$~6 to 46

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

Decided on : 12.01.2015

\+ **ITA 352/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE PACKAGED POWER INC. ..... Respondent

\+ **ITA 353/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

M/S GE PACKAGED POWER INC. ..... Respondent

\+ **ITA 354/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE PACKAGED POWER INC ..... Respondent

\+ **ITA 355/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE PACKAGED POWER INC. ..... Respondent

\+ **ITA 356/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE PACKAGED POWER INC. ..... Respondent

\+ **ITA 357/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE PACKAGED POWER INC ..... Respondent

\+ **ITA 358/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE JENBACHER GMBH & CO. OHG ..... Respondent

\+ **ITA 359/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE JENBACHER GMBH & CO. OHG ..... Respondent

\+ **ITA 360/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE JENBACHER GMBH & CO. OHG ..... Respondent

\+ **ITA 361/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE NUOVO PIGNONE S.P.A. ..... Respondent

\+ **ITA 362/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE NUOVO PIGNONE S.P.A. ..... Respondent

\+ **ITA 363/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE NUOVO PIGNONE S.P.A. ..... Respondent

+ **ITA 364/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE NUOVO PIGNONE S.P.A. ..... Respondent

+ **ITA 365/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENGINE SERVICES DISTRIBUTION LLC ..... Respondent

+ **ITA 366/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENGINE SERVICES DISTRIBUTION LLC ..... Respondent

+ **ITA 367/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENGINE SERVICES DISTRIBUTION LLC ..... Respondent

+ **ITA 368/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENGINE SERVICES DISTRIBUTION LLC..... Respondent

+ **ITA 369/2014**
DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENGINE SERVICES DISTRIBUTION LLC..... Respondent

+ **ITA 370/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENGINE SERVICES DISTRIBUTION LLC..... Respondent

\+ **ITA 371/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENERGY PARTS INC ..... Respondent

\+ **ITA 372/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENERGY PARTS INC ..... Respondent

\+ **ITA 373/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENERGY PARTS INC ..... Respondent

\+ **ITA 374/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENERGY PARTS INC ..... Respondent

\+ **ITA 375/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENERGY PARTS INC ..... Respondent

\+ **ITA 376/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE AIRCRAFT ENGINE SERVICES LIMITED ..... Respondent

\+ **ITA 377/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE AIRCRAFT ENGINE SERVICES LIMITED..... Respondent

\+ **ITA 378/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE AIRCRAFT ENGINE SERVICES LIMITED..... Respondent

\+ **ITA 379/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE AIRCRAFT ENGINE SERVICES LIMITED..... Respondent

\+ **ITA 380/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE AIRCRAFT ENGINE SERVICES LIMITED..... Respondent

\+ **ITA 381/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION
..... Appellant

versus

GE ENGINE SERVICES MALAYSIA SDN BHD..... Respondent

\+ **ITA 382/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE ENGINE SERVICES MALAYSIA SDN BHD..... Respondent

\+ **ITA 383/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE ENGINE SERVICES MALAYSIA SDN BHD

..... Respondent

\+ **ITA 384/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE ENGINE SERVICES MALAYSIA SDN BHD

..... Respondent

\+ **ITA 385/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE ENGINE SERVICES MALAYSIA SDN BHD

..... Respondent

\+ **ITA 386/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

M/S GE JAPAN LTD

..... Respondent

\+ **ITA 387/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE JAPAN LTD

..... Respondent

\+ **ITA 388/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE JAPAN LTD

..... Respondent

\+ **ITA 389/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE JAPAN LTD

..... Respondent

\+ **ITA 390/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE NUOVO PIGNONE S.P.A

..... Respondent

\+ **ITA 391/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE NUOVO PIGNONE S.P.A

..... Respondent

\+ **ITA 402/2014**

DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION

..... Appellant

versus

GE ENERGY PARTS INC

..... Respondent

Through : Sh. Balbir Singh, Sr. Standing Counsel with Ms. Rubal Maini, Advocate, for CIT.

Sh. Sachit Jolly and Ms. Gargi Bhatt, Advocates, for the respondent.

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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1. In these appeals under Section 260A of the Income Tax Act, 1961 (hereafter referred to as "the Act"), the Revenue questions the common order of the ITAT dated 16.7.2013 in ITA No.6034/Del-2010 and connected appeals, by which the order of the Commissioner of Income Tax (Appeals) ("CIT(A)") deleting the interest levied under Section 234B, was confirmed. The Revenue argues that the substantial question of law which arises for consideration is whether the Income Tax Appellate Tribunal (ITAT) fell into error in holding that the assessee could not be saddled with interest liability under Section 234B of the Act.

