$~

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

Reserved on: February 26, 2016
Date of Decision: April 7, 2016

\+ **W.P.(C) 3244/1999**

CEAT LIMITED ..... Petitioner

Through: Mr. S. Ganesh, Senior Advocate with Ms. Mallika Joshi, Mr. Kishan Rawat and Mr. Rajat Gava, Advocates.

versus

THE CENTRAL BOARD OF DIRECT TAXES & ORS. ..... Respondents

Through: Ms. Vibhooti Malhotra, Junior Standing Counsel for Mr. Ashok Manchanda, Senior Standing Counsel with Mr. Aaman Aziz, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

JUDGMENT
07.04.2016

%

S. Muralidhar, J.

1. The challenge by the Petitioner, Ceat Limited, in this writ petition under Article 226 of the Constitution of India is to an order dated 8th December, 1998 issued by the Central Board of Direct Taxes ('CBDT') rejecting the prayer of the Petitioner for refund of Rs. 64,53,214/- being the excess tax withheld at source on the penal interest paid by the Petitioner to Sanwa International Finance Limited (SIFL), Hong Kong, since the said payment did not qualify for exemption under Section 10(15)(iv)(c) of the Income Tax Act, 1961 (the 'Act').

2. The challenge in the writ petition is also to a consequential communication dated 16th February, 1999, issued to the Petitioner by the Deputy Commissioner of Income Tax (DCIT), TDS, Circle-I, Mumbai rejecting the Petitioner's application dated 9th October, 1998 addressed to the Commissioner of Income Tax (CIT) for issuing refund.

Background facts

3. The Petitioner entered into an agreement with SIFL, which represented a consortium of banks to finance the cost of the Petitioner's tyre cord plant, which it was setting up at Gwalior, Madhya Pradesh. In terms of the Agreement dated 20th September, 1990, entered into between the Petitioner and SIFL as well as other banks, the Petitioner was granted a term loan facility of Japanese Yen 5 billion. Under the loan agreement, the entire proceeds of the loan facility were to be used for import of capital plant, equipment, raw materials and components for setting up a new nylon tyre cord unit at Malanpur and an expansion of an existing fibre glass plant unit at Timapur. The term loan was to be repaid in ten equal instalments. The Petitioner had a right to prepay the loan wholly or in part without premium or penalty by giving the lenders not less than 14 days' notice of the sum that was to be prepaid. Interest on the loan was payable at a rate which was to be 0.5% per annum over the six months London Inter Bank Offer Rate (LIBOR). The Petitioner was also required to pay a commitment fee of 0.2% and the management fee. The agreement stipulated that all sums payable by the Petitioner under the agreement were to be paid without deduction or withholding any tax leviable in India.

4. Clause 18 of the agreement set out the undertakings that the Petitioner had to furnish. In terms of clause 18(F), it was stipulated that the Petitioner's indebtedness would not at any time exceed 250% of its net worth and its borrowings would not at any time exceed 80% of the book value of the project assets. Under clause 17(C), the Petitioner was required to intimate SIFL its compliance with the financial ratios in conformity with clause 18(F).

5. Under clause 19(C) of the agreement, it was stated that in the event the Petitioner failed to comply with the undertakings furnished in terms of Clause 18, then such breach would amount to an event of default. According to clause 27(B), such default could be waived subject to the conditions that may be imposed by the lenders.

6. Prior to entering into the above agreement on 23rd November, 1989, the Petitioner wrote to the Department of Economic Affairs (DEA), Ministry of Finance (MoF) regarding the above foreign exchange loan which it was seeking to avail from the consortium of banks for the purposes of import of capital goods for the abovementioned plants. On 29th December 1989, the DEA issued an approval for the above proposal. In particular, approval was granted for payment of interest at 0.5% over the LIBOR rate as well as payment of interest and management fee, etc. exempting such payment under Section 10(15)(iv)(c) of the Act. It was consequent upon the above approval that the agreement was entered into between the Petitioner and SIFL on 20th September, 1990.

