2023:DHC:4201-DB

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

% *Date of Decision: 15.05.2023*

\+ **ITA 276/2023**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION – 3 ..... Appellant

Through: Mr Ruchir Bhatia, Sr Standing Counsel with Mr Shlok Chandra and Ms Priya Sarkar, Standing Counsel.

versus

SUMITOMO COPORATION ..... Respondent

Through: Mr C S Aggarwal, Sr Adv with Mr Prakash Kumar, Mr Ravi Pratap Mall and Mr Uma Shankar, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (Oral):

CM Appl.24992/2023 ***[Application filed on behalf of the appellant seeking condonation of delay of 300 days in re-filing the appeal]***

1. This is an application filed on behalf the appellant/revenue seeking condonation of delay in re-filing the appeal.

2. According to the appellant/revenue, there is a delay of 300 days.

3. Mr C.S. Aggarwal, learned senior counsel, who appears on behalf of the respondent/assessee, says he does not oppose the prayer made in the

application.

4. Accordingly, the delay is condoned. The application is disposed of in the said terms.

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5. This appeal concerns Assessment Year (AY) 2005-06.

6. The appellant/revenue seeks to challenge the order dated 25.08.2020 passed by the Income Tax Appellate Tribunal [in short, "Act"].

6.1 The only question which arose for consideration before the Tribunal was whether or not the appellant/revenue was right in refusing to grant credit for tax deducted at source and surcharge amounting to Rs. l,94,54,135/-.

7. The record shows that the respondent/assessee had made off-shore supplies to an entity named Bhakara Beas Management Board [in short, "Board"]. The Board credited to the account of the respondent/assessee, Rs. 4,74,51,548 [albeit, before deducing tax at source and surcharge] as advance towards off-shore supplies made by it. However, before remitting the said amount the Board deducted Rs.1,94,55,135/- towards tax at source and surcharge. Thus, the net amount which was remitted by the Board to the respondent/assessee [which is located in Japan] was Rs.2,79,96,414/-.

7.1 It is in this backdrop that the respondent/assessee seeks credit of Rs.1,94,55,135/- deposited on its behalf towards tax at source and surcharge.

8. We may note that Rs.2,79,96,414/ [after deducting tax at source at the rate of 40% and surcharge], was remitted to the respondent/assessee in the Financial Year (FY) 2004-05 [AY 2005-06].

9. The Tribunal in this background has returned the following findings

of fact, which are recorded in paragraphs 14 to 16 of the impugned order. For the sake of convenience, the same are extracted hereafter:

> *"14. We have heard the rival submissions and also perused the relevant finding given in the impugned orders.* ***From the detailed discussion as made above, we find that the sole issue is with regard to credit of TDS amounting to Rs.19454135/- which was deducted by M/s. BBMB in respect of off-shore supply received by it from assessee in Japan.*** *The assessee had received advances against off-shore supplies to be made of Rs.4,47,45,548/- to be TDS and against the said advance BBMB had deducted tax at source that the surcharge which aggregated to Rs. 1,94,55,135/-.* ***Further the supplies were made against the said advances in the financial year 2006-07 relevant to Assessment Year 2007-08****.* ***BBMB before remitting the aforesaid advances made an application u/s. 195(2) seeking exemption from deduction at source on payments made to the Japan for off-shore supply contract. On 25.05.2004, an order u/s. 195(2) was passed the ITO-Ward-3(1), Chandigarh directing BBMB to deduct tax @ 40% and surcharge of 2.5% on the gross payment to be released to the***
> ***assessee.*** *BBMB later on moved an application to reconsider the order dated 25.05.2004 and on 02.06.2004 order u/s. 195(2) was passed and thus, earlier order dated 25.05.'2004 stood cancelled. Once the earlier order u/s. 195(2) wherein direction was given to deduct tax at source has been canceled that means TDS has wrongly been deducted and then off-course the assessee had become entitled to refund of the said sum. Though, later on, again BBMV was directed to deduct tax @ 4% on the gross payment. Once the request of BBMB for grant of refund of excess TDS was rejected, BBMB had filed an application for revision u/s 264. However, in the order u/s. 264, Ld. CIT simply stated that M/s Sumitomo Corporation has filed income tax return for the said amount of TDS deducted had been claimed and the assessment proceedings have already been completed wherein has been allowed. Thus, the matter at that stage attained finality.*
> *15.* ***Now in the. re-assessment proceedings the Assessing Officer has denied the credit, of TDS after invoking the provision of Section 199. As pointed out by the Id. Counsel from the records that, income from off-shore supply was never held to be assessable in India even by the Department when actual off-shore supply was made in the Assessment Year 2007-08. Even the Id. CIT-DR has not pointed out any categorical finding that such an off-shore supply was assessable in absence of any PE and all the supplies made from outside in India were ever held to be taxable in India.*** ***Once the payment on which TDS has been deducted is***

not taxable in India there is no question as to why such TDS amount is not refunded or credit is not being given to the assessee.

16. ***The provision of Section 199 would apply in a case where taxes are deducted in accordance with the provision of Chapter-XVII and in relation with income which is assessable. In the assessee case since the tax were deducted in view of the order passed u/s 195(2) dated 25.05.2004 which was subsequently cancelled on 06.02.2014 and therefore taxes withheld were not in accordance with the provisions of 195 of the Act and hence Section 199 will not apply in such case. Once the receipt by itself could not have been subjected to deduction of tax at source u/s. 195 and receipts cue held not to be income, then there was no question of not granting refund or giving credit of such tax deducted at source. There is no whisper in the assessment order or in the subsequent assessment records as placed before us that since supplies has been made in the Assessment Year 2007-08, therefore, any income has accrued in India nor there is any finding that the amount received as advances represented any income which is assessable to tax in India. In fact, this sum has never been held to be assessable either in the Assessment Year 2005-06 when advance was received or in the Assessment Year 2007-08 when supplies have been made****. As regards applicability of Section 1.99 for which reliance has been placed by the Id. CIT-DR and also raised in the grounds of appeal, it would be relevant to extract Section 199 as stood in the Financial Year 2005-06 as under:*

Credit for tax deducted:

199. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be, and credit shall be given to him for the amount so deducted on the production of the certificate furnished under Section 203 of the assessment made under this Act for the assessment year for which such income is assessable]:

Provided that

(i) in a case where such person or owner [or depositor or unit-holder] or shareholder is a person, whose income is included under the provisions of Section 60, Section 61, Section 64, Section 93 or Section 94, in that the total income of another person, the payment shall be deemed to have been made on behalf of, and the credit shall be given to, such other person;

(ii) in any other case, where the dividend on any share is assessable as the income of a person other than the shareholder, the payment shall be

deemed to have been made on behalf of and the credit shall be given to, such other person in such circumstances as may he prescribed;
[provided further that where any property, deposit security, unit or share is owned jointly by two or more persons not constituting a partnership, the payment shall be deemed to have been made on behalf of and credit shall be given to, each such person in the same proportion which rent, interest on deposit or on security or income in respect of unit or dividend on share is assessable as his income.]

17. On a bare perusal of the aforesaid provision, it would be seen that said statutory provision provides that credit shall be given to him for the amount so deducted on the production of certificate furnished u/s 203 of the Act in the assessment made under the said Act for the AY for which such income is assessable. In other words, what is provided is that where a sum is held assessable to tax, the credit shall be given to him in that year. It has nowhere been provided that where a sum is not assessable to tax and has not been assessed to tax as is the case here, credit will not be given in the year in which tax has been deducted at source.

18. Thus the Assessing Officer was not correct in invoking the provision of Section 199 so as to deny the credit of TDS for which assessee was entitled to and has correctly been allowed for the subsequent Assessment Year on similar advances. The contention raised by the Ld. CIT-DR as pointed by ld. Senior counsel is not tenable. Thus we do not find any reason to interfere in the direction given by the Ld. CIT to allow credit of Rs. 1,94,54,135/- and same is upheld."

10. According to us, having regard to the aforesaid observations, it is evident that the singular issue which arose for consideration before the Tribunal was whether tax credit could have been given *qua* tax deducted at source, *vis-à-vis* advances received by the respondent/assessee, which is an entity located in Japan, from the Board against off-shore supplies made in the succeeding period i.e., FY 2006-2007 [AY 2007-2008]. The Tribunal having returned a finding of fact that there was nothing on record to suggest that any taxable income arose or accrued in India in favour of the respondent/assessee either in AY 2006-2007 or AY 2007-2008, the

impugned order does not call for any interference.

11. We are of the opinion that the reasoning set forth in the impugned order by the Tribunal is unimpeachable.

12. The Tribunal was right in holding that the advances which are once held to be not income, could not have been subjected to tax at source under Section 195 of the Act.

13. Therefore, clearly, the Tribunal was right in concluding that the refund or grant of credit of such tax deducted at source, could not be denied.

14. Accordingly, the appeal is closed, as no substantial question of law arises for our consideration.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

MAY 15, 2023/pmc