IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "L", MUMBAI

BEFORE SHRI R.S.SYAL (A.M) & SHRI N.V.VASUDEVAN(J.M)

ITA NO. 2210/MUM/2000(A.Y. 1998-99)
ITA NO.2211/MUM/2000(A.Y. 1998-99)
ITA NO.2212/MUM/2000(A.Y. 1998-99)

Crompton Creaves Ltd., C.G. House, Taxation Dept., Dr. annie Besant Road, Prabhadevi, Mumbai – 400 030 PAN: (Appellant)	Vs.	The DCIT (TDS), Cir. 1(1), Aaykar Bhavan, MK Road, Mumbai – 20. (Respondent)

Appellant by : Shri Jahangir D. Mistri
Respondent by : Shri Mahesh Kumar

Date of hearing : 14/02/2012
Date of pronouncement : 24/02/2012

ORDER

PER N.V.VASUDEVAN, J.M,

These are appeals field by the assessee against three orders of CIT(A) XXV Mumbai all dated 22/2/2000 relating to A.Y 1998-99.

2. The assessee is a Public Limited Company. The assessee issued quity and equity related instruments to international investors in the form of Global Depository Receipts(GDR). GDRs are essentially US $ denominated GDR in respect of a specified number of shares of the issuer issued for subscription to international investors at a fixed price. The assessee appointed Lead Managers who were responsible to assist in obtaining all relevant permissions, advice on the issue structuring, timing and price of issue, advice on appointment of other advisors to the issue responsibility for co-ordination of the issue, preparation of the Offering Circular for the assessees and all necessary offer documentation to be distributed to potential investors, preparation of road shows, presentation, formulating the marketing strategy, marking and distributing the issue, arranging

for listing in the London stock exchange. The issue was led by Jardine Fleming Intl. Inc. (Lead Manager) and Citibank Intl. plc. ,Merrill Lynch Intl. Ltd., Morgan Stanley & Co. (Co-Leads) and Kotak Mahindra (UK) Ltd. (Manager) (herein after referred to as Manager's to the issue.) For the marketing and distribution and preparation of the documentation to potential investors, the assessee by way of a Subscription Agreement dt. 21st July, 1996, entered into with the Managers' to the issue agreed to pay 3% comprising of Management and Underwriting Commission 1% and Selling Commission 2% to be shared between themselves as mutually agreed by them and to reimburse the Lead Manager for its out of pocket expenses incurred on the aforesaid issue subject to a ceiling of US$ 3,30,000.

3. The Subscription Agreement envisaged issue of 6,220,000 GDRs (firm GDRs) and an option to issue additional 393750 GDRs (optional GDRs). The assessee had a successful GDR issue with nine times over subscription and allotted 6,613,750 GDRs inclusive of firm and optional GDRs being the maximum issue possible at a rate of US$ 7.56 per GDR. Two master GDRs were issued on 10th July 1996, one evidencing the international master GDR and the other the American master GDR in favour of the depository (Bank of New York) to be held on behalf of the beneficial investors. The underlying shares to the GDRs were kept with the custodian in India (ICICI). The work involved in the issuance of GDRs to international investors was carried out outside India and as indicated above, the distribution and marketing as also approaching target international investors all necessarily had to be done outside India. The issue proceeds were collected by the Lead Manager in his account outside India and the net proceeds after deducting commissions and out of pocket expenses were deposited into the assessee's account opened for this purpose in New York. The net proceeds were remitted into India in two tranches on July11, and July 12, 1996. The remittance into India was translated into Rupees and the amount so received as was equivalent to the par value of shares comprised in the issue was credited to Share Capital Account and the balance forming part of the Share Premium Account.

3. The AO passed an order u/s. 195 of the Income Tax Act, 1961 (the Act) on 30/3/1995 holding that the payments made by the assessee to the non-resident Lead Manager's was in the nature of fees for Technical Services rendered and therefore, the assessee ought to have deducted tax at source on the payments so made. Consequent to the order passed under section 195 of the Act holding that the assessee was bound to deduct tax at source on the payments made to the International Lead Managers, the AO passed order under section 201(1) and 201(1A) on 30.3.1995 holding that the assessee was to be treated as an assessee in default in respect of the taxes that ought to have been deducted at source and also interest thereon.

