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

Date of Decision: January 17, 2006

1. ITA 726/2005

THE COMMISSIONER OF INCOME TAX ..... Appellant.

versus

M/S TEJ QUEBECOR PRINTING LTD. ..... Respondent

2. ITA 724/2005

THE COMMISSIONER OF INCOME TAX ..... Appellant.

versus

M/S TEJ QUEBECOR PRINTING LTD. ..... Respondent

3. ITA 725/2005

THE COMMISSIONER OF INCOME TAX ..... Appellant.

versus

M/S TEJ QUEBECOR PRINTING LTD. ..... Respondent

4. ITA 715/2005

THE COMMISSIONER OF INCOME TAX ..... Appellant.

versus

M/S TEJ QUEBECOR PRINTING LTD. ..... Respondent

Advocates who appeared in this case:

For the Appellant: **Mr. R.D. Jolly with Ms. Sonia Mathur, Advocates.**

For the Respondents: **Mr.G.C.Sharma, Sr. Adv. with Mr.M.K.Giri Mr. T.R. Talwar, Ms. Anjali Sharma, Advocates.**

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE B.N.CHATURVEDI

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?

: **T.S. THAKUR, J.**

These appeals under Section 260-A of the Income Tax Act, 1962 (for short "the Act"), arise out of a common order passed by the Income Tax Appellate Tribunal for the assessment years 1994-95 to 1998-99, and shall stand disposed of by this common order.

2. The respondent joint venture company employed one Mr. Lester Garnett, a Canadian national at a fixed remuneration with perquisite of rent free accommodation, car with driver and a servant. The said employee filed his individual tax return and paying taxes on the same under Section 140A of the Act. The Assessing Officer noticed from a perusal of the bank account of the employee and the TDS return filed by the assessee that no

salary had been paid to the employee nor any deduction under Section 192 made by the respondent-assessee. The Assessing Officer accordingly held the assessee company to be in default under Section 201(1) and 201(1A) of the Act. Liability arising on account of interest @ 15% p.a. for different periods for the assessment years 1995-96 to 1999-2000 was consequently determined by the Assessing Officer in terms of an order dated 14th February, 2001. Aggrieved by the said order, the assessee appealed to the Commissioner of Income Tax (Appeals) inter alia contending that since no salary had been paid to Mr. Garnett, there was no obligation for the assessee to deduct tax at source on the same. The finding recorded by the Assessing Officer to the effect that the alleged credits in the Indian Bank account tantamount to receipt of remuneration by the employee was also assailed.

3. The Commissioner of Income Tax (Appeals) allowed the appeal in part and held that the assessee had paid the salary to Mr.Garnett, the expatriate employee through its partner abroad, but subsequently when the Revenue started surveys, the assessee in an attempt to get out of the mess took the plea that it had not made any such payment and that no tax at source was deductible. The Commissioner also held that both the assessee and its employee were trying to benefit from the defaults

committed by them, in as much as the assessee was arguing that it did not deduct the taxes because no salary was paid while the employee was arguing that interest relating to deferment of advance tax was not payable as the salary was not liable to deduction of tax at source. The Commissioner on those findings directed the Assessing Officer to give credit to the extent of taxes paid by Mr.Garnett and recover the remaining amount including interest from the assessee company. The respondent company then preferred a further appeal to the Income Tax Appellate Tribunal who delivered a split decision. While the judicial member of the Tribunal held that since the salary payable to Mr.Garnett had not been actually paid to him, no obligation to deduct tax at source under Section 192 of the Act arose nor was the assessee liable to either pay tax under Section 201 or interest under Section 201(1A) of the Act. The Accountant member of the Tribunal however adopted a different line of reasoning and opined that the obligation to deduct tax at source arose even if the salary payable to the employee was simply credited into his account even if not actually paid. The following question was, in the face of that decision, referred to the Third Member under Section 255(4) of the Income Tax Act :

> "Whether on the facts of the case and in law the assessee was liable to deduct tax at source under Section 192 and consequently liable to

pay the demand of tax and interest under Section 201(1) and 201(1A) of the Act?"

