

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “ F ”: NEW DELHI**

**BEFORE SHRI H S SIDHU JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.:- 3316 /Del/2012
Assessment Year: 2001-02

ADIT Circle 1(2)
International taxation
New Delhi

Vs

Parpool Limited
M/s M G B Metro group Buying H K
Limited
ILO
40 Okhla Industrial Estate
Phase –II
New Delhi
PAN AAECM3289J
(Respondent)

(Appellant)

Assessee by :
Respondent by:
Date of Hearing
Date of pronouncement

None
Mr. R S Negi Sr DR
18/04/2016
03 /06/2016

ORDER

PER PRASHANT MAHARISHI, A. M.

- 1) This appeal is filed by revenue against the order of CIT (A) –XXIX , New Delhi dated 26/03/2012 where Ld. CIT (A) appeal has held that interest under section 234B cannot be levied on the tax payable by the assessee.
- 2) The solitary ground of the appeal taken by the revenue is that on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) erred in deleting the interest levied under section 234 B of the Income Tax Act.
- 3) The brief facts of the case are that appellant is a liaison office of the Hong Kong Company. It was found to be earning certain income in India and therefore it was chargeable to tax. However, the issue was that whether interest under section 234B of the income tax act can be levied on income tax of the assessee where tax under section 195 of the income tax act is deductible from whole of such income. The Learned assessing

officers held that interest in the section 234B of the act is chargeable and therefore this ground was raised by assessee before the Id. CIT (A). However, the CIT (A) did not pass any order on applicability of the provisions of section 234B and consequent interest payable by the assessee in his order dated 01/12/2011 for A Y 2001 2002 and 2008 2009. Therefore the assessee filed an application under section 154 of the income tax act for the both the years making the prayer that the ground against charging of interest under section 234B of the act has not been decided. Based on this application under section 154 the Ld. Commissioner of income tax (A) relying on the various High Court decisions including decision of honourable jurisdictional High Court on that issue held that interest under section 234B of the act is not chargeable in the hands of the appellant being non-resident when its entire income is subject to tax deduction at source under section 195 of the income tax act., hence revenue is in appeal before us.

- 4) Ld. departmental representative contended before us that interest u/s 234B of the income tax act is consequent of income determination and tax thereon therefore it is leviable.
- 5) Despite notice, none appeared on the half of the assessee and therefore in absence of the representation from the respondent we decide this issue on the merits of the case.
- 6) We have carefully considered the contentions of the Ld. departmental representative and perused relevant orders of lower authorities. The issue in appeal is whether interest is chargeable under section 234B of the income tax act in case of non-resident whose income is subject to tax deduction at source under section 195 of the income tax act. In fact in view of the decision of honourable Delhi high court in case of DIT V G E packaged Power inc. 56 taxmann.com 190 (Delhi) this issue is now squarely covered in favour of the assessee. Honourable Supreme court has also dismissed the special leave petition filed by revenue against this order vide order dated 15.07.2015. Honourable Delhi high court has held as under :-

“18. The view of this Court finds confirmation in the position of law as it stands at present, after the Finance Act, 2012; should a situation akin to that in Alcatel Lucent USA Inc (supra) arise, the payer would be treated as the assessee-in-default according to Section 201, and the payee/assessee would not be permitted a tax credit under the proviso in Section 209(1)(d). Clearly, the anomaly of an assessee denying tax liability (whether under a bona fide mistake or by deceit), thereby not

suffering a tax deduction at source, and still being permitted a tax credit for the tax deductible, is remedied after the Finance Act, 2012.

19. Alcatel Lucent USA Inc (supra), in any event, can be distinguished on the ground that the Court was persuaded to confirm the levy of interest under Section 234B, only on account of the equities that needed to be balanced in those peculiar facts, in favour of taxability. This is evident from the following words of the Court:

"26. It further seems to us inequitable that the assessee, who accepted the tax liability after initially denying it, should be permitted to shift the responsibility to the Indian payers for not deducting the tax at source from the remittances, after leading them to believe that no tax was deductible. The assessee must take responsibility for its volte face. Once liability to tax is accepted, all consequences follow; they cannot be avoided. After having accepted the liability to tax at the first appellate stage, it is unfair on the part of the assessee to invoke section 201 and point fingers at the Indian payers. The argument advanced by the learned counsel for the assessee that the Indian payers failed to deduct tax at their own risk seems to us to be only an argument of convenience or despair. As we have pointed out earlier, it is difficult to imagine that the Indian telecom equipment dealers of the assessee would have failed to deduct tax at source except on being prompted by the assessee. It may be true that the general rule is that equity has no place in the interpretation of tax laws. But we are of the view that when the facts of a particular case justify it, it is open to the court to invoke the principles of equity even in the interpretation of tax laws. Tax laws and equity need not be sworn enemies at all times. The rule of strict interpretation may be relaxed where mischief can result because of the inconsistent or contradictory stands taken by the assessee or even the revenue. Moreover, interest is, inter alia, compensation for the use of the money. The assessee has had the use of the money, which would otherwise have been paid as advance tax, until it accepted the assessments at the first appellate stage. Where the revenue has been deprived of the use of the monies and thereby put to loss for no fault on its part and where the loss arose as a result of vacillating stands taken by the assessee, it is not expected of the assessee to shift the responsibility to the Indian payers. We are not to be understood as passing a value-judgment on the assessee's conduct. We are only saying that the assessee should take responsibility for its actions." [Emphasis added]

