

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

Judgment Reserved On: 23.09.2011
% Judgment Pronounced On: 16.12.2011

+ ITA 728 OF 2011

COMMISSIONER OF INCOME TAX ...APPELLANT

Through: Mr. Kamal Sawhney, Advocate

VERSUS

MARUTI UDYOG LTD. ...RESPONDENT

Through: Mr. Ajay Vohra, Ms. Kavita Jha, Advs.

+ ITA 729 OF 2011

COMMISSIONER OF INCOME TAX ...APPELLANT

Through: Mr. Kamal Sawhney, Advocate

VERSUS

MARUTI UDYOG LTD. ...RESPONDENT

Through: Mr. Ajay Vohra, Ms. Kavita Jha, Advs.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

A.K. SIKRI, ACTING CHIEF JUSTICE:

These cases pertain to assessment year 2002-03. While carrying out the assessment, it had come to the knowledge of the Department that the assessee company had introduced voluntary retirement scheme during the

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year, in pursuance to which, as per the details filed, the assessee had paid a sum of ₹ 73.60 crore to the employees which had been amortized under Section 35 DDA of the Income Tax Act, 1961 (hereinafter referred to as the Act). On perusal of the Scheme, the assessing officer observed that the assessee company had paid certain additional benefits also alongwith VRS after analyzing the features of VRS and discussing the provisions of Section 35DDA, Section 10(10C) and Rule 2BA of Income Tax Rules, the assessing officer arrived at a conclusion that the scheme floated by the assessee was not in conformity with Rule 2BA of the Income Tax Rules and, therefore, benefit of Section 10(10C) was not available. Since Section 10(10C) was not available, the assessee was liable to deduct the tax at source on the payments made to the employees. As the assessee had failed to deduct the tax at source, assessing officer determined the short deduction at ₹13,94,55,417/- and interest at ₹986,64,707/- under Section 201(1A) of the Act.

2. The assessee assailed the aforesaid order of the assessing officer before the CIT(A). The CIT(A) allowed the appeal holding that the assessee could not be treated as an ‘assessee in default’ under Section 201(1A) of the Act. The CIT(A) relied upon the judgment of Gujarat High court in the case of *Arun Kumar T. Makwana v. Income Tax Officer*, [2006] 286 ITR 502 (Guj.) and held that the scheme floated by the company was in conformity with Rule 2BA and provisions of the Act. The payments made by the company under VRS cannot be treated as profit in lieu of salary. It was observed that as per the claim of the assessee, wherever any payment is made in excess of ₹5 lacs and payment in regard to early bird incentive, the

tax had been deducted and paid to the Government. Accordingly, CIT(A) directed the assessing officer to verify the quantum of such amount and ascertain whether TDS had been deducted as per the provisions of relevant section and then to charge interest under Section 201(1A) for any delay or short deduction. CIT(A) also held that the assessee cannot be treated as an 'assessee-in-default' under Section 201(1A) as the conduct of the assessee in not deducting tax at source under Section 192 from VRS payment was honest and bonafide. Tax at source should have been deducted on such payment on the basis of fair estimate. It is not the case of the assessing officer that the assessee had failed to deduct and pay tax for good and sufficient reasons.

3. Learned ITAT confirmed the order passed by CIT(A) who had relied upon the aforesaid judgment of Gujarat High Court and on the judgment of jurisdictional High Court in the case of *CIT v. Nestle India Pvt. Ltd.*, [2000] 243 ITR 435. Learned ITAT observed that the CIT(A) had already remitted the matter back to the assessing officer to verify the veracity of the statement made by the assessee that wherever any payment was made in excess of ₹5 lacs in regard to early bird incentive, the tax had been deducted on such payment and had been paid to the Government. Thus, it is not the case of the assessing officer that company had failed to deduct any pay and tax for good and sufficient reasons. Assessee had clearly demonstrated that it had good and sufficient reasons for non-deduction of tax for payment of VRS upto ₹5 lacs.