4. The Third Member agreed with the view taken by the judicial member of the Tribunal and opined that the obligation to deduct tax at source did not arise in the instant case as the salary payable to Mr.Garnett had not been actually paid to him. While saying so, the third member distinguished the decision of the Supreme Court in *Raghava Reddi and Another vs. Commissioner of Income Tax, Andhra Pradesh* **44 ITR 720** relied upon by the Accountant Member. The Third Member held that wherever the Parliament intended deduction to be made at source even without actual payment to the recipient, it had specifically provided for the same as was the position in cases falling under Section 193, 194A, 194C and 195 etc. Reliance was also placed by the Third Member upon the decision of the Andhra Pradesh High Court in *Y.S.C. Babu vs. Syndicate Bank (A.P.)* **253 ITR 1** where the said court has taken the view that for a deduction of tax at source under Section 192, it was necessary that both accrual of salary and its payment should co-exist. In accordance with the majority opinion, the Tribunal eventually allowed the appeals filed by the assessee company in terms of its order dated 11th October, 2004 in these appeals.

5. Appearing for the Revenue, Mr. Jolly strenuously

argued that a substantial question of law as to the interpretation of Section 192 of the Income Tax Act, 1961 arises for consideration of this court. Relying upon the decision of the Supreme Court in *Standard Triumph Motor Co. Ltd. vs. Commissioner of Income Tax* **201 ITR 391**, he submitted that once the amount was credited to the account of the employee, the same amounted to receipt thereof by the payee giving rise to the obligation to deduct tax at source. He urged that the distinction drawn by the majority judgment of the Tribunal between the facts of *Standard Triumph Motor Company's* case (supra) and the case at hand was without any difference. Once the payment credited to the account of the payee was accepted as having been received by the payee for purposes of Section 5(2)(b) of the Act, such payment must be deemed to be a payment good not only for the said provision but also for the provisions of Section 192 of the Act.

6. Mr. Sharma, learned senior counsel for the respondent on the other hand argued that the majority view of the Tribunal on the interpretation of Section 192 of the Act was unexceptionable. He urged that there was a basic difference between the taxability of an income in the hands of the payee and the obligation of the person making the payment to deduct tax at source. He contended that all that Section 5(2)(b) of the

Act envisaged was that even crediting of the amount in the account of the payee was sufficient to give rise to the liability to pay tax on the said amount even if actual payment thereof was not made or received by the payee. That was not however so in the case of Section 192 of the Act where the obligation to deduct tax arises only in case actual payment of the amount is made to the payee. He referred to the provisions of Section 194, 194B, 194BB, 194EE, 194F and 194L to support his submission that under the said provisions, deduction of tax at source could be made only if actual payment of the amount was made to the payee. In sharp contrast the provisions of Sections 193, 194A, 194C, 194D, 194E, 194G, 194H, 194I, 194J, 194K, 195, 196A, 196B, 196C and 196D of the Act authorised deduction of tax at source even in cases where the payment was either credited or made to the payee. This distinction could not be over looked according to Mr. Sharma, while interpreting the provisions of Section 192. He placed reliance upon the decision of the Andhra Pradesh High Court in Y.S.C. Babu's case (supra) to argue that for an obligation to deduct tax at source, payment as also accrual should co-exist.

7. Section 192 of the Income Tax Act, *inter alia,* requires any person responsible for paying any income chargeable under the head "Salaries" to deduct income-tax on the amount payable