4. The AO worked out the quantum of tax in respect of which the Assessee was to be treated as Assessee in default and the quantum of interest payable on tax not deducted at source as follows. The total payment including reimbursement of expenses, fess to the Lead Managers and others that was made on 10/7/96(closing date) was a sum of Rs. 7,68,62,058/-. TDS on this payment/ credit of Rs. 7,68,62,058/- with applicable grossing up, worked out to Rs.3,29,40,882/-. From the closing date till March, 1999 there were 31 completed months. This tax was payable on 10/7/1996 but remained unpaid till date. Accordingly, interest u/s. 201(1A) was worked out at a sum of Rs. 1,27,6,4,692/-. The Assessee was accordingly directed to pay Rs. 4,57,05,474/- .

5. All the orders i.e. order u/s.195 and order u/s. 201(1) and the order u/s. 201(1A) were all passed on 30/3/1999. The assessee preferred three appeals before the CIT(A) namely Appeal No.73/99-2000 against the order u/s. 195 of the I.T. Act dated 30/3/1999. Appeal No.74& 75/99-2000 were preferred against the order u/s. 201(1) & 201(1A) of the I.T. Act dt. 30.3.1995. The issue involved in all the orders was identical. The CIT(A) passed a common order

dated 22/2/2000, which is the order impugned in all these three appeals. The CIT(A) framed the following points for consideration.

1. Maintainability of appeal under section 201;
2. Accrual of Income;
3. No payment So no TDS;
4. It is a direct sale and hence nothing is taxable;
5. Are these services rendered Technical, Managerial, Consultancy in nature;
6. Re-imbursement of expenses is not taxable;
7. Applicability of the judgement of Transmission Corpn. Of A.P.(supra) and validity of order u/s 195;
8. Applicability of DTAA,

6. On the question of maintainability of appeal against an order u/s.201 the CIT(A) held that appeal by the assessee is maintainable against an order passed u/s. 201(1) and 201(1A) of the Act. On the issue of whether there was actual of income the CIT(A) held that irrespective of the place where services is rendered the amount should be deemed to have accrued or arisen in India because the services were utilized by the assessee in business which was carried on by it in India. With regard to the arguments that since the Lead Managers appropriated their commission out of the issue proceeds of the GDR and the assessee did not make to Lead Managers and, therefore, the question of deducting tax at source does not arise for consideration, the CIT(A) held that in effect it was a constructive payment by the assessee and, therefore, there was an obligation on the part of the assessee to deduct tax at source while making payments. On the argument that the GDRs were directly sold and that it was only part of the purchase consideration that was paid to the Lead Managers, the CIT(A) held that the payment was for services rendered and that the amount paid to them could not be said to be part of the consideration received for GDRs. On the question

whether the services rendered were technical, managerial, consultancy etc. in nature, the CIT(A) held that the services rendered by the Lead Managers that the same were technical and managerial services. On the question of taxing reimbursement of expenses it was held that reimbursement was integral part of the fees paid to the Lead Managers and was, therefore, taxable as being part and parcel of the total fees paid. On the question of applicability of the judgment of the Hon'ble Supreme Court in the case of Transmission Corporation of A.P & Others vs. CIT, 239 ITR 587 (SC), the CIT(A) held that it was a statutory obligation of the persons responsible for paying to a non-resident to deduct tax at source. It was also held that if for whatever reasons the payer feels that the amount was not taxable under the Act, he should file an application before the AO and assessee cannot decide on his own whether the income is chargeable to tax or not. On the question of applicability of DTAA, the CIT(A) held that since the assessee did not deduct tax at source u/s. 195 of the Act the question of examining the issue from the DTAA angle did not arise for consideration. For all the above reasons the orders passed by the AO were upheld by the CIT(A), giving rise the present appeals by the assessee before the Tribunal.

7. In the original grounds of appeal the assessee has challenged the applicability of the payments made by it to the Lead Managers or non-resident on the ground that the same was not in the nature of fees for technical services either under the Act or under the DTAA and, therefore, there was no obligation to deduct tax at source on the payments made to the Lead Managers. The assessee has also filed an application for admission of the following additional ground of appeal in all the threeappeals.

