

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 22195 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE B.N. KARIA

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

MULTIBASE INDIA LIMITED.....Petitioner(s)

Versus

INCOME TAX OFFICER & 1....Respondent(s)

Appearance:

MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

MR.VARUN K.PATEL, ADVOCATE for the Respondent(s) No. 1

NOTICE SERVED for the Respondent(s) No. 2

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 14-15/02/2018

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged the action and the stand of the department of the Income Tax in not granting refund of excess amount of Rs.20,22,522/- deducted by the assessee at source.

2. Brief facts are as under.

3. Petitioner is a company registered under the Companies Act. For the assessment year 2005-06, the petitioner had made payment of royalty of Rs.2,00,39,165/- to a foreign based company Multibase S.A. France by name. The company did not have PAN. The petitioner therefore deducted tax at source while making the payment at higher rate of 20%. The company thus deducted a sum of Rs.40,26,438/- by way of TDS.

4. The petitioner later on realized that under clause-13 of Double Taxation Avoidance Agreement between India and France, the royalty paid by the petitioner to the parent company would invite TDS liability only at the rate of 10% and not 20% as deducted by the petitioner. Thus, the petitioner had

made excess deduction of Rs.20,03,912/- under the said head. The petitioner thereupon approached the Assistant Commissioner of Income Tax by writing a letter dated 15.12.2008 and requested that the excess amount of Rs.20,03,912/- be refunded. The authorities were however not inclined to accept such request primarily on the ground that the approach by the petitioner was belated. Reliance would be placed on a circular dated 23.10.2007 issued by the CBDT providing the procedure for refund of tax deducted under section 195 of the Act. There does not appear to be dispute that the petitioner's case would fall within the said circular and provided the relevant conditions are satisfied, the petitioner could claim the return of such excess tax deducted at source. This circular however contained a limitation clause for making applications for refund which reads as under:

"9. The limitation for making a claim of refund under this circular shall be two years from the end of the financial year in which tax is deducted at source. However, all cases for claim of refund under items © to (i) of paragraph 2 which were pending before the issue of this circular and where the claim for refund was made after the issuance of Circular No.790 may also be considered."

5. Since the petitioner's application for refund was beyond the period of limitation prescribed under the said circular, the petitioner also approached CBDT under a communication dated 04.08.2016 and requested for intervention in exercising powers under section 119 of the Act. The petitioner pointed out that excess TDS of Rs.20,03,912/- was made under *bona-fide* mistake and belief. The petitioner has already applied to the departmental authorities for refund. However, the refund is not being granted on the ground of limitation. The petitioner therefore urged the CBDT to exercise powers under section 119 of the Act.

15.02.18

6. We are informed that CBDT has not yet responded to such petition of the assessee. Sum total of above developments is that the petitioner's application for refund of excess TDS deposited is not being decided primarily on the ground that the same was filed after the period of limitation prescribed under the scheme. *Prima-facie*, we do not see any ground to discard the petitioner's contention that there has been excess deposit of TDS as compared to what is prescribed under DTAA and therefore, such excess deposit is required to

be refunded, of course subject to fulfillment of conditions contained in the scheme. Be that as it may, these issues have not been examined by the department since at the very threshold, Commissioner believed that the application is belated.

7. In our opinion, if the petitioner is correct in pointing out that there has been a clear excess deduction of TDS and in depositing the Government revenue, subject to fulfillment of conditions of the scheme, petitioner must receive refund thereof. Unless the delay is gross or intentional or arising out of inaction and lethargy on the part of the petitioner, tax mistakenly deposited cannot be retained by the Government on the ground of delay.

8. Quite apart from the fact whether the authority itself under the scheme had power to condone the delay, section 119 of the Act clearly empowers the CBDT to do so. Sub-section (1) of section 119 gives a power to the CBDT to issue such orders and instructions and directions to the income tax authorities as it may deem fit for proper administration of the Act and the authorities would

observe and follow such orders and instructions of the Board. Sub-section (2) of section 119 further provides inter-alia that without prejudice to the generality of the provisions contained in sub-section (1), the Board may, if it considers it necessary or expedient so to do for avoiding genuine hardships by general or special orders authorizing the income tax authority or the Commissioner (Appeals) to admit an application or claim for any exemption, deduction, refund or any other relief under the Act after the expiry of period prescribed under the Act by or under the Act for making such application or claim and deal with the same on merits in accordance with law.

9. Thus, CBDT undoubtedly has powers to condone the delay even if we assume the Commissioner does not have such powers. We would have ordinarily requested the CBDT to examine the issue and consider exercising such powers on the petition already filed by the petitioner. However, in the present case, the dispute is lingering since quite some time. In any case, the delay is not gross and the repercussion in law is not widespread. We may recall the last date for filing refund claim under the scheme was 31.03.2008. The

petitioner upon coming to realize that excess deduction has been made and deposited with the Government, approached the appropriate authority under letter dated 15.12.2008.

10. Under the circumstances, we propose to condone the delay here itself and then require the competent authority before whom the petitioner's application for refund is pending to decide the same on merits. We order accordingly. The competent authority shall consider the petitioner's application for refund on merits and decide the same in accordance with law, preferably before 31.03.2018.

11. Petition is disposed of accordingly.

THE HIGH COURT
OF GUJARAT

(AKIL KURESHI, J.)

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(B.N. KARIA, J.)

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