7. The total loan utilised by the Petitioner came to 4,900 million Japanese Yen. It was utilised for the following divisions of the Petitioner Company to the extent indicated hereunder:

Tyre Division	-	526.16 Jap Yen (Million)
Glass Fibre Division	-	529.46 Jap Yen (Million)
Tyre Cord Division	-	3844.38 Jap Yen (Million)

8. On 29th April 1994, the Petitioner prepaid a portion of the aforementioned loan pertaining to the tyre division. On 19th August, 1994, it prepaid a portion of the loan which it had utilised for the glass fibre division. Both these prepayments were made with the approval of the MoF dated 29th April, 1994 and 19th August, 1994 respectively.

9. It is stated that the residual loan was charged against the assets of the Petitioner's tyre cord division. Meanwhile the Petitioner was unable to maintain the stipulated ratio of actual indebtedness to net worth. For the financial year ending 30th June 1993 and the financial year ending 30th September 1994, this ratio was 318% and 316% respectively. Since the indebtedness ratio crossed 250%, the lenders imposed a normal penal interest of 1% from 1st July, 1993 onwards. The agency fee was also increased by additional one-time payment of US$ 8,000. As a result on 24th March 1995, the Petitioner wrote to the DEA seeking the approval for payment of penal interest as charged above from 1st July, 1993 onwards. On 7th April, 1995, the DEA replied to the Petitioner approving "payment of penal interest @ 1% per annum on the outstanding amounts with effect from

July 1, 1993, and onetime payment of USD 8,000 as additional agency fee to Sanwa International Finance Limited." Pursuant to the above approval, the Petitioner remitted a sum of Rs. 6,51,41,380 Japanese Yen. It is stated that tax thereon amounting to Rs.49,51,049 was deducted at source and paid to the MoF/Respondent No. 3.

10. Meanwhile the Petitioner decided to disinvest the tyre cord division as it wanted to concentrate on its core business, viz., tyres. However, the Petitioner realised that even if it would sell the tyre cord division, it had to settle the outstanding amount against the loan. On 20th April 1995, the Petitioner received in principle approval of the lenders for sale of the tyre cord division vide fax of the said date from SIFL subject to two conditions – (i) that the outstanding loan balance along with the regular interest must be settled in full; and (ii) an additional penal interest at 2% per annum for the period from 1st January, 1995 till the date of payment should be made to the consortium of lenders. The Petitioner agreed to the said conditions. By the letter dated 24th April 1995, the Petitioner wrote to the DEA seeking permission to prepay the entire outstanding loan amount in full along with penal interest at 2% from 1st July, 1995 till the date of repayment. Another letter was addressed on 8th May, 1995 for the same purpose. On 19th May 1995, the DEA conveyed its approval for prepayment of the outstanding sum of Japanese Yen 1,763,687,637 by the Petitioner to SIFL together with interest and penal interest @ 2% per annum from 1st January, 1995 till the date of actual prepayment.

11. On 24th May 1995, the Petitioner paid a sum of 1,66,90,711 Japanese

Yen. The tax deducted at source in respect of the said payment in the sum of Rs.15,02,165 was paid to the MoF.

Proceedings in the application for refund

12. It was in the above circumstances that the Petitioner on 5th June, 1995 wrote to the DCIT, Special Range, who was its Assessing Officer (AO) under Section 237 of the Act claiming refund of the aggregate TDS in the sum of Rs. 64,53,214. The main submission of the Petitioner was that the penal interest was "interest" within the meaning of Section 2(28A) of the Act. This payment of penal interest had been specifically approved by the Government and was also exempt from tax. Accordingly it was contended that the Petitioner was entitled to refund of the tax wrongly deducted from the prepayments of the loan to SIFL.

13. The Income Tax Officer (ITO), (TDS), Mumbai wrote to the Petitioner on 19th September 1996, stating *inter alia* that "refund can be granted only in respect of excess tax deducted and/or deductible under Section 192 to 194D of the I.T Act. In your case, the tax under reference was deducted under Section 195 of the I.T Act." The Petitioner then simultaneously appealed against the said order before the Commissioner of Income Tax (Appeals) [CIT(A)] and also filed a rectification application before the ITO, (TDS) Mumbai under Section 154 of the Act.

