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

Decided on 23rd March, 2015

+ ITA 222/2015
+ ITA 223/2015
+ ITA 224/2015
+ ITA 225/2015

AGENCE FRANCES PRESS Appellant
Through Mr. Kaanan Kapur and Mr. Bhushan
Kapur, Advs.

versus

ASST. DIRECTOR OF INCOME TAX Respondent
Through Mr. N P Sahni, sr. standing counsel

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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CM Nos.5382/2015, 5386/2015, 5387/2015 and 5388/2015

Exemption is allowed subject to all just exceptions.

The applications are disposed of.

ITA Nos.222/2015, 223/2015, 224/2015 and 225/2015

1. Admit.
2. Mr. N P Sahni, sr. standing counsel accepts notice.
3. With the consent of the counsel the matter was finally heard.
4. The question of law which arises in this case is whether the appellant was liable to pay interest under Section 234B of the Income Tax Act, 1961 in the facts and circumstances of this case.
5. The appellant, non-resident companies, were sought to be taxed for their activity of distribution of news. In the assessment proceedings right up

to ITAT, the levy of interest under Section 234B was upheld.

6. It was pointed out that the ITAT relied upon a Division Bench judgment of this Court in *Director of Income Tax, International Taxation V. Alcatel Lucent USA Inc.* (ITA No.327/2012 dated 7.11.2013).

7. On the strength of that decision the ITAT upheld interest liability under Section 234B. In *Alcatel Lucent* (supra), this Court had distinguished a previous decision of another Division Bench i.e. *DIT V. Jacobs Civil Inc.* 330 ITR 578.

8. The decisions in *Jacobs Civil Inc.* and *Alcatel Lucent* were considered by the Karnataka High Court in *Commissioner of Income Tax V. Samsung Electronics* (2012) 345 ITR 494, which had been decided after a remand by the Supreme Court. The Supreme Court's observation in respect of order dated 24.9.2009 had inter alia indicated the approach which had to be considered.

"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."

9. In the light of the above directions and after considering the submissions of the parties, the Karnataka High Court decided the matter finally in *Samsung Electronics* (supra).

10. This Court had taken note of the relevant part of the Supreme Court's order after which the Karnataka High Court decided the matter on merits in

Samsung Electronics (supra). This Court thereafter on 12.01.2015 decided in *Director of Income Tax V. GE Packaged Power Inc. and Ors.* as follows :

"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 (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 (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 (supra) applies in such situations; Alcatel Lucent (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 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.”

11. The present appeals are, therefore, entitled to succeed in view of the reasoning in *GE Packaged Power Inc. and Ors* (supra).

12. The substantial question of law is answered in favour of the assessee and against the revenue. Appeals are allowed in terms of the directions extracted above.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

MARCH 23, 2015/ld