> " As no action has been taken by the Department against the payees and time for taking such action has expired, no order under sections 195, 201(1) or 201(1A) can be passed."

8. In the application for admission of the additional ground of appeal the assessee has submitted that the Special Bench of the Mumbai Tribunal in the case of Mahindra & Mahindra Ltd., 313 ITR 263 (Mum) (SB) (AT) has held that no order u/s. 195, 201(1) or 201(1A) of the Act can be passed where revenue has not taken any action against the payee for making assessment of the receipt in the hands of the payee within the time limit for passing order u/s. 147 of the Act and where the time limit for initiating such proceedings u/s. 147 of the Act has also expired. It has also been mentioned in the application that admittedly no action was taken against the payee and that the time for taking such action against the payee under the Act has also expired. It has also been submitted that the question of limitation in whatever manner it arises is a question of law and goes to the root of the appeal and jurisdiction of the Tribunal. In this regard reference has also made to the decision of the Hon'ble Supreme Court in the case of Union of India Ltd. vs. British Corporation Ltd., 268 ITR 481. The assessee has, therefore, prayed for admission of the additional ground of appeal.

9. Before proceeding further it would be useful to refer to the decision of the Special Bench of the Tribunal in the case of Mahindra & Mahindra (supra). The issue that arose for consideration in the aforesaid case was that as to the requirement of tax deduction at source on payments made to non-residents being Lead Managers to the issue on account of marketing, under writing and selling commission in respect of GDR issue outside India. For the purpose of deciding additional ground of appeal raised by the assessee the following conclusion drawn by the Special Bench are relevant.

> " We sum up the conclusions as under:
>
> (i)Any party can raise additional ground on the question of limitation before the Tribunal for the first time, as it is a legal ground not requiring the investigation of the fresh facts.
>
> (ii) Section 195 (1) casts duty on the person responsible for paying or crediting to the account of a non resident any sum chargeable to tax under this Act for deducting tax at source. On failure to deduct or pay to the

Government after deducting, the person responsible is treated as the assessee in default under section 201(1).

(iii) "Any such person" referred to in section 201(1) extends not only the person deducting and failing to deposit the tax but also the person failing to deduct the tax at source.

(iv) Where no time limit is prescribed for taking an action under the statute, the action can be taken only within a reasonable time by harmoniously considering the scheme of the Act.

(v) Tax recovery proceedings are initiated only after the passing of order under section 201(1) and that too if the person responsible fails to comply with notice of demand under section 156.
(vi) The order under section 201(1) is akin to the assessment order, "Assessment" includes reassessment.

(vii) The time limit for initiating the proceedings under section 201(1) cannot be the same as that for the passing of order under this sub-section. Time for initiation is always prior to the time for completing the proceedings.

(viii) The reasonable time for initiating and completing the proceedings under section 201(1) has to be at par with the time limit available for initiating and completing the reassessment as the assessment includes reassessment.

(ix) The maximum time limit for initiating the proceedings under section 201(1) or (IA) is the same as prescribed under section 149 i.e. four years or six years from the end of the relevant assessment year, as the case may be depending upon the amount of income in respect of which the person responsible is sought to be treated as the assessee in default.

(x) The maximum time limit for passing the order under section 201(1) or (1A) is the same as prescribed under section 153(2), being one year from the end of the financial year in which proceedings under section 201(1) are initiated.

(xi) Any order passed under section 201(1) or (1A) cannot be held as barred by limitation if it is not passed within four years from the end of the relevant financial year.

(xii) The person responsible cannot be treated as the assessee in default in respect of tax under section 201(1) if the payee has paid the tax directly. In

such a situation the other consequences shall follow such as liability to interest under section 201(1A).

(xiii) No order under section 201(l) or (1A) can be passed where the Revenue has not taken any action against the payee and further the time limit for taking action against the payee under section 147 has also expired.

(xiv) "Payment" to or crediting the account of non-resident under section 195(1) also covers retention of the, amount by non-resident where only net amount is remitted to the Indian party.