14. The Petitioner's application under Section 154 of the Act was rejected by the ITO by an order dated 28th October, 1996. There were two reasons given in this order – one was that since the Petitioner stated that the tax had

been paid by it on behalf of SIFL, the refund of excess tax, if any, paid can only be made by the said party, on an application made by it under Section 237 of the Act. Attention was drawn to CBDT's circular No.285 dated 21st October, 1980 as to the circumstances when "a person other than an Assessee" could claim refund of tax. Since the Petitioner did not fall within the scope of the said circular its application for refund was not entertained. The Petitioner filed an appeal against the said order dated 28th October, 1996 before the CIT(A).

15. On 19th November 1996, the CIT, City-IV wrote to the Petitioner stating that it could declare itself as a representative assessee of SIFL under Section 161 of the Act and thereafter file refund claim/return with the non-resident refund circle under the charge of CIT, Mumbai. The alternative was to approach the CBDT to persuade it to exercise its powers under Section 119(2)(a) of the Act.

16. On 17th December 1996, the Petitioner wrote to the CBDT requesting it to issue necessary instructions under Section 119 of the Act and grant a refund.

17. On 6th August, 1998, the CBDT issued a circular No.769, setting out the procedure for tax deducted at source under Section 195 of the Act.

18. On 13th August 1998, the CIT(A) disposed of the Petitioner's two appeals. The CIT(A) held that it was "an administrative matter which leaves no scope for any adjudication by me. There is no mistake apparent from

records as the tax was deducted at source, *suo moto* by the appellant co. If any wrong has been committed, in doing so, it can be redressed administratively. The appellant co. is advised to take up the matter with the administrative authorities in this regard including that of the CBDT."

19. On 21st August 1998, the Petitioner again wrote to the CBDT asking it to issue necessary instructions to the ITO to grant the Petitioner refund of income tax in the sum of Rs. 64,53,214. Further the Petitioner on 14th September 1998, once again, applied to the ITO (TDS) by an application under Section 154 of the Act bringing to the ITO's notice the circular No.769 dated 6th August, 1998 issued by the CBDT, which had since granted powers to the ITO to issue refund due to an Assessee under Section 195 of the Act. The Petitioner accordingly requested the ITO (TDS) to grant the refund of the tax deducted in excess.

20. On 9th October 1998, the Petitioner wrote to the CIT, City-IV drawing its attention to the Circular No.769 dated 6th August, 1998 and for a direction to the DCIT to grant refund.

21. The DCIT's letter dated 7th January, 1999 to the Petitioner seeking more details was replied to by the Petitioner on 27th January, 1999.

Rejection of the Petitioner's application for refund

22. The DCIT wrote to the Petitioner on 16th February 1999, rejecting its application for refund. The reason for this rejection was the letter dated 8th December 1998, issued by the CBDT in which it was observed that the

"interest paid to Sanwa International Finance Ltd., Hong Kong does not qualify for exemption as the payment does not relate to the borrowings made for the purpose stated in section l0(15)(iv)(c) of I.T. Act, 1961. Thus tax has correctly been deducted at source u/s.195 on interest paid to M/s. Sanwa and the question of refund does not arise."

23. This was virtually the same as the letter dated 8th December 1998 by the CBDT rejecting the plea for refund. Here it was pointed out that the payment of the penal interest was for transgressing the provisions of clause 18(F)(1)(a) of the Agreement with Sanwa. The consequential letter dated 16th February 1999, written by the DCIT to the Petitioner communicating the rejection of its application dated 9th October, 1998 for issue of refund has already been adverted to hereinbefore and has also been challenged by the Petitioner.

Submissions of the Petitioner

24. Mr. S. Ganesh, learned Senior Advocate appearing for the Petitioner, submitted as under:

i. The Petitioner had fulfilled all the conditions stipulated for payments made to a non-resident which would be exempt from tax in terms of Section l0(15)(iv)(c) of the Act. Accordingly, there was no basis for rejecting its claim.

ii. The interest paid was for utilisation of the funds, which was in respect of import of capital goods which was one of the purposes set out in Section l0(15)(iv)(c) of the Act. The interest was in the nature

of compensation paid for utilisation of the funds. The CBDT, therefore, misconstrued the Agreement entered into between the Petitioner and SIFL. The MoF having approved the payment of penal interest by the letters dated 7th April 1995 and 19th May 1995 it was not open to the CBDT to reject the Petitioner's claim for exemption from payment of tax on the penal interest paid.

iii. The Petitioner's claim for refund had been rejected on account of such procedural technicalities. Between 1996 and 1998, in all of the Petitioner's applications for refund the fact that the interest paid was exempt under Section 10(15)(iv) (c) was not disputed. It was for the first time that the CBDT was taking a contrary view without any valid reason.

iv. Lastly it was submitted that the CBDT had not given the Petitioner an opportunity of being heard prior to passing the order dated 8th December, 1998.

v. Reliance was placed on the decision in ***GE India Technology Centre Private Limited v. Commissioner of Income Tax & Anr (2010) 10 SCC 29***.

Submissions of the Respondents

25. Ms. Vibhooti Malhotra, learned counsel for the Revenue, drew the attention of this Court to the definition of 'interest' under Section 2(28A) of the Act and submitted that the payment of penalty and management fee, etc.

was on account of the failure of the Petitioner to adhere to the conditions stipulated in the Agreement regarding repayment or prepayment of the loan. It was for the Petitioner to maintain the indebtedness ratio in terms of clause 18(F)(i)(a) of the Agreement. Even clause 8 of the Agreement, which defined 'interest' did not include penal interest. The DEA had granted exemption from payment of tax only on the interest on the term loan and not on payment of penal interest.

26. Ms. Malhotra further pointed out that the approval for exemption had to be granted by the Foreign Tax Division of the Department of Revenue and not by the DEA. Therefore, the question of approval by the DEA did not arise.

27. It was submitted by Ms. Malhotra that there was no legal requirement for the CBDT to give a hearing to the Petitioner for rejecting the application for refund of the TDS and in any event the Petitioner never sought such an opportunity of being heard. Ms. Malhotra pointed out that against the order dated 19th September 1996 passed by the ITO (TDS), rejecting the application for refund the Petitioner did not seek any remedy and allowed that order to become final. Instead only a rectification application was filed. Having not preferred an appeal against those orders before the CIT(A) there was no occasion for the Petitioner to have moved the CBDT under Section 119 of the Act for grant of refund. Accordingly, the entire proceedings were misconceived.

28. Ms. Malhotra placed reliance on the decisions in ***BASF (India) Ltd. v.***

W. Hasan, Commissioner of Income Tax (2006) 151 Taxman 31 (Bom) and ***Mardia Chemicals Ltd. v. Commissioner of Income Tax & Anr. (2012) 26 taxmann.com 42 (Guj.)***. The thrust of the submissions of Ms. Malhotra on the basis of these decisions was that the Petitioner's application for refund had to be processed only in terms of the circulars that were in force at the time of making of such application. The subsequent circular including circular No.769 dated 6th August, 1998, would not apply in the case of the Petitioner since its application was made for the first time on 5th June, 1995.

29. Ms. Malhotra further submitted that the penal interest paid by the Petitioner was in the nature of compensation and did not service the principal loan component. She referred to clauses 18(F) and 27 of the Agreement for this purpose. Reference was also made to the decisions in ***Commissioner of Income Tax, Shimla v. H.P. Housing Board (2012) 18 taxmann.com 129 (HP)*** and ***Commissioner of Income Tax v. Sahib Chits (Delhi) (P.) Ltd. (2009) 185 Taxman 34 (Delhi)***. She submitted that the eligibility for exemption had to be strictly construed and since the Petitioner did not fulfil the conditions, the CBDT was justified in rejection of application for refund. Reliance was also placed on the decision in ***Star Industries v. Commissioner of Customs (Imports), Raigad (2015) 63 taxmann.com 131 (SC)***.

Scope of definition of 'interest'

30. The first issue that arises is whether the payment by the Petitioner of penal interest and other charges would fall within the definition of 'Interest' under Section 2(28A) of the Act. The said provision reads as under:

> "2(28A) " interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;"

31. The definition has both exhaustive as well as inclusive part. Even in the exhaustive part, following the word 'means', the expression 'interest' takes into account interest payable 'in any manner' in respect of 'any' moneys borrowed or debt incurred. The words 'debt incurred' has a further inclusive part, i.e., deposit, claim or other similar 'right or obligation'. The inclusive part of the definition accounts for 'any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised.'