at the stipulated rate at the time of payment. The term "payment" has not been defined either in Section 192 or at any other place of the Act. The expression shall, therefore, have to be given its ordinary literal meaning. It follows that the person making the payment can or is required to make a deduction towards tax at source only at the time of making such payment. The accrual of the payment and the actual act of making the payment must both exist in order that a deduction at source may be made. No deduction at source is contemplated under Section 192 in cases where a payment towards salary has accrued but is not made. This position becomes clearer if we refer to similar other provisions in the Act like Sections 194(B), 194(BB), 194(EE), 194(F) and 194(L) under which also a deduction at source is envisaged only if actual payment of the amount is made to the payee. In contradiction to that requirement, there are provisions in the Act which authorise deduction at source even in cases where the payment is either made to the payee or credited to his account. The provisions of Section 193, 194(A), 194(C), 194(D), 194(E), 194(G), 194(H), 194(I), 194(J), 194(K), 195, 196(A), 196(B), 196(C) & 196(D) are in this regard relevant. The inference therefore is that wherever the Parliament intended deductions to be made at source only at the time of making the payment, it provided so and wherever deductions were intended to be made

even if the payment is credited to the account of the payee it made a specific provision to that effect. The distinction between the two cannot be obliterated by interpreting the provisions of Section 192 in a manner which would amount to re-writing the said provision so as to bring them at par with the provisions that require deductions at the time of payment or credit of the amount to the payee's account. The decision of the Andhra Pradesh High Court in *Syndicate Bank's* case (supra) takes a somewhat similar view.

8. In *Standard Triumph Motor's* case relied upon by Mr.Jolly, the Supreme Court was dealing with a situation where a Non-resident Indian company was entitled to a royalty on all sales effected by it. The Indian company which was liable to make this payment credited the amount of royalty to the appellant in its account books. In the returns filed by the assessee-Non-resident company it admitted the royalty but filed nil returns claiming that it was maintaining its accounts on cash basis and since no part of the royalty had been received by it, therefore, nothing was payable. The question was whether the credit entry of the royalty to the account of the appellant-assessee amounted to receipt of the royalty by the appellant and was, therefore, taxable. Interpreting Section 5(2)(b) of the Act, the Apex Court held that as soon as money is credited to the

account of the assessee it must be deemed to have received the same, hence taxable. In arriving at the conclusion, the Supreme Court placed reliance upon its earlier decision in **Raghava Reddi Vs. CIT, 44 ITR 720.**

9. It is, therefore, evident that the Supreme Court was not dealing with a case involving deduction of tax at source under Section 192 of the Act. It was, on the other hand, dealing with the question of taxability of the amount credited to the account of the assessee having regard to the provisions of Section 5(2)(b) of the Act. The question whether the amount was taxable in the hands of the payee and, if so, for which assessment year is, however, a matter distinctly different from the question of deduction of tax at source under Section 192. The majority decision of the Tribunal, therefore, rightly held that the obligation to deduct tax at source did not in the instant case arise as the amount of salary due to the employee had not been paid.

10. Mr.Jolly made a feeble attempt to urge that the salary due to Mr.Garnett had in fact been received by him outside the country and that the plea of non-payment was raised only to avoid the liability arising out of the non-deduction of tax at source. We see no reason to go beyond the finding of fact recorded by the Tribunal that there was no actual payment of the salary by the assessee to Mr.Garnett. The Tribunal has, in this

regard, observed:

> "The lower authorities have simply proceeded on the assumption that the money credited in the account of Mr.Garnett with Hongkong & Shenghai Banking Corporation was paid by the assessee out of unknown sources. Such assumption, in our opinion, is based on surmises and conjectures and, therefore, no adverse inference can be drawn against the assessee. If the Assessing Officer could obtain the account of Mr.Garnett from the bank, he could also make enquiries as to who paid the amount in the account of Mr.Garnett. On the other hand, the assessee has been able to place the evidence that Quebecor World of Canada had paid this amount as advance to Mr.Garnett for discharging his income-tax liability in India. It further shows that this money was returnable by Mr.Garnett to the Canadian Company on receiving his salary from India. Accordingly, it is held that the revenue has not discharged its onus to prove that any payment of salary was made by the assessee to Mr.Garnett during the year under consideration."

11. In the light of, what we have said above, we see no error of law in the view taken by the Tribunal to warrant interference by this Court. The appeal, accordingly, fails and is hereby dismissed.

T.S.THAKUR, J

B.N. CHATURVEDI, J

January 17 ,2006
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