(xv) Fees for technical services under section 9(1) (vii) read with Explanation 2 covers management commission and selling commission allowed to the non-resident in respect of the GDR issue. Underwriting commission does not fall within the definition of "fees for technical services" under section 9(1)(vii). Reimbursement of expenses does not have the income element and hence cannot assume the character of income deemed to accrue or arise in India.

(xvi) If a particular amount is not taxable as per the provisions of the Double Taxation Avoidance Agreement, such income cannot be taxed in the hands of the non-resident notwithstanding the fact that the same is taxable under the regular provisions of the Income-tax Act, 1961.

(xvii) Where the technical services are not made available to the Indian party though used by the non-resident for its benefit, the amount of management and selling commission cannot be held to be taxable as per the first DTAA with the U.K.

As can be seen from the decision of the Special Bench referred to above, the question of limitation is a legal ground and does not require investigation of fresh facts and therefore can be admitted for adjudication by the Tribunal, even if raised before the Tribunal for the first time.

10. The ld. D.R has however objected to the admission of the addition ground of appeal. It was pointed out by the ld. D.R that the Hon'ble Karnataka High Court in the case of Sumsung Electronic Co. Ltd., 185 Taxaman 313 (Kar) has taken the view that in proceedings u/s. 195 the determination of the tax liability of a non-resident cannot be gone into and, therefore, the additional ground would

not arise for consideration at all. On this argument it is noticed that the Hon'ble Supreme Court in the case of G.E. India Technology Center Pvt. Ltd., vs. CIT 327 ITR 456 (SC) has since reversed the decision of the Hon'ble Karnataka High Court. Resultantly, the question whether the payments made to the non-resident were taxable or not can be decided in the proceedings u/s. 195 as well as 201(1) and 201(1A) of the Act.

11. As far as the additional ground of appeal raised by the assessee is concerned we find that Hon'ble Special Bench of ITAT in the case of Mahindra & Mahindra (supra) has held that an order under section 201(1) or 201(1A) cannot be passed where the revenue has not taken any action against the payee and further the time limit for taking action against the payee under section 147 of the Act has also expired. The ld. D.R has not been able to satisfy the Bench as to whether any action has been taken against the payee within the time as contemplated by the decision of the Hon'ble Special Bench. In the submission dated 21/2/2010 filed by the ld. D.R it has been submitted as follows:

> "So, if the above implications of the special bench decision are applied to the facts of the case of present assessee then it may be seen that the default to deduct the TDS was made on 10/7/96 and the amount of default was 3,29,40,882/ therefore as per the decision of special bench the proceedings u/s 195 r/w 201 could be initiated upto 4 years from the end of relevant AY i.e upto 3 1/3/2002 and the same could be completed upto 3 1/3/2003, whereas in the instant case the order u/s 195,201(1) & 201(IA) were initiated on 26/11/98 and completed by passing orders on 30/3/99 itself which is much before the limitation date of 3 1/3/2003 treating the assessee in default u/s 201(1) for an amount of Rs 3.29 Crores and u/s 201(lA) for an amount of Rs 1.27 crores Hence the time limits prescribed by the special bench in Mahindra & Mahindra have been duly adhered and support the case of revenue that the orders are not barred by limitation".

From the above submission of the ld. D.R it is clear that no action has been taken against the payee within the time contemplated by the Hon'ble Hon'ble Special Bench. We must also make it clear that D.R's submission that the Special Bench

contemplates passing of an order u/s. 201(1) and 201(1A) within certain time limit is not correct. The Special Bench contemplates taking of action in the hands of the payee within a particular time. We also find that no assessment has been made in the hands of the payee in respect of the sums received from the assessee in respect of GDR issues. Similarly no proceedings have been taken against it till date for assessing such income. We further find that the time limit for issuing notice under section 148 has obviously come to an end since the assessment year under consideration is 1998-99. As the time limit for taking action against the payee under section 147 is also not available, and there is no course left to the Revenue for making the assessment of the non-resident, ex-consequenti, no lawful order can be passed against the assessee either under section 201(1) or (1A). We therefore hold that in the facts and circumstances of the present case, the order passed under section 195 read with section 201(1) or (1A) of the Income-tax Act,1961, is invalid.