4. Still not satisfied, the present appeal is preferred impugning the order of the tribunal. It is the submission of the revenue that the tribunal has not

decided the real issue raised before it by the revenue and is guided by the mere fact that the assessee had not deducted tax at source on payment of VRS up to ₹5 lacs for good and sufficient reasons. It is the submission that the real issue was that the scheme of voluntary retirement was not in conformity with Rule 2BA of the Income Tax Rules as the amount paid/payable under the scheme exceeded the amount equivalent to three months salary for each completed year of service and it exceeded ₹5 lacs. Therefore, tax at source was required to be deducted and the assessee should have been treated as 'assessee-in-default'. Learned counsel for the revenue referred to and relied upon the reasoning given in the order of the assessing officer. It was pointed out that VRS provided that employees opting for early retirement in the months of September, 2001 and October, 2001 would be entitled for certain additional benefits, namely,

- (i) Medical coverage under "superannuation Medical Insurance Plan" till attaining the age of normal retirement, i.e. 58 years. The insurance plan provides a medical insurance of ₹2 lacs per annum.
- (ii) The employees from technician/assistants (L01 to L10) category would be entitled for a monthly pension of 100% of last drawn monthly Basic + DA for a maximum period of 24 months or balance of months of service, whichever is less.
- (iii) Medically unfit employees who opted for early retirement shall be entitled for a one time medical allowance of ₹25,000/-

5. The assessee also floated a Voluntary Separation Scheme (VSS) for drivers as per Circular No.09/01 dated 22/11/01. As per this scheme,

permanent drivers working as casuals before, who opted for the scheme, will get the benefit of 2.5 months salary (basic + DA) for each completed year of service or salary (basic + DA) for balance months of service whichever is less. In addition to the above benefit, 24 months salary (basic + DA) would be given as adhoc amount. Further, the permanent drivers would also be entitled for a lumpsum benefit of ₹2.25 lacs. The drivers who directly joined as permanent employees would be entitled to three months salary (basic + DA) for each completed year of service or salary (basic + DA) for the balance months of service, whichever is less. In addition, 24 months salary (basic + DA) would be given as adhoc amount. Likewise, VRS for the assessment year 2003-04 which was circulated on 20th September, 2003 provided that employees retiring under this scheme would be entitled to ex-gratia payment of three months salary for every completed year of service or salary for balance of months, whichever is less. This also provided similar additional benefits as provided in the earlier scheme. It was submitted that payment under VRS scheme is exempt from tax if it is paid as per the provisions of the Act and Rule 2BA. Since the payment far exceeded the limit prescribed under those provisions, the tax at source was required to be deducted.

6. In order to appreciate the aforesaid contentions, it would be necessary to first look into the relevant provisions which are Section 10(10C), 35DDA and 201 of the Act and Rule 2BA of the Income Tax Rules. The relevant portions of all these provisions are reproduced below:

“[(10C) any amount received [or receivable] by an employee of—

- (i) a public sector company ; or
- (ii) any other company ; or
- (iii) an authority established under a Central, State or Provincial Act; or
- (iv) a local [authority ; or]
- [(v) a co-operative society ; or
- (vi) a University established or incorporated by or under a Central, State or Provincial Act and an institution declared to be a University under section 3 of the University Grants Commission Act, 1956 (3 of 1956) ; or
- (vii) an Indian Institute of Technology within the meaning of clause (g) of section 366 of the Institutes of Technology Act, 1961 (59 of 1961) ; or
- [(viia) any State Government; or]
- [(viib) the Central Government; or]
- [(viic) an institution, having importance throughout India or in any State or States, as the Central Government may, by notification in the Official Gazette, specify in this behalf; or]
- (viii) such institute of management as the Central Government may, by notification in the Official Gazette, specify in this behalf,] [on his] [voluntary retirement or termination of his service, in accordance with any scheme or schemes of voluntary retirement or in the case of a public sector company referred to in sub-clause (i), a scheme of voluntary separation, to the extent such amount does not exceed five lakh rupees];

Provided that the schemes of the said companies or authorities [or societies or Universities or the Institutes referred to in sub-clauses (vii) and (viii)], as the case may

be, governing the payment of such amount are framed in accordance with such guidelines (including inter alia criteria of economic viability) as may be prescribed [***]:

Provided further that where exemption has been allowed to an employee under this clause for any assessment year, no exemption thereunder shall be allowed to him in relation to any other assessment year ;]

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[35DDA. Admortisation of expenditure incurred under voluntary retirement scheme.

(1) Where an assessee incurs any expenditure in any previous year by way of payment of any sum to an employee 35[in connection with] his voluntary retirement, in accordance with any scheme or schemes of voluntary retirement, one-fifth of the amount so paid shall be deducted in computing the profits and gains of the business for that previous year, and the balance shall be deducted in equal instalments for each of the four immediately succeeding previous years.

[(2) Where the assessee, being an Indian company, is entitled to the deduction under sub-section (1) and the undertaking of such Indian company entitled to the deduction under sub-section (1) is transferred, before the expiry of the period specified in that sub-section, to another Indian company in a scheme of amalgamation, the provisions of this section shall, as far as may be, apply to the amalgamated company as they would have applied to the amalgamating company if the amalgamation had not taken place.