32. Thus, it is seen that the expression 'interest' is meant to encompass all kinds of payments in respect of moneys borrowed or debt incurred. It need not be interest *per se* but it could be a discharge of any other 'similar right or obligation'. It could include a 'service fee'. It could include any other 'charge'. It is in this context that one has to examine the clauses in the Agreement entered into between the Petitioner and SIFL on 20th September, 1990.

Relevant clauses of the agreement

33. Clause 8(B) of the Agreement refers to 'Normal Interest Rate', which is linked to the LIBOR as already noticed. Clause 9 deals with the Fees to be paid. Clause 9(B) talks of the 'Management Fee'; 9(C) deals with the

'Participation Fees' and 9(D) deals with the 'Agency Fee'. Clause 10A makes it clear that all sums payable by the borrower shall be paid free of any restriction or condition and in particular "without any deduction or withholding for or on account of any tax imposed, levied, collected withheld and under Clause 10(A)(3) "without deduction or withholding except to the extent required by law" on account of any other amount, whether by way of set off or otherwise.

34. Under Clause 10(B) of the Agreement 'Grossing-up of payments' is envisaged. It states that if the borrower himself at any time deducts or withholds any tax in the sum payable, the borrower shall pay such additional amount as is necessary to ensure that the bank to which such payment is due is paid such additional amount equal to what it had received had no deduction been made. Clause 27 refers to 'Remedies, Waivers, Amendments and Consents'. Clause 27B states that any provision of the Agreement can be amended or supplemented only if the borrower or majority of the banks so agree in writing and any event of default or breach of any provision could be waived where the majority of the banks agree and subject to such conditions as are envisaged thereunder.

Effect of prior approval of the MoF

35. What is important to note here is that this Agreement itself was entered into with the prior approval of the DEA. It should be recalled that the Petitioner obtained an advance approval of the DEA on 29th December, 1989 in terms of which the Government of India approved payment of interest at 0.5% over the LIBOR rate and confirmed that payment of such interest and

management fee, etc. would be exempt under Section 10(15)(iv)(c) of the Act. It was on the basis of this approval that the Petitioner entered into the Agreement with SIFL and the borrowers on 20th September, 1990.

36. It also appears that the DEA did approve all the remittances of penal interest at 1% from 1st July, 1993 and again at a further penal interest of 2% from 1st January, 1995 by the letters dated 7th April, 1995 and 19th May, 1995.

37. At this stage, it must be noted that the plea of the Respondent that it is the Foreign Trade Tax Division (FTTD) of the MoF, which had to grant such approval, was not the stand taken at any of the stages when the Petitioner applied for and obtained the approval of the DEA. The Petitioner cannot, therefore, be faulted for proceeding on the basis that the DEA had duly approved the remittances of the penal interest amount without deducting TDS.

38. It appears to the Court that a considered decision was taken by the MoF to grant approval not only to the Agreement as entered into between the Petitioner, the SIFL and the consortium of banks containing all of the aforementioned conditions but also to the payments made on two occasions without raising any objection that such payments did not constitute 'interest' within the meaning of Section 2(28A) of the Act or that since such payments were occasioned by a breach of contract by the Petitioner, they did not qualify as payments towards servicing the loan availed of by the Petitioner under the Agreement. Therefore, the said objection raised by the CBDT at

the subsequent stage cannot be countenanced.

39. Clause 27(B) of the Agreement itself envisages that waiver of a default event could be granted subject to the conditions that might be stipulated for such waiver. It was on the strength of this clause that SIFL agreed to ignore the event of default on the condition that the Petitioner paid the additional rate of 1% interest for the period from1st July, 1993 to 31st December, 1994 and at the rate of 2% interest for the period from 1st January to 1st June, 1995. These payments were, therefore, in the "nature of interest" and would in any event be covered by the expression "other charge in respect of the moneys borrowed" occurring in Section 2(28A) of the Act. Consequently the objections raised by the Respondent on these grounds do not appear to be justified in law.