This Court finds that no need is made out in these facts to balance any equities in these facts, as the assessee has not vacillated in its stand as to the existence of a PE in India or otherwise. In any event, as observed earlier, the position of law itself requires that the tax be deducted at source, whatever may be the assessee's stance, failing which the payer is treated as an assessee-in-default under Section 201, and the payee is required to discharge its liability to pay the tax that was not deducted under Section 191.

20. This court also notices that the Madras High Court decision in Madras Fertilizers Ltd. (supra) and that of the Uttarakhand High Court in Sedco Forex International Drilling Co. Ltd. (supra) was considered and affirmed by the Bombay High Court in NGC Network Asia LLC (supra) that "We are clearly of the opinion that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee-assessee." An important decision is that of the Karnataka High Court in CIT v. Samsung Electronics Co. Ltd. [\[2012\] 345 ITR 494/\[2011\] 203 Taxman 477/16 taxmann.com 141](#), which also considered the same issue, i.e. the obligation under Section 195 (1). The High Court in the first instance had rejected the Revenue's appeal; the Supreme Court remitted the matter - for determination as to whether income by way of royalty had been made out in the facts of the case. The High Court decision first set out the order of the Supreme Court inter alia, as to the nature of obligation cast upon the payer under Section 195:

'While remanding the matter, Hon'ble Supreme Court has made certain observations while analysing the provisions of Section 195 of the Act as follows:

"7. Under Section 195(1), the tax has to be deducted at source from interest (other than interest on securities) or any other sum (not being salaries) chargeable under the I.T. Act in the case of non-residents only and not in the case of residents. Failure to deduct the tax under this Section may disentitle the payer to any allowance apart from prosecution under Section 276B. Thus, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the I.T. Act, to deduct income tax at the rates in force unless he is liable to pay income tax thereon as an agent. Payment to non-residents by way of royalty and

payment for technical services rendered in India are common examples of sums chargeable under the provisions of the I.T. Act to which the aforesaid requirement of tax deduction at source applies. The tax so collected and deducted is required to be paid to the credit of Central Government in terms of Section 200 of the I.T. Act read with Rule 30 of the I.T. Rules, 1962. Failure to deduct tax or failure to pay tax would also render a person liable to penalty under Section 201 read with Section 221 of the I.T. Act. In addition, he would also be liable under Section 201(1A) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid. The most important expression in Section 195(1) consists of the words "Chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such is not chargeable to tax under the I.T. Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the I.T. Act. It may be noted that Section 195 contemplate not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated October 30, 1995 the CBDT has clarified that the tax deductor can take into consideration the effect of while deducting TAS. It may also be noted that Section 195(1) is in identical terms with Section 18(3B) of the 1922 Act, In CIT v. Cooper Engineering [\[1968\] 68 ITR 457 \(Bom.\)](#) it was pointed out that if the payment made by the resident to the non-resident was an amount which was not chargeable to tax in India, then no tax is deductible at source even though the assessee had not made an application under Section 18(3B) (now Section 195(2) of the I. T. Act). The application of Section 195(2) pre-supposes that the person responsible for making the payment to the non-resident is in no doubt

that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the ITO (TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the ITO (TDS) that the question of making an order under Section 195(2) will arise. In fact, at one point of time, there was a provision in the I. T. Act to obtain a NOC from the Department that no tax was due. That certificate was required to be given to RBI for making remittance. It was held in the case of Czechoslovak Ocean Shipping International Joint Stock Company v. ITO [\[1971\] 81 ITR 162 \(Calcutta\)](#) that an application for NOC cannot be said to be an application under Section 195(2) of the Act. Which deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195. Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions. Reference to ITO (TDS) under Section 195(2) or 195(3) either by the non-resident or by the resident payer is to avoid any future hassles for both resident as well as non-resident. In our view, Sections 195(2) and 195(3) are safeguards. The said provisions are of practical importance. This reasoning of ours is based on the decision of this Court in Transmission Corporation (supra) in which this safeguard. From this it follows that where a person responsible for deduction is fairly certain then he can make his own determination as to whether the tax was deductible at source and, if so, what should be the amount thereof.'

The Supreme Court after considering the submissions of learned counsel appearing for the parties regarding the validity of the order passed by this Court dated 24-9-2009 has observed as follows:

'9. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions however, the expression "sum chargeable under the provisions of the Act" is used only in Section 195. For example, Section 194C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, Sections 194EE and 194F inter alia provide for deduction of

tax in respect of "any amount" referred to in the specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in Section 195(1). Therefore, this Court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the ITO(TDS). It is a provision requiring tax to be deducted as source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, Section 195 has to be read in conformity with the charging provisions, ie., Sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in Section 195(1). The fact that the Revenue has not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from Section 195(1). While interpreting a Section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the machinery Sections. The Act is to be read as an integrated code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of C.I.T v. Eli Lilly & Co. (India) (P.) Ltd. [\[2009\] 312 ITR 225 \(SC\)](#) the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the I.T Act form one single integral, inseparable Code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax" under the I.T. Act. It is true that the judgment in Eli Lilly (supra) was confined to Section 192 of the I.T. Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum 'chargeable under the provisions of the Act', which

expression, as stated above, do not find place in other Sections of Chapter XVII. It is in this sense that we hold that the I.T. Act constitutes one single integral inseparable Code. Hence, the provisions relating to TDS applies only to those sums which are Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the I.T. Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum. i.e., the payee could seek a refund. It must therefore follow, if the Department is right that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such so chargeable" where a proportion of the sum so chargeable is liable to tax. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that Section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the ITO(TDS) of payments made to non-residents. In other words, according to the Department Section 195(2) is a provision by which payer is required to inform the Department of the remittances he makes to the non-residents by which the Department is able to keep track of the remittances being made to non-residents outside India. Section 195(1) uses the expression "sum chargeable under the provisions of the Act". We need to give weightage to those words. Further, Section 195 uses the word 'payer' and not the word "assessee". The payer is not an

assessee. The payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under Section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The above mentioned contention of the Department is based on an apprehension which is ill founded. The payer is also an assessee under the ordinary provisions of the I.T. Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income Tax Act for the said sum as an "expenditure". Under Section 40(a)(i), inserted vide Finance Act, 1988 w.e.f. 1.4.89, payment in respect of royalty, fees technical services or other sums chargeable under the Income Tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the IT. Act. This provision ensures effective compliance of Section 195 of the I.T. Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the I.T. Act. In a given case where the payer is an assessee he will definitely claim deduction under the I.T. Act for such remittance and on inquiry if the AO finds that the sums remitted outside India comes within the definition of royalty or fees for technical service or other sums chargeable under the I.T. Act then it would be open to the AO to disallow such claim for deduction. Similarly, vide Finance Act, 2008, w.e.f. 1.4.2008 sub-section (6) has been inserted in Section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from 1.4.2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage.'

The Karnataka High Court first addressed this question and stated that:

"17. It is clear from the scrutiny of the material on record and the contentions of the parties viz., revenue and the respective respondent in these cases that the fact that payments have been made by the respondent herein to non-resident for having imported shrink wrapped software/off-the-shelf software is not disputed. There is also no dispute that no tax was deducted at source by the respondent under Section 195(1) of the Act in respect of such payments on the ground that the same were made for the purpose of purchase of shrink wrapped software/off-the-shelf software. It is contended by the respondent that

since there is no permanent establishment of the non-resident in India, the said payments have to be treated as income from business and is not taxable under the Income Tax Act in India and consequently, there is no obligation on the part of the respondent to deduct the advance tax under Section 195 of the Act and also consequential proceedings would not be attracted. Therefore, the dispute between the revenue and the respondent in these cases is whether payments made by the respondent to the non-resident would constitute 'royalty' or 'Income from Business' and if it is to be treated as 'Income from Business', whether the non-resident is required to have a permanent establishment in India. Further, in the absence of any permanent establishment of the non resident in India, is there no obligation on the part of the payee, the respondent herein to deduct tax at source under Section 195 of the Act. Therefore, the fact that the payments made by the payee, the respondent herein to the non-resident would constitute income of the non-resident is indisputable. However, the dispute is as to whether such income in the hands of the non-resident is to be treated as sale and income from business covered under Article 7 of the DTAA with respective countries or whether the payments would amount to royalty in the hands of the non-resident, for which no permanent establishment is required for making payment in India. There is also no dispute that if the payments made by the respondent are held to be royalty and not 'Income from Business', there is an obligation on the part of the payee, the respondent herein to deduct the tax at source and in default, the respondent herein would be considered as a default assessee. Once there is an obligation to deduct tax at source under Section 195 of the Act, which imposes a statutory right on any person responsible for paying to a non-resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the Act, to deduct income-tax at the rates in force unless he is liable to pay income-tax thereon as an agent. Payment to non-residents by way of royalty and payment for technical services rendered in India are common examples of sums chargeable under the provisions of the Act to which the aforesaid requirement of TDS applies. The tax so collected and deducted is required to be paid to the credit of Central Government in terms of Section 200 of the Act read with rule 30 of the Income Tax Rules, 1962. Failure to deduct tax or failure to pay tax would also render a person liable to penalty under Section 201 read with Section 221 of the Act. In addition, he would also be liable under Section 201(1A) to pay simple interest at 12 per cent per annum on the

amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid. Therefore, if the amount is held to be royalty, the other consequences as referred to above would follow."

After holding that the transaction in that case amounted to royalty and, therefore, taxable, the Court ruled that the obligation to deduct tax was with the payer:

"In any view of the matter, in view of the provisions of Section 90 of the Act, agreements with foreign countries DTAA would override the provisions of the Act. Once it is held that payment made by the respondents to the non-resident Companies would amount to 'royalty' within the meaning of Article 12 of the DTAA with the respective country, it is clear that the payment made by the respondents to the non-resident supplier would amount to royalty. In view of the said finding, it is clear that there is obligation on the part of the respondents to deduct tax at source under Section 195 of the Act and consequences would follow as held by the Hon'ble Supreme Court while remanding these appeals to this Court."

21. A Court's task is to unravel the legislative intent, if it is not discernable. Where, however, the provisions are clear, the Court's duty is to administer the law in its terms. It is bound to adhere to its precedents; yet its devotion to a previous holding cannot blind it to the clear terms of the statute, wherever found. If Alcatel Lucent USA Inc(supra) is correct and is to be applied in all situations, there would be dissimilar and asymmetrical results entirely dependent on the facts presented in each case. It is unclear what would be the outcome where the payee is, in fact, under the bona fide belief that it does not have a PE, or how the payer is to discern that a payee's assertion is intended to defeat the law. This Court therefore, notes that this precise question was addressed in Samsung Electronics Co. Ltd. (supra) by the Supreme Court, while remitting the matter for reconsideration by the High Court. The Court perceptively held that:

"Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions. Reference to ITO (TDS) under Section 195(2) or 195(3) either by the non-resident or by the resident payer is to avoid any future hassles for both resident as well as non resident. In our view, Sections 195(2) and 195(3) are safeguards. The said provisions are of

practical importance. This reasoning of ours is based on the decision of this Court in Transmission Corporation (supra) in which this safeguard. From this it follows that where a person responsible for deduction is fairly certain then he can make his own determination as to whether the tax was deductible at source and, if so, what should be the amount thereof."

22. This Court, therefore, holds that Jacobs Civil Incorporated/Mitsubishi Corporation (supra) applies in such situations; Alcatel Lucent USA Inc (supra) can be explained as a decision turning upon its facts; its seemingly wide observations, limited to the circumstances of the case. This Court, therefore, holds that the view taken by ITAT was correct; the primary liability of deducting tax (for the period concerned, since the law has undergone a change after the Finance Act, 2012) is that of the payer. The payer will be an assessee in default, on failure to discharge the obligation to deduct tax, under Section 201 of the Act.

23. For the above reasons, this Court finds that no interest is leviable on the respondent assessee under Section 234B, even though they filed returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assessee was liable to tax under Section 195(1), and to what extent, by taking recourse to the mechanism provided in Section 195(2) of the Act. The failure of the payers to do so does not leave the Revenue without remedy; the payer may be regarded as an assessee-in-default under Section 201, and the consequences delineated in that provision will visit the payer. The appeal of the Revenue is accordingly dismissed without any order as to costs."

- 7) Therefore respectfully following the decision of Honourable Delhi high court in case of DIT V G E Packaged power (Supra) we hold that on the payments received by the assessee the payer were required to deduct tax at sources u/s 195 of the act and as the tax was 'deductible' u/s 195 of the act there is no failure on part of the assessee in payment of advance tax. Therefore, assessee cannot be saddled with the burden of interest u/s 234B of the act. Hence, we confirm the order of the Ld. CIT (A) in deleting

interest under section 234 B of the income tax act 1961 in case of case of the assessee. In the result, solitary ground of appeal of the revenue is dismissed.

8) In the result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on 03/ 06/2016.

Sd/-

(H.S. SIDHU)
JUDICIAL MEMBER

Dated: the 3rd June, 2016

‘veena’

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

By order
AR Registrar