2. Briefly, the facts are that General Electric group was manufacturing equipment relating to oil and gas, energy, transportation and aviation, for supply to customers in India. After a survey under Section 133A at the premises of General Electric International Operations Company Inc. ("GEIOC"), the *liaison office*, reassessment proceedings were initiated against several entities of the GE group for assessment years (AYs) 2000-2001 till AY 2006-07, on 31.3.2008. The respondents in these appeals are 8 such entities ("assessees") i.e. GE Packaged Power Inc., GE Jenbacher Gmbh, Nuovo Pignone Spa, GE Engine Services Inc., GE Energy Parts Inc., GE Aircraft Engine Services Ltd., GE Engine Services Malaysia, and GE Japan Ltd., over various AYs. The assessees filed NIL returns of income and sought reasons for reopening assessment, which were duly provided. Objections to reassessment were disposed of, and notice under Section 143(2) was issued, and final assessment order was issued. The Assessing

Officer (AO) found that the assessees had a permanent establishment ("PE") in India. The taxable income of the assessees was computed by attributing some percentage of the sale price/consideration received as profits to the PE; interest under Sections 234A and 234B of the Act was also levied.

3. The assessees appealed against the order of the AO; the CIT(A) disposed of the appeals by its order of 30.9.2010, confirming the reopening of the assessment, the finding on existence of PEs in India, and the attribution of profits to the PEs. However, on the question of interest under Section 234B for failure to pay advance tax in terms of Sections 208 and 209, the CIT(A) applied the interpretation to Section 234B of the Act, given in *Director of Income Tax v. Jacabs Civil Inc.* 330 ITR 578 (Del.) and deleted the interest, therefore, holding in favour of the assessees. Before the ITAT, the Revenue argued that the position of law, as held by the Supreme Court in *CIT v. Anjum M.H. Ghaswala and Ors.* (2001) 252 ITR 01, was that interest under Section 234B is mandatory, and that the AO is not vested with any discretion in that regard. The appeals by the Revenue before the ITATwere dismissed, by its order of 16.7.2013, on the ground that the position of law in *Jacabs* (supra) was applicable squarely, and that the judgment sought to be relied upon by the Revenue, in *Anjum M.H. Ghaswala* (supra) was also considered in *Jacabs*(supra). The Revenue is in appeal before this Court against the said order of the ITAT.

4. The Revenue argues that the ITAT's reliance on *Jacab* (supra) in the impugned order was misplaced as the proposition that interest, under Section 234B, is not chargeable cannot be unqualified, because regard must be had to the role of the assessee/payee in the non-deduction or short-deduction of tax at source. Mr. Balbir Singh for the Revenue argues that the relevance of

the assessee's role was made clear in *DIT – International Taxation v. Alcatel Lucent USA Inc,* by a Division Bench of this Court in ITA No. 327 of 2012, dated 07.11.2013, in which it was held that interest could be imposed on an assessee foreign company which denies tax liability, for non-payment of advance tax, because there exists a presumption that the assessee had represented to the Indian payer that tax should not be deducted from the remittances made to it. In *Alcatel Lucent* (supra), the foreign assessee first contested the PE status, but later, during the appellate stage, in a *volte face,* admitted that it was a PE and that its income was chargeable to tax in India. In such a situation, if the payer does not deduct tax, the assessee is assumed to have played some role in the non-deduction of tax at source by the payer, and interest under Section 234B is payable by the assessee.

5. Specific reliance was sought to be placed by the revenue, on the Court's emphasis that an assessee claiming its income not to be taxable in India, unlike one that admits its tax liability from the outset, cannot argue that it is the responsibility of the payers to deduct tax, and at the same time benefit from the tax credit under Section 209(1)(d). It was argued that this case was akin to *Alcatel Lucent* (supra), in that the assessees had denied their tax liability initially (by filing NIL returns after the Section 148 notice), and, therefore, could not take shelter under *Jacabs* (supra),to now argue that the payer had an absolute liability to deduct tax from the remittance to the non-resident payee. The Indian payer could not possibly have been responsible for deducting tax from the remittances made to the assessees, under such circumstances.