(3) Where the undertaking of an Indian company entitled to the deduction under sub-section (1) is transferred, before the expiry of the period specified in that

subsection, to another company in a scheme of demerger, the provisions of this section shall, as far as may be, apply to the resulting company, as they would have applied to the demerged company, if the demerger had not taken place.

(4) Where there has been reorganisation of business, whereby a firm is succeeded by a company fulfilling the conditions laid down in clause (xiii) of section 47 or a proprietary concern is succeeded by a company fulfilling the conditions laid down in clause (xiv) of section 47, the provisions of this section shall, as far as may be, apply to the successor company, as they would have applied to the firm or the proprietary concern, if reorganisation of business had not taken place.

(5) No deduction shall be allowed in respect of the expenditure mentioned in subsection (1) in the case of the amalgamating company referred to in sub-section (2), in the case of demerged company referred to in sub-section (3) and in the case of a firm or proprietary concern referred to in sub-section (4) of this section, for the previous year in which amalgamation, demerger or succession, as the case may be, takes place.

(6) No deduction shall be allowed in respect of the expenditure mentioned in subsection (1) under any other provision of this Act.]]

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Consequences of failure to deduct or pay.

201. [(1) Where any person, including the principal officer of a company,—

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.]

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Guidelines for the purposes of Section 10(10C).

Rule 2BA. any amount received by an employee of-

- (i) a public sector company; or
- (ii) any other company; or
- (iii) an authority established under a Central, State or Provincial Act; or
- (iv) a local [authority; or]
- (v) a co-operative society; or
- (vi) a University established or incorporated by or under a Central, State or Provincial Act and an institution declared to be a University under section 3 of the University Grants Commission Act, 1956 (3 of 1956); or
- (vii) an Indian Institute of Technology within the meaning of clause (g) of Section 3 of the Institute of Technology Act, 1961 (59 of 1961); or
- (viii) an institution, having importance throughout India or in any State or States, as the Central Government may,

by notification in the Official Gazette, specify in this behalf; or]

(viii) such institute of management as the Central Government may, by notification in the Official Gazette, specify in this behalf] at the time of his voluntary retirement [or voluntary separation] shall be exempt under clause (10C) of section 10 only if the scheme of voluntary retirement framed by the aforesaid company or authority [or co-operative society or University or institute] as the case may be [or if the scheme of voluntary separation framed by a public sector company,] is in accordance with the following requirements, namely:

(i) it applies to an employee [***] who has completed 10 years of service or completed 40 years of age;

[(ii) it applies to all employees (by whatever name called) including workers and executives of a company or of an authority or of a co-operative society, as the case may be, excepting directors of a company or of a co-operative society;]

(iii) the scheme of voluntary retirement [or voluntary separation] has been drawn to result in overall reduction in the existing strength of the employees [***];

(iv) the vacancy caused by the voluntary retirement [or voluntary separation] is not to be filled up;

(v) the retiring employee of a company shall not be employed in another company or concern belonging to the same management;

(vi) the amount receivable on account of voluntary retirement [or voluntary separation] of the employee does not exceed the amount equivalent to [three months] salary for each completed year of service or salary at the time of retirement multiplied by the balance months of

service left before the date of his retirement on superannuation:

[**Provided** that requirement of (i) above would not be applicable in case of amount received by an employee of a public sector company under the scheme of voluntary separation framed by such public sector company.]

Explanation : In this rule, the expression salary shall have the same meaning as is assigned to it in clause (h) of rule 2 of Part A of the Fourth Schedule.]”

7. A reading of the aforesaid provisions would demonstrate that as per Section 10(10C) of the Act, any amount received or receivable by an employee on his voluntary retirement or termination of services would be exempted up to ₹5 lakhs if the scheme is in accordance with the guidelines as specified in Rule 2BA of the Income Tax Rules. Clause (vi) of Rule 2BA provides that the amount receivable on account of voluntary retirement shall not exceed the amount equivalent to three months salary for each completed year of service or salary at the time of retirement multiplied by balance months of service left before the date of his retirement on superannuation. Explanation to this Rule stipulates that the expression ‘salary’ shall have the same meaning as is assigned to it in clause (h) of Rule 2 of Part A of the Fourth Schedule. As per this, salary for the purpose of this Rule is to be taken as basic salary + DA, if the terms of employment provide for payment of DA.

