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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
15-20.

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ITA 455/2015

COMMISSIONER OF INCOME TAX, INTERNATIONAL
TAXATION – 2

..... Appellant

Through: Mr. Rahul Chaudhary, Advocate.

versus

PACIFIC CONSULTANTS INTERNATIONAL INC..... Respondent

Through: Mr. Gautam Jain, Advocate with
Mr. Piyush Kumar Kamal, Advocate.

With

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ITA 456/2015

COMMISSIONER OF INCOME TAX, INTERANATIONAL
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..... Appellant

Through: Mr. Rahul Chaudhary, Advocate.

versus

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Through: Mr. Gautam Jain, Advocate with
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ITA 460/2015

COMMISSIONER OF INCOME TAX, INTERNATIONAL
TAXATION – 2

..... Appellant

Through: Mr. Rahul Chaudhary, Advocate.

versus

PACIFIC CONSULTANTS INTERNATIONAL INC..... Respondent

Through: Mr. Gautam Jain, Advocate with
Mr. Piyush Kumar Kamal, Advocate.

And

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ITA 512/2015

COMMISSIONER OF INCOME TAX, INTERNATIONAL
TAXATION – 2

..... Appellant

Through: Mr. Rahul Chaudhary, Advocate.

versus

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PACIFIC CONSULTANTS INTERNATIONAL INC..... Respondent
Through: Mr. Gautam Jain, Advocate with
Mr. Piyush Kumar Kamal, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

ORDER
% **27.01.2016**

1. These appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') are directed against the common order dated 12th January 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 1694 to 1699/Del/2006 for the Assessment Years ('AYs') 1997-98 to 2002-03.
2. By these appeals, the Revenue is questioning the decision of the ITAT in deleting the penalty imposed on the Respondent Assessee under Section 271(1)(c) of the Act.
3. The Assessee which has its headquarters in Japan is engaged in carrying on the business of rendering engineering services to various projects in India. It offered technical consultancy services to the projects funded by the Overseas Economic Cooperation Fund and two of such projects were Development of Tourist Infrastructure along the Buddhist Circuit ('Buddhist Circuit Project') and the Ajanta Ellora Conversion & Tourist Development Project ('Ajanta Ellora Project').
4. An agreement dated 19th October 1990 was entered into between the Assessee and the Government of India through the Ministry of Tourism

(‘MOT’). Clause 5 of the said agreement dealt with payment of taxes on the income earned by the Assessee in relation to the above projects. It read as under:

“5.01 The Government warrants that the Foreign Consultant and their staff shall be exempted from the payment of all taxes, duties, fees levies and other impositions under the laws and regulations of India or the Government shall reimburse to the consultant the cost of the said account, if the exemption is not granted by the Tax Authorities in respect of:

5.01.1. any payment made to the Foreign Consultant or to the Expatriate staff in connection with the carrying out of the services:

5.01.2 any equipment, materials, and supplies brought into India for the purpose of carrying out the services and which will be subsequently re-exported therefrom”.

5. An amendment was made to the above agreement on 31st August 1998 which contained the following stipulation in relation to the above Clause 5.01:

“3) The Government are pursuing the matter of tax exemption for PCI and their staff as mentioned in Article 5.01 of the Original Agreement. In the event that exemption is not granted, the Government will pay any taxes due direct to the relevant tax authority.”

6. A second agreement was entered into between the Assessee and the MOT on 10th August 1993 which also contained a similar clause as above in relation to payment of tax.

7. The case of the Assessee is that it was under the *bona fide* belief that the taxes would be directly remitted by the MOT to the Government of India. In

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relation to the issue of non-deduction of tax deducted at source ('TDS') from the payments made by it to foreign consultants, the issue travelled to this Court at the instance of the Assessee which filed appeals before the Tribunal being ITA Nos. 1635 to 1642 for the AYs 1991-92 to 1998-99. The said appeals of the Assessee were allowed by the ITAT by the order dated 20th December 2004. This order was upheld by the Court on 15th November 2006 when it dismissed the Revenue's appeal against the said order.

8. As far as the present appeals are concerned, this is the second round of litigation on the issue of penalty. In the first round, the ITAT had by its order dated 13th December 2006 deleted the penalty. That order was set aside by this Court and the matter was remanded to the ITAT for deciding the appeals afresh in the light of the amendment by which Section 271(1B) of the Act was introduced.