6. The case of the assessees is that they are non-resident companies and the payment received by them should have suffered a tax deduction at

source, by the payer, who was required so to do by Section 195 of the Act. Placing reliance on *Jacabs* (supra), it is argued that the obligation upon the payer to deduct tax at source, before making remittances to the non-resident assessee, was absolute. This was evident from the terms of pre-amended Section 209(1)(d), by which the assessee was not liable to pay advance tax, owing to the tax credit that it was entitled to for the tax that was "deductible" at source, in computing its advance tax. In other words, in computing its own advance tax liability, it was entitled to reduce that tax *deductible* or *collectible* at source by the payer. The amendment of proviso to Section 209(1) in the Finance Act, 2012, prescribing that the non-resident assessee can take credit only for the amount of tax *actually deducted* by the payer, was with effect from 1.4.2012, having been made expressly prospective. Consequently, during the AYs in question, no interest was leviable under Section 234B. *Alcatel Lucent* (supra) was sought to be distinguished, on the ground that that decision turned on the *volte face* of the assessee as to whether its income was taxable in India, at the appellate stage. There being no admission here of tax liability, it is argued that the obligation rests upon the payer to deduct tax at source. Reliance was also placed on *CIT v. Madras Fertilizers Ltd.* [1984] 149 ITR 703 (Mad.); *DIT (Int. Taxation) v. NGC Network Asia LLC* 313 ITR 187 (Bom.); *Sedco Forex International Drilling Inc. v. DCIT* 264 ITR 320 (Utt.); *Motorola Inc. v. DIT* 95 ITR 269 (Delhi SB) and *Qualcomm Inc. v. ADIT,* 153 TTJ 513 (Del.), for this proposition.

7. The question that arises for consideration is whether interest should be levied on the assessee under Section 234B, on the ground of non-payment of advance tax. The case of the Revenue, in short, is that the position of law in

Alcatel Lucent (supra) is applicable, since the assessee, having denied tax liability during reassessment, caused the payer to erroneously refrain from deducting tax under Section 195; it must thus suffer an interest for non-payment of advance tax. The case of the assessees on the other hand is that the position of law in *Jacabs* (supra) must apply, and that the obligation was upon the payer to deduct tax at source before making remittances to them; the payer's failure to do so cannot invite an interest upon the payees.

8. Section 195(1) envisages deduction of tax at source by *"any person responsible for paying"* to a foreign company, *"any other sum chargeable"* under the provisions of the Act, at the time of credit of such income to the account of the payee. The Court, in *Jacabs* (supra), interpreted this obligation of the payer to deduct tax as absolute, in these terms:

> *"8. …The scheme of the Act in respect of non residents is clear. Section 195 of the Act puts an obligation on the payer, i.e. any person responsible for paying to a non-resident, to deduct income tax at source at the rates in force from such payments excluding those incomes which are chargeable under the head "Salaries". Therefore, the entire tax is to be deducted at source which is payable on such payments made by the payee to the non-resident. Section 201 of the Act lays down the consequences of failure to deduct or pay. These consequences include not only the liability to pay the amount which such a person was required to deduct at source from the payments made to a non-resident but also penalties etc. Once it is found that the liability was that of the payer and the said payer has defaulted in deducting the tax at source, the Department is not remedy-less and therefore can take action against the payer under the provisions of Section 201 of the Income Tax Act and compute the amount accordingly. No doubt, if the person (payer) who had to make payments to the non-resident had defaulted in deducting the tax at source from such payments, the non- resident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident is liable to pay tax and*

the question of payment of advance tax would not arise. This would be clear from the reading of Section 191 of the Act along with Section 209 (1) (d) of the Act. For this reason, it would not be permissible for the Revenue to charge any interest under Section 234B of the Act."

9. To understand whether Section 234B may be had recourse to, for failure to pay advance tax, one must understand the scheme of advance tax payment. One obligation is imposed upon the payer of a sum to a foreign company, requiring a deduction of tax at source under Section 195. A second obligation is directly imposed upon the assessee, by requiring it to compute its advance tax liability as stipulated under Section 209. However, a foreign company assessee that receives remittances that are attributable as business profits to a PE in India, is permitted a tax credit while computing its advance tax liability under Section 209, since a tax is deductible at source under Section 195.Section 209(1)(d), prior to the Finance Act, 2012, read:

*"**Section 209. Computation of advance tax***

(1) The amount of advance tax payable by an assessee in the financial year shall, subject to the provisions of sub-sections (2) and (3), be computed as follows, namely:-

a. …

b. …

c. …

d. the income-tax calculated under clause (a) or clause (b) or clause (c) shall, in each case, be reduced by the amount of income-tax, which would be deductible [or collectible] at source during the said financial year under any provision of this Act from any income (as computed before allowing any deductions admissible under this Act) which has been taken into account in computing the current income or, as the case may be, the total

income aforesaid; and the amount of income-tax as so reduced shall be the advance tax payable:"