The CBDT Circular of August 1998

40. The other major objection raised is that at the time when the application for refund was made, the CBDT circular No.769 dated 6th August, 1998 was not in force. Ms. Malhotra drew the attention of the Court to circular No.285 dated 21st October, 1980, which first stipulated the procedure for regulating refund of amounts paid in excess of tax deducted at source. She also referred to the subsequent circulars that had been issued, i.e., circular No.790 dated 20th April, 2000; circular No.7/2007 dated 23rd October, 2007 and the most recent being 2/2011 dated 27th April, 2011.

41. In the present case, it is interesting to note that when the Petitioner first made an application for refund on 5th June, 1995, it referred to only Section

237 of the Act. It mentioned therein that although it had made applications to the MoF for permission to remit the penal interest without TDS, those approvals were not received by the time the payments had to be made. The Petitioner also urged the grounds in support of its contention that it had wrongly deducted TDS. There was no reference to any particular circular. The order of the ITO (TDS) dated 19th September, 1996 referred to CBDT's circular No.285 dated 21st October 1980, which stated that refund could be granted only in respect of excess tax deducted under Sections 192 to 194D of the Act whereas in the case of the Petitioner the tax had been deducted under Section 195 of the Act. This was the only ground on which the application was rejected. In other words, the rejection was not on the grounds subsequently stated, viz., that the application should have been made by SIFL and not the Petitioner. It was in response to this order that on 30th September, 1996, the Petitioner wrote to the ITO pointing out that its application was not with reference to any circular but under Section 237 of the Act which entitled an Assessee to seek refund subject to satisfying the AO that excess tax had been paid. It was accordingly requested that the ITO rectify the mistake in the earlier order dated 19th September, 1996. This application was rejected on 28th October, 1996 where for the first time it was stated that the application under Section 237 of the Act could have been made only by SIFL and not the Petitioner. The only exception where a person other than an Assessee could claim refund was provided in the CBDT's circular No.285 dated 21st October, 1980 and since the Petitioner's case did not fall within the scope of the said circular its request could not be entertained.

42. To be fair to the Petitioner it did challenge the above orders by filing appeals before the CIT(A). However, in the meanwhile the CIT, Mumbai-IV addressed a communication dated 19th November, 1996 in response to the Petitioner's letter dated 30th September, 1996 giving its advice as to what it could do in the matter. The said letter reads as under:

> "Sub: Application under Section 154 of the Income-tax Act, 1961 (The Act)
>
> Ref: Your letter dated 30.9.1996
>
> Please refer to the above letter addressed to ITO, TOS-IV, Mumbai, endorsing copy of this letter.
>
> In this connection I have been directed by the CIT MC IV, Mumbai to inform you that you may declare yourself as a representative assessee of M/s.Sanwa International Finance Ltd., Hong-Kong U/s.161 of the Income-tax Act, 1961 and thereafter file the refund claim/return with non resident refund circle under the charge of CIT, MCIT,Mumbai. In case you decline to declare yourself as a representative assessee you may please approach the CBDT with your request in view of the powers vested with them U/s.119(2)(a) of the Income-tax Act, 1961."

43. It was pursuant to the above letter that on 17th December, 1996, the Petitioner addressed a letter to the CBDT under Section 119 of the Act.

44. Meanwhile the CIT(A) by the order dated 13th August, 1998, dismissed the appeal of the Petitioner treating the entire matter to be an administrative one and that "if any wrong has been committed, in doing so, it can be addressed administratively." Here again the CIT(A) added "the appellant-company is advised to take up the matter with the administrative authorities in this regard including that of the CBDT."

45. In view of both this order as well as the letter dated 19th November, 1996 of the CIT, the Petitioner considered it appropriate to approach the CBDT itself.

46. The Petitioner's letter dated 17th December 1996 to the CBDT did not elicit any response. It addressed a further application on 21st August, 1998 to CBDT following the order dated 13th August, 1998 of the CIT(A). The Petitioner pointed out that it was not a representative Assessee of SIFL and, therefore, it had to approach the CBDT under Section 119 of the Act.