12. We also find that the Hon'ble Delhi High Court in the case of CIT vs. N H K Japan Broadcasting Corporation, 305 ITR 137(Del) considered the following question of law viz., Whether the Income-tax Appellate Tribunal was correct in law in holding that the orders passed under section 201(1) and 201(1A) of the Income-tax Act, 1961, are invalid and barred by time having been passed beyond a reasonable period ? The Hon'ble Court noticed that section 201 of the Act does not prescribe any limitation period for the assessee being declared as an assessee in default. The Hon'ble Court agreed with the conclusions of the Tribunal that the initiation of proceeding against the assessee in treating it as in default, were required to be initated within a reasonable period. The Hon'ble Court held that a duty is cast upon the person liable to deduct tax at source but if he fails to do so, it does not wash away the liability of the person liable to pay as the primary liability to pay tax is on the person who earns the income. The liability of the person liable to deduct tax is a vicarious liability and, therefore, he cannot be put in a situation which would prejudice him to such an extent that

the liability would remain hanging on his head for all time to come in the event the Income-tax Department decides not to take any action to recover the tax either by passing an order under section 201 of the Income-tax Act, 1961, or through making an assessment of the income of the person liable to pay tax. The Hon'ble Court thereafter found that a period of three years for competing assessment u/s.153 of the Act would be a reasonable period, but took note of the fact that Income-tax Appellate Tribunal has, in a series of decisions, taken the view that four years would be a reasonable period of time for initiating action, in a case where no limitation is prescribed. The Hon'ble Court observed that the rationale for holding so was that if there is a time limit for completing the assessment, then the time limit for initiating the proceedings must be the same, if not less. Nevertheless, the Tribunal had given a greater period for commencement or initiation of proceedings, the Hon'ble Court felt that it would not disturb the time limit of four years prescribed by the Tribunal and expressed the view that in terms of the decision of the Supreme Court in Bhatinda District Co-op. Milk Producers Union Ltd. [2007] 9 RC 637 ; 11 SCC 363 action must be initiated by the competent authority under the Income-tax Act, where no limitation is prescribed as in section 201 of the Act within that period of four years. In Van Oord ACZ India (P) Ltd. v. Commissioner of Income-tax 323 ITR 130 (Del), the Hon'ble Delhi High Court had approved the view expressed by the Special Bench in the case of Mahindra & Mahindra Ltd. (supra).

13. The learned D.R. however placed reliance on the decision of the Hon'ble Punjab & Haryana High Court in the case of CIT vs. HMT Ltd., ITA No.524 of 2009 dated 17/7/2011 wherein the Hon'ble Court has taken the view that no period of limitation can be read into the provisions if there is no period of limitation specified in the Act for taking action u/s. 201(1) or 201(1A) then no time limit can be read into those provisions. Similar view has also been expressed by the Hon'ble Calcutta High Court in the case of Bhura Exports Pvt. Ltd. vs. ITO, 202 Taxaman 88(Cal). We are of the view that the decision of the

Hon'ble Delhi High Court has to be accepted as the view expressed therein is in favour of the assessee. In the light of the above we hold that the orders under section 195, 201(1)& 201(1A) of the Act cannot be sustained. Accordingly we hold that the order passed under section 195 r.w.s. 201(1) and 201(1A) is invalid and all the orders are set aside. Appeals of the assessee are accordingly allowed. In view of the above decision we do not wish to deal with the question as to whether the amount in question was in the nature of Fees for Technical Services which can be brought to tax and the other submissions on the provisions of the relevant DTAAs.

14. In the result, all these appeals of the assessee are allowed.

Order pronounced in the open court on the 24th day of Feb.2012

Sd/- Sd/-

(R.S.SYAL) (N.V.VASUDEVAN)
ACCOUNTANT MEMBER JUDICIAL MEMBER
Mumbai, Dated. 24th Feb. 2012

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R"D" Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches

MUMBAI.

	Details	Date	Initials	Designation
1	Draft dictated on	17/2/2012		Sr.PS/PS
2	Draft Placed before author	20/2/2012		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			