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

\+ ITA 920/2009

Date of decision: 22nd October, 2009

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms. P.L. Bansal, Adv.

versus

TADASHI MURAKAMI ..... Respondent
Through: Dr. Rakesh Gupta, Adv.
with Ms. Aarti Saini and
Ms. Mahima Agarwal, Advs.

% CORAM:
HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

J U D G M E N T

A.K.SIKRI, J. (ORAL)

1. The Assessee herein was an employee of M/s Hongo India Pvt. Ltd. He was paid salary in Indian currency as well as in foreign currency. Tax in the sum of Rs.1,68,104/- was also paid by his employer.

2. While framing the assessment the Assessing Officer (AO) added the aforesaid amount of Rs.1,68,104/- treating it to be a monetary perk. In this manner, the figure of gross total income was arrived at Rs.51,56,849/- and after giving standard deduction of

Rs.20,000/- the total income was arrived at Rs.51,36,849/-. On this, tax was calculated at Rs.15,15,055/-. After doing this exercise, the AO also grossed up tax liability, applying the provisions of 195A, to Rs.22,61,276/-. No basis of this grossing up of the tax liability is stated in the order of the AO.

3. In the appeal filed by the Assessee herein before the CIT (Appeal) the submission was that the AO has erred in grossing up. While making this submission, the Assessee mentioned that it was on the basis of advance tax paid and grossing up could not have been done, since the advance tax was paid by the Assessee himself. Recording the finding that Assessee had paid advance tax of Rs.12,50,686/-, the addition on account of the grossing up was deleted. CIT (Appeal) also deleted addition of Rs.1,68,104/- holding that this was a non-monetary perk.

4. The Revenue went in appeal against the order of the CIT (Appeal). The Income Tax Appellate Tribunal (ITAT) has sustained the deletion of Rs.1,68,104/- treating it to be a non-monetary benefit. For arriving at this conclusion it relied upon the judgment of a Special Bench of the ITAT in the case of *RBF Rig Corporation LIC.* Insofar as grossing up is concerned the ITAT held that the AO had not given any finding to the effect that the tax on monetary benefits/salary was paid by the employer and, therefore, such grossing up of the tax was not sustainable.

5. Challenging the order of the Tribunal in respect of grossing up, the submission of the learned counsel for the Revenue is that in case the AO had not given any finding to this effect, the

ITAT should have remit the case back to the AO in order to find the reasons. We are not impressed with this submission. Under Section 195A of the Income Tax Act, grossing up could be done by the AO if the tax chargeable on any income was borne by the employer. It is clear from the assessment order that tax amount of Rs.1,68,104/- was paid by the employer and, specifically, addition to this effect was made by the AO. While grossing up tax liability under Section 195A, the AO did not furnish any reason. He has not even stated as to what is other amount of tax paid by the employer on the basis of which grossing up was done under the said provision. In the appeal filed by the Assessee this grossing up was challenged on the ground that this was done on the basis of advance tax paid i.e. on the presumption that such an advance tax was paid by the employer. The assessee pointed out that it was factually incorrect as this advance tax was in fact paid by the employee/Assessee himself. This aspect was not challenged or disputed by the Department. Therefore, one has to infer that the grossing up was done keeping in view the payment of advance tax.

6. Since the finding of fact is arrived at that this advance tax has been paid by the employee and not by the employer the basis for this grossing up by the AO was clearly unsustainable. We may also record the statement of Dr. Gupta, learned counsel appearing for Assessee at the bar that the advance tax was in fact paid by the Assessee himself. In the circumstances, we are of the view that no question of law arises, insofar as the grossing up is concerned.

7. Coming to the addition of Rs.1,68,104/-, since the tax effect on that amount is much less than Rs.4 lac, we refuse to entertain the appeal on that ground.

8. This appeal is accordingly dismissed.

A.K. SIKRI, J.

SIDDHARTH MRIDUL, J.

October 22, 2009
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