10. The position in law, therefore, was that the assessee was entitled to, in its computation of its advance tax liability, take a tax credit of that amount which was deductible or collectible, regardless of whether the amount was actually deducted or collected. As *Jacabs* (supra) noted, the reason for this was because, advance tax is to be computed either based on the previous year's assessment, or on an estimate of the income to be earned that year- which is to be made much before the final assessment. There is no possible way in which the provision could allow a tax credit of the amount *deducted or collected*, because the actual deduction takes place at a later point in time i.e. at the point at which the payment is actually made to the assessee.

11. This provision unsurprisingly opened the window for the assessee to take tax credit of an amount that was deductible, even if it was not actually deducted. There were several reasons why the amount actually deducted could be less than the amount deductible by the payer. Despite not suffering deduction, the position of law permitted the assessee to take credit of the amount *deductible*. Of course, such amount which was not actually deducted could later be brought to tax under Section 191. Nonetheless, in recognition of this anomalous situation, Parliament inserted a proviso in the Finance Act, 2012, - with prospective effect from 1.4.2012, to Section 209 (1) in the following terms:

[1]*[Provided that for computing liability for advance tax, income-tax calculated under clause (a) or clause (b) or clause (c) shall not, in each case, be reduced by the aforesaid amount of income-tax which would be deductible or collectible at source during the*

said financial year under any provision of this Act from any income, if the person responsible for deducting tax has paid or credited such income without deduction of tax or it has been received or debited by the person responsible for collecting tax without collection of such tax.]

12. This Court is of the opinion that the law prior to the 2012 amendment must be read to prevent such anomalies from arising. With this background, this Court has to examine the applicability of the position of law in *Alcatel Lucent* (supra). The facts in *Alcatel Lucent* (supra) were that the assessee was a non-resident company which supplied some equipment to Indian consumers, and received payment for it in the AY 2007-08. Based on the materials found in the survey at the premises of Alcatel Lucent India Ltd., the Indian subsidiary, the AO for Alcatel Lucent France concluded that the assessee had a PE in India. Reassessment proceedings were initiated against the assessee for AYs 2004-05 to 2007-08. The assessee maintained the position that it was not liable to tax in India, as it did not have a PE in India. Consequently, it filed NIL returns. However, the AO found that a percentage of its income was taxable in India, attributable to its PE, and levied interest under Section 234A, 234B and 234C. In the appeal to the CIT(A), the assessee claiming *inter alia*, *first*, that the computation of income, by attributing business profits to a PE, was incorrect, and *second*, that the interest levied under Section 234B was incorrect, since the whole consideration received by it was liable to tax deduction at source under Section 195, thus precluding any advance tax liability on its part. However, *it did not press the first ground in the proceedings*. The CIT(A) ultimately deleted the interest under Section 234B, on the ground that while the non-resident assessee was liable to tax, it could not be held to be liable to

advance tax, as *first,* the obligation was absolute upon the payer to deduct tax at source, under Section 195, read with Section 201 (which permitted recovery from the payer, as assessee-in-default, of both the tax as well as interest, for not deducting tax) and *second,* whether or not any tax was actually deducted, the assessee was allowed a tax credit of that amount of tax that was *deductible* or *collectible* at source, by the pre-amended Section 209(1)(d), thus negating the assessee's liability to pay advance tax. The ITAT, on appeal by the Revenue, confirmed the view of the CIT(A).

13. The Division Bench of this Court however, held in favour of the Revenue, reasoning:

> *"20. The other argument on behalf of the assessee that the liability of the payer under Section 201 is absolutely different from the liability of the non-resident assessee under Section 234B need not be examined and for the purpose of the present case it would not make any difference, on account of the peculiar facts of the present case. It may be recalled that the argument put forth by the revenue before the Income Tax Appellate Tribunal was that at the time of the receipt of monies from India, the assessee took the plea that it did not have any PE in India and, therefore, the payment was not chargeable to tax in India, with the consequence that Section 195(1) was not applicable, whereas in the appeals before the CIT (Appeals), a contradictory stand was adopted by the assessee, by accepting the fact that it had a PE in India and by admitting that the income earned in India was chargeable to tax. <u>It was further argued by the revenue that such a contradictory plea cannot be permitted to be taken by the assessee. It was pointed out that consistent with the stand taken in the return, the assessee would have told the Indian payer that no tax should be deducted from the remittance and it was, therefore, not open to the assessee, merely because at the first appeal stage it chose not to contest the assessment of the income attributable to the Indian PE, to turn around and say that since it has now accepted its liability to pay tax on the Indian income, it was for the Indian payers to have</u>*

deducted the tax and if they had not done so the assessee cannot be held liable for the interest.This argument of the revenue was rejected by the Tribunal on the ground that there was no material in support of the plea that the assessee represented to the Indian payers not to deduct tax, nor did any such facts or circumstances emerged from the impugned orders.