9. Having noticed that no return of income had been filed by the Assessee for the AYs 1997-98 to 2000-01, a notice under Section 148 of the Act was issued by the Assessing Officer ('AO') on 11th September 2003. For AY 2001-02, notice under Section 148 of the Act was issued on 8th November 2004. Pursuant to the above notices, the Assessee filed returns for AYs 1997-98 to 2000-01 on 20th August 2004 and for AY 2001-02 on 10th January 2005. Pursuant to the assessment orders passed by the AO for the aforementioned AYs as well as AY 2002-03 on 28th February and 1st March 2005, the Assessee paid the requisite tax along with interest.

10. Penalty proceedings were separately initiated under Section 271(1) (c) for the aforementioned AYs by a notice issued on 16th August 2005. A

common order dated 31st August 2005 was passed by the AO levying penalty for the AYs in question and this was affirmed by the CIT (A) by a common order dated 28th February 2008. Thereafter, the Assessee went in appeal before the ITAT which has by the impugned common order dated 12th January 2015 deleted the penalty.

11. The case of the Revenue is that the Ministry of Finance ('MOF') by letter dated 7th January 2000 addressed to the MOT, rejected the latter's application for grant of exemption for payment of income tax under Section 10(8B) of the Act on the ground that the consultancy income of the Assessee or its employees did not qualify for exemption. The matter was again taken up by the MOT with the MOF for reconsideration. The MOF, however, by letter dated 12th December 2001 advised the MOT that its request for exemption could not be accepted. It is accordingly contended by the Revenue that the Assessee was fully aware that the income from the two projects were not exempt from income tax and therefore it was incumbent on the Assessee not only to file returns disclosing the income earned from the above projects but in any event after issuance of the notices under Section 148 of the Act such income ought to have been disclosed and offered to tax in the returns filed pursuant to the said notices. It is stated that the fact that the Assessee was earning income from the two projects came to light only when a survey was conducted by the Income Tax Department under Section 133A of the Act. It is accordingly contended that the Assessee had concealed the material particulars of its income earned from the two projects. It is urged that there was no justification for the ITAT to have deleted the penalty under Section 271(1) (c) of the Act.

12. The case of the Assessee, on the other hand, is that it was under the *bona fide* belief that in terms of the specific clause in the agreement entered into by it with the MOT that it was MOT which would remit the taxes in question directly to the MOF, even if the request for exemption was rejected by the MOF. It was further contended that as far as returns filed for AYs 1997-98 to 2001-02 are concerned, a note was appended to the returns filed in which the circumstances under which the income earned from the projects was not being offered to tax, was explained. It is submitted that the necessary tax had in fact been paid in respect of the earnings from the two projects by the MOT and therefore there was no revenue loss. Reliance is placed on the decisions of the Supreme Court in *Hindustan Steel Ltd. v. State of Orissa* (1972) 83 ITR 26 (SC), *Price Waterhouse Coopers (P) Ltd. v. Commissioner of Income Tax* (2012) 348 ITR 306 (SC), *CIT v. Reliance Petroproducts (P) Ltd.* (2010) 322 ITR 158 (SC).

13. Having considered the submissions of learned counsel for the parties, the Court is of the view that in the present case the ITAT was justified in its conclusion that there was no concealment of material particulars by the Assessee with a view to avoiding payment of taxes. The fact of the matter is that there was a specific clause in the Agreement between the MOT and the Assessee to the effect that the foreign consultants and their staff would be exempt from payment of all taxes and in any event such taxes would be reimbursed. Even in the amended clause it was stated: "In the event that exemption is not granted, the Government will pay any taxes due direct to the relevant tax authority." In the circumstances, if the Assessee was under

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the impression that it was not required to pay taxes on earnings from the two projects, it cannot be said that there was an attempt at concealment of income or material particulars. As far as filing of returns after issuance of notice under Section 148 of the Act is concerned, although it is a stage subsequent to the rejection by the MOF of the request of the MOT for grant of exemption, a note was appended by the Assessee to the returns filed by it for the AYs 1997-98 to 2001-02, explaining the circumstances under which it was not offering the earnings for tax. This supports the contention of the Assessee that there was no concealment of material particulars.

14. It is also noticed that as far as Ajanta Ellora Project is concerned, the receipts in the hands of the Assessee for the AYs 1998-99 onwards pertained to the earlier years since the project came to an end in AY 1997-98. That apart, it appears to the Court that the reasoning of the ITAT and its conclusions on merits on the question whether the Assessee could be said to have concealed the material particulars cannot be said to be perverse.

15. In the facts and circumstances of the case, the Court is not persuaded to frame any substantial question of law.

16. The appeals are accordingly dismissed.



S.MURALIDHAR, J



VIBHU BAKHRU, J

JANUARY 27, 2016

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