



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

Dated this the 15th day of June, 2015

Present

THE HON'BLE MR JUSTICE VINEET SARAN

&

HON'BLE MR JUSTICE ARAVIND KUMAR

Income Tax Appeals 477 c/w 478 / 2009

Between

1 Commissioner of Income Tax
C R Building, Queens Road
Bangalore

2 Income Tax (TDS) I
C R Building, Queens Road
Bangalore

Appellants

(By Sri K V Aravind, Advocate)

And

M/s ITC Hotels Ltd
(Since Amalgamated with ITC)
(M/s Windsor Manor Sheraton & Towers)
Sankey Road, Bangalore

Respondent

(By Sri Rupesh Jain, Adv.)

Appeals are filed under S.260A of the Income Tax Act praying to set aside the order dated 1.5.2009 in ITA 70/Bang/2009 & ITA 69/Bang/2009 by the Income Tax Appellate Tribunal confirming the

order of the Appellate Commissioner and confirm the order passed by the Income Tax Officer (TDS) I, Bangalore.

Appeals coming on for hearing this day, *Vineet Saran J*, delivered the following:

JUDGMENT

The assessee respondent M/s ITC Hotels Ltd is a public limited company engaged in the business of owning, operating and managing hotels. During the financial years 1999-2000 and 2000-01 relevant to the assessment years under consideration, the respondent assessee had remitted an amount of Rs.1,11,35,305/- and 2,52,93,968/- respectively to M/s Sheraton International Inc.,(for short, Sheraton) a US Company (for international marketing, publicity and sales / reservation related services provided by it) without deducting tax at source under Section 195 of the Income Tax Act. Prior to that also, for the earlier assessment years, no such deduction was made and the assessee had applied to the Assessing Officer for issuance of No Objection Certificates for making remittances for marketing, publicity and reservation, without deduction of tax at source for the reason that Sheraton had no permanent establishment in India and therefore, business profits earned by it could not be brought to tax under the Act. In the previous years, the Income

Tax Department had issued the requisite No Objection Certificates to the assessee for making remittances of the said fees to Sheraton without deduction of tax at source. This position was accepted by the Department consistently for over nine years and thereafter also, the assessee was never required to deduct tax at source.

The said Sheraton International Inc., was assessed to tax in Delhi. It was only after the Assessing Officer at Delhi had assessed Sheraton by holding that it is liable to pay tax on such income, that proceedings for non-deduction of tax at source was initiated against the respondent/assessee and, by order dated 31.7.2001 passed by the Assessing Officer, it came to be held that respondent/assessee is an 'assessee in default' and held that amount paid by respondent/assessee to Sheraton (which is a Non Resident) as 'royalty payment' and as such held that respondent assessee is liable to pay tax on royalty. As such, tax as well as the interest, was levied for the assessment years 2000-01 and 2001-02. Challenging the said order, appeals were filed before the Commissioner of Income Tax which came to be allowed by a detailed reasoned order dated 28.11.2008. The Department challenged the order of the Commissioner of Income Tax before the Tribunal, which appeals were dismissed by the Tribunal on 1.5.2009. Aggrieved by the same,

these appeals are filed by the Revenue. ITA 477/2009 was admitted on 14.7.2010 and ITA 478/2009 was admitted on 30.6.2010 on the following substantial questions of law:

1 Whether the Tribunal was correct in holding that the income earned by M/s Sheraton International, USA in India was not liable for deduction of TDS u/s 195 r/w S.197 of the Act, in respect of payments made by the assessee as they did not have a permanent establishing in India as per S.9 r/w its explanation and consequently provisions of Ss.201(1) and 201(1A) of the Act was not attracted?

2 Whether the Tribunal was correct in not taking into consideration the principles enunciated by the Apex Court in Transmission Corporation of AP Ltd., Vs CIT – 239 ITR 587, where it clearly laid down that the taxability or not of the income of M/s Sheraton International, USA, was liable to tax in India or not had to be examined by the Assessing Officer under S.195 of the Act and not in the hands of the payer / deductor of TDS?

