisdom. Test of bona fide has to be applied keeping in mind the position as it existed, when the

return of income was filed. The Act, i.e. the Income Tax Act, is complex legislation involving intricate and often debatable legal positions. The legal issue involved may relate to principles of accountancy. Invariably, on questions of interpretation, the assessees do adopt a legal position which they perceived as most beneficial or suitable. This would not be construed as lack of bona fides as long as the legal position so adopted is not per se contrary to the language of the statute or an undebatable legal position not capable of a different connotation and understanding. When two legal interpretations were plausible and there was a genuine or credible plea, penalty for concealment/furnishing of inaccurate particulars, should not and cannot be imposed. If the view taken by the assessee required consideration and was reasonably arguable, he should not be penalized for taking the position. The tax statutes are convoluted and complex and there can be manifold opinions on interpretation and understanding of a provision or the tax treatment. In such cases, even when the interpretation placed by the Revenue is accepted, penalty should not be imposed if the contention of the assessee was plausible and bona fide. Of course full facts should be disclosed. While applying the test of bonafide, we have to also keep in mind that even best of legal minds can have difference of opinion. It is not uncommon to have dissenting opinion on the question of law, in the courts.

32. On the aforesaid aspect, we would like to refer to the following observations of the Supreme Court in the case of ***CIT v. Reliance Petroproducts (P) Ltd., (2010) 11 SCC 762:-***

> " 10. Section 271(1)(c) is as under:
>
> > "271. Failure to furnish returns, comply with notices, concealment of income, etc.—(1) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person—

***

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income."

A glance at this provision would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. Present is not the case of concealment of the income. That is not the case of the Revenue either. However, the learned counsel for the Revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in Section 271(1)(c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars.

11. The learned counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". We do not think that such can be the interpretation of the words concerned. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In CIT v. Atul Mohan Bindal[(2009) 9 SCC 589] where this Court was considering the same provision, the Court observed that the assessing officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This Court referred to another decision of this Court in Union of India v.Dharamendra Textile Processors [(2008) 13 SCC 369] as also the decision inUnion of India v. Rajasthan Spg. & Wvg. Mills [(2009) 13 SCC 448] and reiterated in para 13 that: (Atul Mohan Bindal case [(2009) 9 SCC 589] , SCC p. 597, para 13)

"13. It goes without saying that for applicability of Section 271(1)(c), conditions stated therein must exist."

12. Therefore, it is obvious that it must be shown that the

conditions under Section 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise.

13. In Dilip N. Shroff v. CIT [(2007) 6 SCC 329] this Court explained the terms "concealment of income" and "furnishing inaccurate particulars". The Court went on to hold therein that in order to attract the penalty under Section 271(1)(c), mens rea was necessary, as according to the Court, the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. It went on to hold that clause (iii) of Section 271(1) provided for a discretionary jurisdiction upon the assessing authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars.

14. It was further held in Dilip N. Shroff [(2007) 6 SCC 329] that the assessee must be found to have failed to prove that his explanation is not only not bona fide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The Court ultimately went on to hold that the element of mens rea was essential.

15. It was only on the point of mens rea that the judgment in Dilip N. Shroff v.CIT [(2007) 6 SCC 329] was upset. In Union of India v. Dharamendra Textile Processors [(2008) 13 SCC 369] after quoting from Section 271 extensively and also considering Section 271(1)(c), the Court came to the conclusion that since Section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no necessity of mens rea. The Court went on to hold that the objective behind enactment of Section 271(1)(c) read with the Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under Section 276-C of the Act. The basic reason why the decision in Dilip N. Shroff v.

> CIT [(2007) 6 SCC 329] was overruled by this Court in Union of India v. Dharamendra Textile Processors[(2008) 13 SCC 369] was that according to this Court the effect and difference between Section 271(1)(c) and Section 276-C of the Act was lost sight of in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] .
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> 16. However, it must be pointed out that in Union of India v. Dharamendra Textile Processors [(2008) 13 SCC 369] no fault was found with the reasoning in the decision in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] where the Court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] to the effect that mens rea was an essential ingredient for the penalty under Section 271(1)(c) that the decision in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] was overruled.
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> .....
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> 18. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to inaccurate particulars.
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> .....
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> 20. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the assessing officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the legislature."

33. In view of the legal position, when we examine the question of bonafide, we find that the assesee had discharged the said onus for the reasons set out above. We also record that while examining the question of bonafides, we have taken into account the conduct of the appellant assessee

in disclosing full and true particulars in return of income as well as befc the Assessing Officer at the time of assessment proceedings. In the present case, as noticed above, there is no allegation that full details with regard to the agreement, quantum of receipt, the factum why the payment was made and also the fact that the receipts had been offered for taxation in four separate assessment years, were duly disclosed and stated. We have noted that the appellant assessee had claimed that technical know-how would be used for three years and, therefore, consideration received was relatable to three years. We have rejected the said contention but in case the terms of payment and the agreement had been worded differently, the assessee may well have succeeded. In fact the assessee did not try to draft the agreement in a way, which could have ensured that the amount received was bifurcated/divided as income of four assessment years.

34. Keeping in view the entirety of facts, we do not think that in view of the explanation offered by the assessee it is a fit case, where penalty for concealment of income under Section 271(1)(c) should be imposed. The assessee's conduct shows that they had acted in a bona fide manner and also furnished all material facts and particulars.

35. In view of the aforesaid discussion, the substantial question of law framed in ITA No. 255/2003, mentioned in paragraph 24, is answered in favour of appellant assessee and against the respondent Revenue. Penalty under Section 271(1)(c) of the Act is directed to be deleted. Appeal ITA No. 255/2003 is disposed of accordingly. There will be no order as to costs.

-sd-

(SANJIV KHANNA)
JUDGE

-sd-

(V. KAMESWAR RAO)
JUDGE

SEPTEMBER 25, 2014
VKR/kkb