21. We are unable to uphold this part of the decision of the Tribunal. It must be remembered that in the note appended to the return the assessee was quite categorical in denying its liability to be assessed in India. It relied on the double taxation avoidance agreement between India and USA and pointed out that there was no permanent establishment in India. It further stated that the telecom equipments were sold outside India and the payments were also received outside India and thus the assessee did not have any taxable presence in India so as to be liable for tax on its Indian income. If this was the stand of the assessee, it is not impermissible or unreasonable to visualise a situation where, the assessee would have represented to its Indian telecom dealers not to deduct tax from the remittances made to it. On the contrary it would be surprising if the assessee did not make any such representation; such a representation would only be consistent with the assessee's stand regarding its tax liability in India. Moreover, no purpose would have been served by the assessee taking such a categorical stand regarding its tax liability in India and at the same time suffering tax deduction under Section 195(1). Therefore, in our opinion, even though there may not be any positive or direct evidence to show that the assessee did make a representation to its Indian telecom dealers not to deduct tax from the remittances, such a representation or informal communication of the request can be reasonably inferred or presumed. The Tribunal ought to have accorded due weightage to the strong possibility or probability of such a request having been made by the assessee to the Indian payers since otherwise the denial of its tax liability on its Indian income would have served little purpose for the assessee.

…

23. The Tribunal, keeping in mind the above observations, underlined by us, ought to have drawn the inference that the Indian payers did not deduct the tax under Section 195(1) because of the request made by the assessee, consistent with its stand that it was not liable to be taxed in India."

[emphasis added]

14. The Court went on to state in para 25:

"25. …It is open to the assessee to deny its liability to tax in India on whatever grounds it thinks fit and proper. Having denied its tax liability, it seems unfair on the part of the assessee to expect the Indian payers to deduct tax from the remittances. It is also open to the assessee to change its stand at the first appellate stage and submit to the assessment of the income. When it does so, all consequences under the Act follow, including its liability to pay interest under Section 234B since it would not have paid any advance tax. Such liabilities would arise right from the time when the income was earned. Advance tax was introduced as a PAYE Scheme - "pay as you earn". It is not open to the assessee, after accepting the assessment at the first appellate stage to claim that the Indian payers ought to have deducted the tax irrespective of the fact that the assessee itself claimed the Indian income to be not taxable. We can understand an assessee who admits its tax liability right from the beginning to contend that it was the responsibility of the payers to deduct the tax and if they did not, even then the tax which ought to have been deducted by them should be set off against the assessee's advance tax liabilities."

[emphasis added]

15. Apparently, it is this part of the decision that the Revenue seeks to rely upon, in arguing that the view in *Alcatel Lucent* (supra) did not turn on the *volte face* by the assessee as to its PE status, but instead on the fact that, at the time of assessment, the assessee *denied* its tax liability altogether. This Court, upon consideration, is of the view that the fact that was central to the decision of this Court in *Alcatel Lucent* (supra) is the assessee's initial denial of PE status, and consequently of its tax liability, that was aggravated by its

subsequent *volte face* by way of its admission that it was a PE liable to tax in India. This resulted in the Court's view that the assessee had played a role in influencing the payer's non-deduction of tax at source, and was thus required to compensate for such a *volte face*, by paying interest under Section 234B.

16. This Court respectfully cannot apply the view taken in *Alcatel Lucent* (supra) to this case. This is because if the payer deducts tax at source only when the assessee admits tax liability, then deductions would not be made in cases where the assessee either falsely or under a *bona fide* mistake denies tax liability. Tax obligations cannot be founded on assertions of interested parties. In such cases, the payer's obligation to deduct tax would depend on the payee's opinion of whether it is liable to tax, which may differ from its actual liability to tax as determined by the A.O's final order. This effectively authorizes the assessee and the payer to contract out of the statutory obligation to deduct tax at source, which in this case, is located in Section 195(1). Surely this could not be the Parliamentary intent. If such were the case, there would have been no need to treat the payer as an assessee-in-default for failure to deduct tax at source, under Section 201.This Court is thus in agreement with the position of law in *Jacabs* (supra), that the obligation of the payer to deduct tax is absolute.