47. Interestingly by this time, the CBDT had come out with circular No.769 dated 6th August, 1998 granting powers to the ITO to grant refund under Section 195 of the Act. On the strength of this circular an application was again filed before the ITO by the Petitioner on 14th September, 1998, asking it to exercise those powers in relation to the refund due under Section 195 of the Act.

48. At this stage a reference be made to Section 195 of the Act which deals with payments of sums to non-residents. While Section 195(1) obliges a person paying to a foreign company any interest to deduct tax at source from such payments under Section 195(3) of the Act it need not do so if a certificate is obtained from the Assessing Officer by the non-resident. There is a role envisaged for the CBDT under Section 195(5) of the Act to make specific rules on the aspect of deduction of tax at source with regard to payments to non-residents.

49. In ***GE India Technology Centre Private Limited*** (*supra*), the Supreme Court explained that "Section 195(2) provides a remedy by which a person may seek a determination of the 'appropriate proportion of such sum so chargeable' where a proportion of the sum so chargeable is liable to tax." The Court rejected the contention of the Revenue that it is only the recipient of the sum, i.e., the payee, which could seek refund and that the Revenue would be entitled to appropriate moneys deposited by the payer even if such payment is not chargeable to tax. A reference was made to the decision in ***Transmission Corporation of A.P. Ltd. v. CIT (1999) 7 SCC 266***, which recognised the right of the person expected to deduct tax at source to apply to the ITO (TDS) in case there was any doubt as to the amount to be deducted at source.

50. It appears to the Court that in the light of the law explained in ***GE India Technology Centre Private Limited*** (*supra*), the Petitioner in the present case was justified in going before the ITO with an application dated 14th September, 1998, requesting that the CBDT's circular No.769 dated 6th August, 1998 be applied.

51. It must also be noted at this stage that this circular No.769 dated 6th August, 1998 of the CBDT came as a result of a number of representations made to it for granting approval for refund of excess deduction of TDS. The circumstances noted in para 1(i) by the CBDT itself details where such refund appears to be justified is – (a) where a contract is cancelled and no remittance is required to be made to the foreign collaborator; (b) where the

contract is cancelled after the remittance is made and the foreign collaborator returns the remitted amount; and (c) where the TDS is found to be in excess "for any other reason". Para 2 of the said circular acknowledges that a lot of hardship resulted where the Assessing Officer while assisting a foreign resident in whose case deduction was made at source having to file a return in order to entertain the plea for refund. Paras 3 & 4 therefor state as under:

> "3. The matter has been considered by the Board. It has been decided that in the type of cases, referred to above, a refund may be made independent of the provisions of the Income-tax Act, 1961 to the person responsible for deducting the tax at source from payments to the non-resident, after taking the prior approval of the Chief Commissioner concerned.
>
> 4. The excess tax deducted would be the difference between the actual deductible. This amount should be adjusted against the existing tax liability under any of the Direct Tax Acts. After meeting such liability, the balance amount, if any, should be refunded to the person responsible for deduction of tax at source."

Decisions cited by the Respondent

52. As far as the decisions cited by the learned counsel for the Respondents are concerned, it is true that in ***BASF (India) Ltd.*** (*supra*) as well as ***Mardia Chemicals Ltd.*** (*supra*), it has been held that a subsequent circular could not be applied retrospectively to take away the vested right created in an Assessee by the earlier circular. In both cases the earlier circular was the circular dated 6th August, 1998.

53. However, these decisions cannot be applied in the present case by the Revenue to deny the Petitioner consideration of its application for refund in

terms of the circular dated 6th August, 1998. It must be noticed that its claim for refund was actually never rejected on merits since the order of the CIT(A), which substituted the order of rejection by the ITO advised the Petitioner to approach the CBDT. In fact, even the CIT advised the Petitioner likewise. It was pursuant to both these orders, the Petitioner approached the CBDT. At the time of making of the application to the CBDT on 21st August, 1998, the circular dated 6th August, 1998 had been issued. The whole idea was to provide a remedy for excessive or wrongful deduction of TDS, the refund of which was sought. This circular was beneficial to the person who had deducted TDS and was seeking refund. Therefore, there was no question of the CBDT not considering the applicability of the said circular as far as the Petitioner was concerned. These decisions, therefore, do not come to the aid of the Revenue to justify its rejection of the application made by the Petitioner.