8. It is not in dispute that the payment made by the assessee to its employees under the said VRS is much more than what is prescribed in Rule

2BA of the Income Tax Rules. Also, it is more than ₹5 Lakhs. Therefore, there may not be quarrel to the extent that payment made beyond ₹5 Lakhs or beyond the limit prescribed in Rule 2BA of the Rules would not be exempted from tax under Section 10(10C) of the Act. However, such an extra payment made in excess of the exempt limit is an income taxable in the hands of the employees who are made this payment. The moot question is as to whether assessee can be treated as 'assessee-in-default' for not deducting tax at source on the amounts paid over and above the amounts admissible as exemption under the aforesaid provisions.

9. Focusing on this aspect, CIT(A) took note of the fact that VRS payments had been made to all the employees who are assessed to income tax and whose full particulars including name, address, PAN (wherever available) were furnished to the TDS authorities. The assessing officers who had assessed these employees had, in their assessment orders, granted these employees the benefit of tax exemption under Section 10(10C) in respect of VRS payments made under the VRS scheme to the extent of maximum of ₹5 Lakhs. These assessments orders had become final. Thus, while assessing the income of these employees, the income tax department clearly and unequivocally held that tax exemption under Section 10(10C) of the Act was available to the employees in respect in respect of VRS payments made under the VRS scheme. When this view is taken qua the employees at whose hands such payments are taken as taxable income beyond ₹5 Lakhs, the department cannot argue that no tax exemption under Section 10(10C) is at all available in respect of VRS payments made by the assessee to any of its employees and on this premise the Department could not allege that since

the assessee did not deduct tax on this amount, it was to be treated as 'assessee-in-default'. In the opinion of the CIT(A), this stand of Department was in total contrast and contradiction to the view taken by the department itself while making assessments in the cases of the employees. That apart, the CIT(A) also accepted the contention of the assessee that benefits which were payable to the employees under notice, namely, extra/additional payments if they opted for early retirement in the months of September and October, 2001, were subject to the unfettered and uncontrolled discretion of the management of the assessee. These benefits were not available to the employees opting for VRS as a matter of right and hence, were not part of VRS announced by the assessee. They were under the notice giving incentive for opting at an early date which were wholly gratuitous, discretionary and the employees could not claim any vested right therein unlike the payments specified under the VRS. It is worthwhile to note that insofar as these payments are concerned, namely, additional incentive given for early option, the assessee had duly deducted the tax at source and the same was not considered by the assessee for computing the limit of exemption specified under Section 10(10C) of the Act. The CIT(A), thus, concluded that the assessee was not 'assessee-in-default'. It relied upon the judgment of Gujarat High Court in the case of **Arun Kumar T. Makwana** (supra) in support of its conclusion. The CIT(A) also took support from Circular No.640 issued by CBDT, New Delhi whereby the CBDT had clarified and given answer to various queries raised by the Department. He particularly referred to question No.6 and the answer thereto. Question No.6 is that where the amount receivable on account of voluntary retirement

exceeds rupees five lakhs in case of an employee, whether the entire amount receivable or only the excess of the amount above rupees five lakhs is to be subject to income tax? The answer is that only the amount representing the excess above the limit of rupees five lakhs is to be subjected to income tax. The CIT(A) also held that in any case the assessee had acted in a bona fide and for good and sufficient reasons and, therefore, could not be treated as 'assessee-in-default' within the meaning of Section 201/201(1A) of the Act. Accepting this view of the CIT(A), the Tribunal after extracting various portions of the orders of the CIT(A) dismissed the appeal by observing:

“4.3 Furthermore, Ld. Commissioner of Income Tax (Appeals) has referred the Hon'ble Gujarat High Court decision in the ca of Arun Kumar Makwana: 286 ITR 502. In the said order it was held that it is not the intention of the legislature that every scheme must provide of payment of amount equivalent to (i) three months salary for each completed year of service or (ii) salary at the time of retirement multiplied by the balance three months of service left before the date of his retirement on superannuation. Only condition of Rule 2BA is that amount receivable should not exceed this limit. It was further held that Rule 2BA does not provide at all that the amount representing the lower of the two limits specified in clause (vi) of rule 2BA; amount upto Rs.5 lacs qualifies for exemption u/s 10(10C). From the above judgment of this Hon'ble Court it is evident that payment upto Rs.5 lacs have to be allowed and given the necessary deduction. Assessee had submitted that wherever any payment is made in excess of Rs.5 lacs the payment on excess amount tax has been deducted by such companies and paid to the government. Hence Ld. Commissioner of Income Tax (Appeals) has directed the Assessing Officer to verify the quantum of such amount

and ascertain that the TDS has been deducted as per the provision of relevant section and charge interest u/s 201(1A) for any delay or short deduction. We find that Ld. Commissioner of Income Tax (Appeals)'s in his order in this regard is in conformity with the Hon'ble Gujarat High Court decision cited above and it does not need to interfere in the same.