17. The implication of an absolute obligation upon the payer to deduct tax at source under Section 195(1) is that it becomes the responsibility of the payer to determine the amount it ought to deduct from the remittance to be paid to the assessee, towards tax. This determination would depend directly on the income of the assessee that is taxable in India on account of being

attributable to its PE in India. That this determination is the responsibility of the payer is provided for, in the statute, in Section 195(2), which reads:

> *(2) Where the person responsible for paying any such sum chargeable under this Act other than salary to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.*

Thus, the assessee's liability to tax does not depend on its own view of its PE status, or its admission or denial of tax liability. If an assessee files NIL returns at the stage of assessment, and maintains that it is not liable to tax in India, the payer is obliged to apply to the AO to determine what portion, if any, of its remittance to the assessee, is liable to be deducted at source towards tax.

18. The view of this Court finds confirmation in the position of law as it stands at present, after the Finance Act, 2012; should a situation akin to that in *Alcatel Lucent* (supra) arise, the payer would be treated as the assessee-in-default according to Section 201, and the payee/assessee would not be permitted a tax credit under the proviso in Section 209(1)(d). Clearly, the anomaly of an assessee denying tax liability (whether under a *bona fide* mistake or by deceit), thereby not suffering a tax deduction at source, and still being permitted a tax credit for the tax *deductible,* is remedied after the Finance Act, 2012.

19. *Alcatel Lucent* (supra), in any event, can be distinguished on the ground that the Court was persuaded to confirm the levy of interest under

Section 234B, only on account of the equities that needed to be balanced in those peculiar facts, in favour of taxability. This is evident from the following words of the Court:

> *"26. It further seems to us inequitable that the assessee, who accepted the tax liability after initially denying it, should be permitted to shift the responsibility to the Indian payers for not deducting the tax at source from the remittances, after leading them to believe that no tax was deductible. The assessee must take responsibility for its volte face. Once liability to tax is accepted, all consequences follow; they cannot be avoided. After having accepted the liability to tax at the first appellate stage, it is unfair on the part of the assessee to invoke section 201 and point fingers at the Indian payers. The argument advanced by the learned counsel for the assessee that the Indian payers failed to deduct tax at their own risk seems to us to be only an argument of convenience or despair. As we have pointed out earlier, it is difficult to imagine that the Indian telecom equipment dealers of the assessee would have failed to deduct tax at source except on being prompted by the assessee. It may be true that the general rule is that equity has no place in the interpretation of tax laws. But we are of the view that when the facts of a particular case justify it, it is open to the court to invoke the principles of equity even in the interpretation of tax laws. Tax laws and equity need not be sworn enemies at all times. The rule of strict interpretation may be relaxed where mischief can result because of the inconsistent or contradictory stands taken by the assessee or even the revenue. Moreover, interest is, inter alia, compensation for the use of the money. The assessee has had the use of the money, which would otherwise have been paid as advance tax, until it accepted the assessments at the first appellate stage. Where the revenue has been deprived of the use of the monies and thereby put to loss for no fault on its part and where the loss arose as a result of vacillating stands taken by the assessee, it is not expected of the assessee to shift the responsibility to the Indian payers. We are not to be understood as passing a value-judgment on the assessee's conduct. We are only saying that the assessee should take responsibility for its actions."*

[emphasis added]

This Court finds that no need is made out in these facts to balance any equities in these facts, as the assessee has not vacillated in its stand as to the existence of a PE in India or otherwise. In any event, as observed earlier, the position of law itself requires that the tax be deducted at source, whatever may be the assessee's stance, failing which the payer is treated as an assessee-in-default under Section 201, and the payee is required to discharge its liability to pay the tax that was not deducted under Section 191.

20. This court also notices that the Madras High Court decision in *Madras Fertilizers Ltd.* (supra) and that of the Uttarakhand High Court in *Sedco* (supra) was considered and affirmed by the Bombay High Court in *Director International Taxation v NGC Network Asia LLC* [2009] 313 ITR 187(Bom) that *"We are clearly of the opinion that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee-assessee." An important decision is that of the Karnataka High Court in Commissioner of Income Tax v Samsung Electronics Co Ltd.* 2012 (345) ITR 494 (Kar)*, which also considered the same issue, i.e. the obligation under Section 195 (1). The High Court in the first instance had rejected the Revenue's appeal; the Supreme Court remitted the matter - for determination as to whether income by way of royalty had been made out in the facts of the case. The High Court* decision first set out the order of the Supreme Court inter alia, as to the nature of obligation cast upon the payer under Section 195:

> *"While remanding the matter, Hon'ble Supreme Court has made certain observations while analysing the provisions of Section 195 of the Act as follows:*

"7. Under Section 195(1), the tax has to be deducted at source from interest (other than interest on securities) or any other sum (not being salaries) chargeable under the I.T. Act in the case of non-residents only and not in the case of residents. Failure to deduct the tax under this Section may disentitle the payer to any allowance apart from prosecution under Section 276B. Thus, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the I.T. Act, to deduct income tax at the rates in force unless he is liable to pay income tax thereon as an agent. Payment to non-residents by way of royalty and payment for technical services rendered in India are common examples of sums chargeable under the provisions of the I.T. Act to which the aforestated requirement of tax deduction at source applies. The tax so collected and deducted is required to be paid to the credit of Central Government in terms of Section 200 of the I.T. Act read with Rule 30 of the I.T. Rules, 1962. Failure to deduct tax or failure to pay tax would also render a person liable to penalty under Section 201 read with Section 221 of the I.T. Act. In addition, he would also be liable under Section 201(1A) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid. The most important expression in Section 195(1) consists of the words "Chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such is not chargeable to tax under the I.T. Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the I.T. Act. It may be noted that Section 195 contemplate not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments.

The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated October 30, 1995 the CBDT has clarified that the tax deductor can take into consideration the effect of while deducting TAS. It may also be noted that Section 195(1) is in identical terms with Section 18(3B) of the 1922 Act, In CIT v. Cooper Engineering (MANU/MH/0040/1967 : 68 ITR 457) it was pointed out that if the payment made by the resident to the non-resident was an amount which was not chargeable to tax in India, then no tax is deductible at source even though the assessee had not made an application under Section 18(3B) (now Section 195(2) of the I.T. Act). The application of Section 195(2) pre-supposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the ITO (TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the ITO (TDS) that the question of making an order under Section 195(2) will arise. In fact, at one point of time, there was a provision in the I.T. Act to obtain a NOC from the Department that no tax was due. That certificate was required to be given to RBI for making remittance. It was held in the case of Czechoslovak Ocean Shipping lnternational Joint Stock Company v. ITO MANU/WB/0143/1970 : 81 ITR 162 (Calcutta) that an application for NOC cannot be said to be an application under Section 195(2) of the Act. Which deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section195. 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."

The Supreme Court after considering the submissions of learned counsel appearing for the parties regarding the validity of the order passed by this Court dated 24-9-2009 has observed as follows:

"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". Similarly, Sections* 194EE *and 194F inter alia provide for deduction of tax in respect of "any amount" referred to in the specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in Section 195(1). Therefore, this Court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the ITO(TDS). It is a provision requiring tax to be deducted as source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, Section* 195 *has to be read in conformity with the charging provisions, ie., Sections* 4, 5 *and* 9. *This reasoning flows from the words "sum*

chargeable under the provisions of the Act" in Section 195(1). *The fact that the Revenue has not obtained any information per se cannot be a ground to construe Section* 195 *widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section* 195, *as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from Section* 195(1). *While interpreting a Section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the machinery Sections. The Act is to be read as an integrated code. Section* 195 *appears in Chapter XVII which deals with collection and recovery. As held in the case of C.I.T. v. Eli Lilly & Co. (India) (P.) Ltd. [*MANU/SC/0487/2009*: 312 ITR 225) the previsions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the I.T. Act form one single integral, inseparable Code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax" under the I.T. Act. It is true that the judgment in Eli Lilly (supra) was confined to Section* 192 *of the I.T. Act. However, there is some similarity between the two. If one looks at Section* 192 *one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly, Section* 195 *imposes a statutory obligation on any person responsible for paying to a non-resident any sum 'chargeable under the provisions of the Act', which expression, as stated above, do not find place in other Sections of Chapter XVII. It is in this sense that we hold that the I.T. Act constitutes one single integral inseparable Code. Hence, the provisions relating to TDS applies only to those sums which are Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department that any person making payment to a non-*

resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the I.T. Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum. i.e., the payee could seek a refund. It must therefore follow, if the Department is right that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum changeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such so chargeable" where a proportion of the sum so chargeable is liable to tax. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that Section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the ITO(TDS) of payments made to non-residents. In other words, according to the Department Section 195(2) is a provision by which payer is required to inform the Department of the remittances he makes to the non-residents by which the Department is able to keep track of the remittances being made to non-residents outside India. Section 195(1) uses the expression "sum chargeable under the provisions of the Act". We need to give weightage to those words. Further, Section 195 uses the word 'prayer' and not the word "assessee". The payer is not an assessee. The payer becomes an