We have heard Sri K V Aravind Kumar, learned counsel for the appellant as well as Sri Rupesh Jain along with Sri Prashant Kumar learned counsel for the respondent assessee and have perused the record.

The undisputed facts of these appeals are that though the Assessing Officer of Sheraton at Delhi had held that such payments which were made by the assessee/respondent to Sheraton were liable to payment of tax on the basis of which proceedings were initiated against the respondent/assessee, the said order of the Assessing Officer was set aside by the Tribunal and affirmed by the Delhi High Court, meaning thereby that the said Sheraton was not liable for payment of tax. It cannot be disputed that under law, it is the recipient which would be chargeable to tax and if the recipient is not liable to pay tax, then the question of deduction of tax at source would not arise. In the present case, the question that would arise is whether payment made by the respondent assessee to Sheraton would amount to 'business income' or 'royalty' or 'fee for technical service' and said issue has been settled by the Delhi High Court in the case of *Director of Income Tax Vs Sheraton International Inc – (2009) 313 ITR 267* and it has been held that such income would be 'business income' not liable for payment of tax under the Double Taxation Avoidance Agreement (DTAA). Since

the recipient (Sheraton) of payment made by the respondent/assessee itself has been held not liable for payment of tax, then question of holding that respondent/assessee was liable to deduct tax at source did not arise. It is settled law that a person paying interest or any other sum to any non-resident is not liable to deduction of tax at source if such sum is not chargeable to tax under the Income Tax Act.

Sri K V Aravind has placed reliance on the judgment of this Court in the case of *Commissioner of Income Tax Vs Synopsis International Old Ltd – (2013) 212 Taxman 454*, to support his submission that payment made by the respondent assessee to Sheraton would be chargeable to tax at the hands of Sheraton as it amounts to royalty. It is submitted by Sri K V Aravind, learned counsel for the appellant that amount paid by the respondent/assessee to Sheraton would be 'royalty' under the provisions of S.9(1)(vi) of the Income Tax Act as has been held by this Court in the case of *Synopsis International* (supra) and as such, respondent/assessee was required to deduct tax at source before making payment to Sheraton. Be that as it may, we are not going into the question as to in the facts and circumstances, whether such payment made would amount to 'royalty' or not, as in this particular case, the jurisdiction to decide the said issue in the case of recipient i.e.,

Sheraton would be the Assessing Officer at Delhi and the Delhi High Court has already held in favour of recipient Sheraton that Sheraton would not be liable to pay tax since it is a 'business income' and on account of Sheraton not having permanent establishment in India such business income was not taxable in India. In the facts of the present case, we would not go into the correctness of the judgment of the Delhi High Court or the applicability of the judgment in the case of *Synopsis International*.

The undisputed position is that Delhi High Court in the case of *Sheraton International Inc* (supra) has clearly held that the income received by Sheraton would not be liable to tax therefore, question of deducting tax at source by the respondent assessee while making payment to Sheraton would not arise. Although Sri Rupesh Jain, learned counsel for the respondent/assessee has stated that the decision in the case of *Synopsis International* (supra) is distinguishable on facts but, we need not go into the said question as we are clear that with regard to payment of tax by Sheraton or deduction of tax at source by the respondent/assessee would be governed by the decision of the Delhi High Court in the case of *Sheraton International* (supra). Even otherwise, as we have already observed herein above, the Revenue itself

had given No Objection Certificates consistently for several years and allowed the respondent assessee to make payment to Sheraton without deducting tax at source and it was only after the decision of the Assessing Officer at Delhi in the case of Sheraton holding that payment made to it would be liable for payment of income tax in India, the proceedings in question had been initiated against the respondent assessee herein. However, once the said order of the Assessing Officer itself has been set aside by the Delhi High Court, the very foundation of initiating proceedings against the respondent assessee disappears and once the foundation goes, the structure cannot remain, i.e., proceedings against the respondent assessee cannot go on.

In view of the above discussion, we answer the two substantial questions of law in favour of the assessee and against the Revenue. Appeals accordingly, stand dismissed. No order as to costs.

***Sd/-
Judge***

***Sd/-
Judge***

An