4.4 Another aspect which the Ld. Commissioner of Income Tax (Appeals) has addressed that assessee has acted in a bona fide and for good and sufficient reasons. In this regard, decision of the Delhi Bench of the Tribunal in Nestle India Pvt. Ltd. 61 ITD 441 has been referred in the Ld. Commissioner of Income Tax (Appeals)'s order in which it has been held that assessee cannot be treated in default u/s 201(1A) of the Act when the conduct of the assessee for not deducting TDS was not malafide.

4.5 Revenue has appealed against the above order of Hon'ble Delhi High Court in the case of CIT v. Nestle India Ltd. reported in 243 ITR 435 has dismissed the revenues appeal by holding as under:-

“In our view, the proposed questions are not fit for reference to this Court. From the afore-extracted portion of the order of the Tribunal it is evident that the Tribunal's finding that the assessee had a good and sufficient reason for not deducting tax at source on the said amount is founded on the fact that it was under a bona fide belief that the conveyance allowance was not to be included in the salary. The conclusion arrived at by the Tribunal is a pure finding of fact, which does not give rise to any question of law. The Tribunal has not examined, and rightly so, the question as to whether the said allowance has to be adjudicated at the time of assessment of the employee receiving the said allowance and he cannot be bound by the stand of

his employer about the taxability or otherwise of a particular allowance. Deduction of tax at source by an employer is always a tentative deduction of income tax subject to regular assessment in the hands of the payee/recipient...”

4.6 In view of the above said case law, assessee claimed that wherever any payment is made in excess of Rs.5 lacs has been made in regard to early bird incentives, the tax has been deducted by the company on such payments and paid to the Govt. This aspect has already been remitted to the Assessing Officer for verification of the veracity of the statement. Thus, it is also not the case of the Assessing Officer that company has failed to deduct and paid the tax for good and sufficient reasons. Assessee has clearly demonstrated that it had good and sufficient reasons. Assessee has clearly demonstrated that it had good sufficient reasons for non-deduction of tax for payment of VRS upto Rs.5 lacs. Under the circumstances, we also do not find any infirmity in the order of the Ld. Commissioner of Income Tax (Appeals) in this regard and uphold the same.”

10. We are of the view that the aforesaid judgment of Gujarat High Court squarely covers the case in favour of the assessee. In that case, the Gujarat High Court observed that the emphasis in Rule 2BA is on the amount receivable on account of Voluntary Retirement Scheme, which should not exceed the limit prescribed therein and that it is not the intention of the legislature that every VRS framed by the companies must provide that an employee availing benefit of VRS would be paid an amount either equivalent to (1) three months’ salary for each completed year of service; or

(2) salary at the time of retirement multiplied by the balance months of service left before the date of his retirement on superannuation.

11. It was further observed that on construction of Rule 2BA, it is difficult to hold other manners/methods/made of payment of amount in the VRS framed by the companies are forbidden. The Court noted that if such a construction was to be adopted then the same would adversely affect several employees of several companies without any fault on their part and VRS would not be of benefit to them. Such a construction, the Court held, was not called for having regard to the provisions of Section 10(10C) of the Act.

12. In the above case, the VRS of the assessee provided for 45 days salary of each completed year of service, and a specified sum for the balance year of service as ex-gratia amount. It was held by the Court that the VRS framed by the assessee company was in conformity with the guidelines prescribed in Rule 2BA of the Rules, even though the amount payable thereunder was not computed on the basis specified in the said Rule.

13. The factual position which emerges from the aforesaid discussion is that (a) in the assessment orders passed in the case of employees, the Department accepted that the employees were entitled to the benefit of Section 10(10C) of the Act; (b) as per the judgment of Gujarat High Court, merely because payment of more than ₹5 lakhs is made would not mean that the schemes are not in conformity with Rule 2BA and the provisions of Section 10(10A) of the Act; (c) wherever any payment is made in excess of ₹5 lakhs and payments made in regard to early bird incentives, the tax has

been deducted by the company on such payments made and that tax is paid to the Government.

14. The assessee acted in a bona fide manner and, therefore, cannot be treated as ‘assessee-in-default’ having regard to the principles laid down by this Court in *Nestle India Pvt. Ltd.* (supra) which has been reiterated recently by this Court in *CIT v. ITC Ltd.*, [2011] 199 Taxman 412.

15. In view of the aforesaid, we are of the opinion that all the aspects are duly considered and no substantial questions of law arise. Accordingly, these appeals are dismissed.

ACTING CHIEF JUSTICE

**SIDDHARTH MRIDUL
(JUDGE)**

December 16, 2011
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