assessee-in-default only when he fails to fulfil the statutory obligation under Section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The above mentioned contention of the Department is based on an apprehension which is ill founded. The payer is also an assessee under the ordinary provisions of the I.T. Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income Tax Act for the said sum as an "expenditure". Under Section 40(a)(i), inserted vide Finance Act, 1988 w.e.f. 1.4.89, payment in respect of royalty, fees technical services or other sums chargeable under the Income Tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the IT. Act. This provision ensures effective compliance of Section195 of the I.T. Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the I.T. Act. In a given case where the payer is an assessee he will definitely claim deduction under the I.T. Act for such remittance and on inquiry if the AO finds that the sums remitted outside India comes within the definition of royalty or fees for technical service or other sums chargeable under the I.T. Act then it would be open to the AO to disallow such claim for deduction. Similarly, vide Finance Act, 2008, w.e.f. 1.4.2008 sub-section (6) has been inserted in Section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from 1.4.2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage."

The Karnataka High Court first addressed this question and stated that:

"17. It is clear from the scrutiny of the material on record and the contentions of the parties viz., revenue and the respective respondent in these cases that the fact that payments have been made by the respondent herein to non-resident for having

imported shrink wrapped software/off-the-shelf software is not disputed. There is also no dispute that no tax was deducted at source by the respondent under Section 195(1) of the Act in respect of such payments on the ground that the same were made for the purpose of purchase of shrink wrapped software/off-the-shelf software. It is contended by the respondent that since there is no permanent establishment of the non-resident in India, the said payments have to be treated as income from business and is not taxable under the Income Tax Act in India and consequently, there is no obligation on the part of the respondent to deduct the advance tax under Section 195 of the Act and also consequential proceedings would not be attracted. Therefore, the dispute between the revenue and the respondent in these cases is whether payments made by the respondent to the non-resident would constitute 'royalty' or 'Income from Business' and if it is to be treated as 'Income from Business', whether the non-resident is required to have a permanent establishment in India. Further, in the absence of any permanent establishment of the non resident in India, is there no obligation on the part of the payee, the respondent herein to deduct tax at source under Section 195 of the Act. Therefore, the fact that the payments made by the payee, the respondent herein to the non-resident would constitute income of the non-resident is indisputable. However, the dispute is as to whether such income in the hands of the non-resident is to be treated as sale and income from business covered under Article 7 of the DTAA with respective countries or whether the payments would amount to royalty in the hands of the non-resident, for which no permanent establishment is required for making payment in India. There is also no dispute that if the payments made by the respondent are held to be royalty and not 'Income from Business', there is an obligation on the part of the payee, the respondent herein to deduct the tax at source and in default, the respondent herein would be considered as a default assessee. Once there is an obligation to deduct tax at source under Section 195 of the Act, which imposes a statutory right on any person responsible for paying to a non-resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the Act, to deduct

income-tax at the rates in force unless he is liable to pay income-tax thereon as an agent. Payment to non-residents by way of royalty and payment for technical services rendered in India are common examples of sums chargeable under the provisions of the Act to which the aforestated requirement of TDS applies. The tax so collected and deducted is required to be paid to the credit of Central Government in terms of Section 200 of the Act read with rule 30 of the Income Tax Rules, 1962. Failure to deduct tax or failure to pay tax would also render a person liable to penalty under Section 201 read with Section 221 of the Act. In addition, he would also be liable under Section 201(1A) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid. Therefore, if the amount is held to be royalty, the other consequences as referred to above would follow."

After holding that the transaction in that case amounted to royalty and, therefore, taxable, the Court ruled that the obligation to deduct tax was with the payer:

"In any view of the matter, in view of the provisions of Section 90 of the Act, agreements with foreign countries DTAA would override the provisions of the Act. Once it is held that payment made by the respondents to the non-resident Companies would amount to 'royalty' within the meaning of Article 12 of the DTAA with the respective country, it is clear that the payment made by the respondents to the non-resident supplier would amount to royalty. In view of the said finding, it is clear that there is obligation on the part of the respondents to deduct tax at source under Section 195 of the Act and consequences would follow as held by the Hon'ble Supreme Court while remanding these appeals to this Court."

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 *Jacabs* (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 assessees under Section 234B, even though they filed returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assessees were 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.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

JANUARY 12, 2015