

आयकर अपीलीय अधिकरण "सी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

श्री राजेन्द्र सिंह लेखा सदस्य एवं श्री संजय गर्ग न्यायिक सदस्य के समक्ष
BEFORE SHRI RAJENDRA SINGH, ACCOUNTANT MEMBER
AND SHRI SANJAY GARG JUDICIAL MEMBER

आयकर अपील संख्या/ITA NO.2603/Mum/2011
(निर्धारण वर्ष/Assessment year:- 2005-06

Income Tax Officer (International Taxation) (TDS)-4(1), 139, 1 st Floor, Scindia House, Ballard Estate, Mumbai	बनाम / Vs.	M/s Pipavav Shipyard Ltd, Skill House, 209, Bank Street Cross Lane Fort, Mumbai – 400023.
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील संख्या/ITA NO.2604/Mum/2011
(निर्धारण वर्ष/Assessment year:- 2005-06

Income Tax Officer (International Taxation) (TDS)-4(1), 139, 1 st Floor, Scindia House, Ballard Estate, Mumbai	बनाम / Vs.	M/s Pipavav Shipyard Ltd, Skill House, 209, Bank Street Cross Lane Fort, Mumbai – 400023.
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by	Shri R.A Pant
प्रत्यर्थी की ओर से / Respondent by	Shri Keshav Bhujle & Shri S.K.Matsaddi

सुनवाई की तारीख / Date of hearing	30.7.2013
घोषणा की तारीख / Date of pronouncement	7.8.2013

आदेश / ORDER

PER RAJENDRA SINGH, AM

These appeals by the revenue are directed against the orders of CIT(A) dated 5.1.2011 and 17.1.2011 relating to assessment order and the penalty u/s 271 C levied by the AO for assessment year 2005-06.

2. We first take up the appeal of the revenue **in ITA no. 2603/Mum/2011** relating to the assessment order. The only dispute raised by the assessee is regarding treating the assessee in default u/s 201 and consequential levy of interest u/s 201(1A) for non deduction of tax at source. The facts in brief are that the AO during the assessment proceedings noted that the assessee had remitted a sum of Rs. 122.65 lakh to Overseas Ship Building Corporation Centre as payment for consulting fees relating to consultation and supervision. The assessee had undertaken a project to establish a modern ship breaking yard at Pipavav Port Ltd. in the state of Gujarat in the name of Pipavav Ship dismantling & engineering Co. Ltd. The name of the company later on had been changed to Pipavav Shipyard Ltd. The assessee had taken financial assistance from Japan Bank for International cooperation (JBIC) in connection with the ship breaking project. The assessee had booked an amount of Rs. 122.65 lakh towards the consultancy charges payable to Overseas Shipbuilding cooperation Centre and the agency appointed and approved by JBIC. The AO noted that the assessee had not deducted tax at the time of credit/payment of the said sum. The AO, therefore, treated the assessee as in default u/s 201 and also levied consequential interest u/s 201 (1A).

3. The assessee disputed the decision of AO and submitted before CIT(A) that " Exchange of Notes" signed between the Government of India and Government of Japan on 11-1-1996, had exempted the fund from all fiscal levies or taxes imposed in India in connection with the loan. The assessee also submitted that the consultation under taken by the assessee was a step-in-aid for construction of port facilities. The services rendered pertained to consultancy advice given towards construction, supervision work in connection with ship building and dismantling yard being put up by the assessee company. Therefore, it was argued that the same was excluded from the definition of fees for technical services. It was also submitted that the actual payment of the amount was dependent on certain regulatory compliances which were entirely outside the control of the assessee and it was not possible for the assessee to remit the amount on its own until regulatory approval was received. It was submitted that no approval had been received in this case. Assessee had neither made the payment nor had any expenditure been claimed. It was thus argued that no tax was required to be deducted. The assessee placed reliance on the judgments of Hon'ble High Court of Bombay in case Pfizer Corporation (2003) ITR 391 in which it was held that right to receive income arises to the non-resident only after the regulatory approvals were received. It was also submitted that M/s Overseas Shipbuilding Cooperation Centre was not liable for taxation in India in respect of the consulting fees and, therefore, the