Validity of the impugned order of the CBDT

54. That brings us to the question of validity of the order passed by the CBDT rejecting the Petitioner's application for refund. In the first place it is required to be noticed that the CBDT, in fact, did not give the Petitioner any opportunity of being heard. The impugned order was not directly communicated to the Petitioner. The Petitioner got to know of it when a copy thereof was enclosed with the letter dated 16th February 1999 of the DCIT.

55. There is only one ground on which the CBDT rejected the Petitioner's application for refund. This was that the penal interest was paid by the

Petitioner as a result of violation/transgression of the Agreement and was, therefore, not exempt under Section 10(15)(iv)(c) of the Act. This is factually incorrect since Clause 27 of the Agreement itself provides for waiver, in the event of default, by SIFL subject to certain conditions. The penal interest was imposed as part of the conditions of the Agreement itself. Therefore, the payment of penal interest cannot be said to be for breach of the terms of the conditions but in terms of the conditions imposed for condoning such breach. The impugned order of the CBDT, therefore, proceeds on an erroneous interpretation of the clauses of the Agreement.

56. The order of the CBDT does not state that the Petitioner otherwise does not satisfy the conditions contained in the CBDT's circular dated 6th August, 1998. It also does not state that the said circular would not apply to the Petitioner's application for refund. This is yet another reason why the Court is not prepared to entertain the plea of the Revenue to the above effect because that was not the ground on which the CBDT rejected the Petitioner's application.

57. In the considered view of the Court, therefore, the impugned order dated 8th December 1998 of the CBDT rejecting the Petitioner's application for refund is unsustainable in law.

58. At this stage it must also be noted that the two decisions referred to by the Revenue, i.e., ***Commissioner of Income Tax v. Sahib Chits (Delhi) (P.) Ltd.*** (*supra*) and ***Commissioner of Income Tax, Shimla v. H.P. Housing Board*** (*supra*) are distinguishable on facts. The first case concerned the

question whether 'bid amount' which was to be distributed amongst the members of the chit fund would be considered to be 'interest'. The second case involved a question whether interest paid by the housing loan allottees for delay in completion of construction of flats was 'interest' within the meaning of Section 2(28A) of the Act. On the facts of that case it is clear that the allottees of the flat had not given money to the Board by way of deposit nor had the Board borrowed the amount from the allottees whereas in the present case the Petitioner clearly availed of the loan and the penal interest was paid in relation to the moneys borrowed by it.

Objections as to maintainability

59. Lastly, the Court proposes to deal with the objection raised by the Respondents in their written submissions on the ground of territorial jurisdiction by relying on the decision in ***Oil & Natural Gas Commission v. Union of India (1991) 188 ITR 368 (Delhi)***; ***Raj Kumar Mangla v. Chairman, Central Board of Direct Taxes (1999) 102 Taxman 110 (Delhi)*** and ***Union of India v. Orient Enterprises (1998) 99 ELT 193 (SC).***

60. The Court notes that the above objection has been raised for the first time at the stage of arguments and not in the counter affidavit filed by the Revenue. In any event, the impugned order is passed by the CBDT and the order itself showed that it has been passed at New Delhi. Consequently a part of the cause of action has arisen within the jurisdiction of this Court. The objection on the ground of territorial jurisdiction is accordingly rejected.

Conclusion

61. For all of the aforementioned reasons, the decision of the CBDT communicated to the Petitioner it its letter dated 8th December 1998 and further communicated to it by the DCIT, Mumbai by the letter dated 16th February 1999, is hereby quashed. Since it is not the case of the Revenue that the Petitioners prayer for refund of the sum of Rs. 64,53,214 is not admissible in terms of Circular No. 769 dated 6th August, 1998 of the CBDT, a direction is issued to the DCIT to pass appropriate orders granting refund to the Petitioner for the said sum together with whatever interest is admissible in accordance with law within a period of four weeks from today.

62. The writ petition is allowed in the above terms but in the circumstances with no orders as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

APRIL 7, 2016
b'nesh