same being not liable to be taxed. Reliance was placed on the several judgments. It was also submitted that the order u/s 201 had been passed on 27-01-2010 whereas the due date of TDS was 31-5-2005 which was after more than four years. Therefore in view of the decisions of Tribunal on subject, order was barred by limitation. It was also pointed out that the limitation period had also been provided in the Act w.e.f 1.4.2010 u/s 201(3)(ii). CIT(A) after considering the submissions of the assessee held that the assessee had neither made the payment nor claimed any expenditure and, therefore the assessee was not liable for deduction of TDS. It was also held by CIT(A) that the order was barred by limitation in view of the decision of Mumbai bench of Tribunal in case of Raymond Woollen Mills Ltd. (57 ITD 536). CIT(A) accordingly cancelled the order passed by AO u/s 201 and 201(1A). Aggrieved by the decision of CIT(A), revenue is in appeal before Tribunal.

4. Before us the learned AR for the assessee reiterated the submissions made before lower authorities that the assessee had neither made the payment nor claimed expenditure and, therefore, no income on this account had accrued to Overseas Shipbuilding Cooperation Centre. It was also submitted that the said party did not have any permanent establishment (PE) in India nor has any business connection in India. Even otherwise the income was not taxable in India. Therefore, no tax was required to be deducted. It was also submitted that the order was barred by limitation. Learned DR on the other hand placed reliance on the orders of AO.

5. We have perused the records and considered the rival contentions carefully. The dispute is regarding treating the assessee in default u/s 201 (1) and consequential levy of interest u/s 201 (1A) for failure to deduct TDS in respect of amounts payable to M/s Overseas Shipbuilding Cooperation Centre in connection with consultancy work. The actual payment of the amount was dependent on certain regulatory compliances and approvals which were ultimately not received. The payment had also not been made. Therefore in such a situation no income on account of such payment could said to have been accrued to the non resident. The assessee had neither made the payment nor had claimed any revenue expenditure. Therefore only on the basis of entry in the books of accounts, the assessee could not be held liable for deduction of tax at source when ultimately the amount was found not payable nor it was paid, income therefore had not accrued to the Overseas Shipbuilding Cooperation Centre. The said company had also no PE in India nor had any business connection in India. There is no material placed on record before us to controvert the claim of the assessee that the assessee had no PE in India nor any business

connection in India. The income on this account even if paid is not taxable in India. Therefore no tax was required to be deducted. Considering the facts and circumstances of the case, we see no infirmity in the order of CIT(A) canceling order of AO passed u/s 201(1) 201(1A) and the same is, therefore, upheld.

6. Now we take up the appeal of the revenue in **ITA no.2604/Mum/2011** relating to levy of penalty u/s 271C. The penalty had been levied for failure to deduct TDS in respect of amount payable to M/s Overseas Shipbuilding Cooperation Centre. The AO had held that the assessee was liable to deduct tax in respect of the amount payable to the said concern and since there had been failure, the AO treated the assessee in default u/s 201(1) and levied interest u/s 201(1A). In addition penalty had also been levied u/s 271C for said default. We have already dealt with the issue of liability to the to assessee to deduct tax at source in respect of amount payable to Overseas Shipbuilding Cooperation Centre and we have already held that the assessee was not liable to deduct tax and thus upheld the order of CIT(A) canceling the order of AO u/s 201(1) and 201(1A). The penalty levied by the AO, therefore, cannot survive. We accordingly confirm the order of CIT(A) canceling the penalty.

7. In the result both the appeals of the revenue are dismissed.

Order pronounced on 7-8-2013

Sd/-

(Sanjay Garg)
Judicial Member

Sd/-

(Rajendra Singh)
Accountant Member

SKS Sr. P.S, Mumbai dated 7.8.2013

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI