IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 955 of 2005
With
TAX APPEAL NO. 956 of 2005
TO
TAX APPEAL NO. 966 of 2005

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and
HONOURABLE MR.JUSTICE K.J.THAKER

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ETHNIC HOLDINGS PVT. LTD.....Appellant(s)
Versus
I.T. OFFICER, TDS,....Opponent(s)

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Appearance:
MR. S.N. SOPARKAR WITH MR. B.S. SOPARKAR WITH MRS SWATI

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SOPARKAR, ADVOCATE for the Appellant(s) No. 1
MR SUDHIR M MEHTA, ADVOCATE for the Opponent(s) No. 1
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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 16/12/2014

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Since all these appeals arise from the common judgment and order of the Income Tax Appellate Tribunal, Ahmedabad, they are being disposed of by this common judgment.

2. By way of these appeals, the appellant-assessees have challenged the common Judgment and order dated 08.09.2003 passed by the Income Tax Appellate Tribunal, Ahemabad, *[**for the "the Tribunal"]*** in ITA Nos. 2263, 2264, 2268, 2269, 2273, 2274, 2278, 2279, 2283, 2284, 2288 and 2289/ Ahd/ 2002, whereby the appeals preferred by the assessees were partly allowed by the Tribunal and held that the appellant-assessees were required to deduct TDS for the Assessment Year 1995-96 and 1996-97.

3. While admitting these appeals on 20.04.2006, the Court formulated the following substantial question of law:-

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"Whether in the facts and circumstances of the case, the ITAT was right in law in holding that inspite of the Special Court's direction the appellant was liable to deduct tax at source as required u/s. 194A of the Act ?"

4. To adjudicate the question framed as above, the basic facts shorn off unnecessary details are required to be noticed. The present appellants-assessee entered into an agreement with Fairgrowth Financial Services Ltd [hereinafter referred to as "***the FFSL***). On 28.03.1992, loan of different amounts were sanctioned by the FFSL in favour of the appellants-assessee and the same was accepted by the appellants-assessees on 30th March, 1992. The appellants-assessees had taken loan of Rs.14,98,2500/- from the FFSL against the pledge of 3,28,000 shares of United Phosphorous Ltd. (hereinafter referred to as "***the UPL***"). As per the terms of the agreement the appellants have to repay 20% within 60 days and balance 80% within 180 days. The appellants-assesees handed over 3,28,000 shares of UPL together with duly executed transfer form to FFSL since as per the agreement the appellants have to repay 20% amount within 60 days i.e. before 30th May 1992. In the

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meantime, on 5/12.05.1992 and 4.06.1992, FFSL illegally sold 2,28,000 shares to Syndicate Bank and sub-pledged 1,00,000 shares to NHB, which is the part of the record.

4.1. In the month of June, 1992, the Government promulgated Special Court ordinance, 1992. On 2nd July, 1992, custodian appointed for FFSL. On 10.08.1992, the Syndicate Bank purchased 2,28,000/- shares and presented before UPL for registering the transfer. On 13.08.1992 UPL received intimation of sub-pledge of 1,00,000 shares with NHB. On 14.08.1992, the appellants and other assessees filed Misc. Petition No.10 of 1992 against the Custodian, FFSL, Syndicate Bank, NHB and UPL. The prayers of the said Misc petitions read as under:-

"The petitioner therefore pray:-

(a) that it be declared that the said shares described in schedules being Ex. "A" and "B" did not and do not belong to the 2nd respondents as owners thereof and that attachment of the said shares under the said Ordinance constitutes only a limited attachment restricted to the rights of the 2nd Respondents as pledges only of the said shares.

(b) that it be declared that the 2nd Respondents and/or 1st Respondents and/or bound and liable to return to the respective petitioners said 3,50,000 shares listed in the schedules being Ex."A" and "B" hereto against payment of

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balance debt in accordance with contractual terms to the 1st Respondent the 2nd Respondent or to such person as this Hon'ble court directs;

(c) that without prejudice to prayer (b) above declared that out of said 3,50,000 shares to or the 2nd Respondents or to such person as the extent of 23.76 per cent thereof stand and have stood duly and validly redressed and that the petitioners, or such of them as may be held entitled, are entitled to forthwith to deliver of said 23.76 per cent shares out of 3,50,000 shares described in schedules being Ex. "A" and "B" hereto.

(d) That the limited attachment in respect of 23.76 per cent of the said shares described in Ex. "A" and "B" be raised and/or be ordered to be or stand raised forthwith and the said 23.76 per cent shares be ordered and directed to be forthwith delivered and handed over to the petitioners or such of them as may be found entitled thereto by either of the Respondents Nos.1 to 5.

(e) without prejudice to the prayer (d) above the limited attachment on all the 3,50,000 shares described in schedules being Ex. "A" and "B" hereto be raised and Respondents Nos. 1 to 5 be ordered and directed to deliver all the said shares to the respective payment of balance debt and interest in accordance with contractual terms to such persons as this Hon'ble Court directs;

(f) This Hon'ble Court be pleased to give directions to the petitioners in respect of the payment of the balance debt on the due dates to the 1st or 2nd Respondents against delivery to the respective

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petitioners of the shares listed in the schedule being Ex. "A" and "B" hereto.

(g) That it be declared that 3rd and 4th Respondents respectively have not acquired and are not entitled to any right title or interest in the said 2,50,000 shares described in Exhibit "A" hereto and the 1,00,000 shares described in Exhibit "B" hereto or any part thereof.

(h) that it be declared that purported sale or transfer of 2,50,000 shares described in schedule Ex. "A" hereto by 2nd Respondents to the 3rd Respondents and the purported sale or transfer of 1,00,000/- shares in exhibit "B" hereto by the 2nd to the 4th Respondents are illegal, null void of no effect or not binding on the petitioners or any one of them.

(I) that without prejudice to prayer (g) and/or (h), the purported sale or transfer of 2,50,000 shares described in schedule being Ex. "A" hereto by 2nd Respondents to the 3rd Respondents and the purported sale of transfer of 1,00,000/- shares described in Exhibit "B" hereto by Respondent 2 to Respondent 4 be set aside and/or cancelled.

(j) that 3rd and 4th Respondents respectively by themselves their servants and agents be restrained from in any manner selling and/or transferring and/or dealing with disposing of or parting with possession of or alienating or creating any right title or interest in favour of anyone else in respect thereof or claiming or exercising any right title, interest or benefit in respect of the 2,50,000/- shares described in Exhibit

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"A" and the 1,00,000 shares described in Exhibit"B" hereto or acting on the basis of relative transfer forms executed by the respective petitioners and handed over to the second Respondents in respect of the said 3,50,000 shares.

(k) That the 5th Respondent by themselves their servants or agents be restrained from in any manner transferring from the names of the respective petitioners to the names of 3rd and/or 4th Respondents respectively or any one else the said 2,50,000 described in Exhibit "A" and/or 1,00,000 shares described in Ex."B" or any part thereof and/or from acting on the basis of any transfer form/s lodged with them in relation to any of the said 3,50,000 shares described in Exhibit "A" and "B" hereto.

(l) that pending the hearing and final disposal of this petition interim reliefs in terms of prayer (j) and (k) above be granted.

(m) that pending the hearing and final disposal of this petition, the Court Receiver, High Court, Bombay or some other fit and proper person be appointed Receiver of said 3,50,000/- shares described in the schedules being Exh. "A" and "B" hereto and of the relative transfer forms and all rights and benefits attached to and incidental to the said shares with all powers under Order XL: rule 1 of the Code of Civil Procedure, 1908 including power to take actual physical possesion of the said 3,50,0000 shares described in the schedules being Ex."A:" and "B" hereto (from whomsoever they may be lying with) and of the relative share certificates and the relative transfer form (from

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whomsoever they may be lying with) and to hand over to the respective petitioners against tender of balance debts and interest by the petitioners in such manner as this Hon'ble Court may direct and to exercise voting and all right attached and/or incidental to all the said shares according to the instructions of the respective petitioner-holders thereof.

(n) for ad-interim reliefs in terms of prayers (l) and (m) above.

(o) for costs of this petition

and

(p) for such other and further reliefs as this Hon'ble Court may deem fit in the circumstances of the case.

4.2. On 18.08.1992, the Ordinance was replaced by the Special Court Act, 1992. In some of the matters, the Special Court held that provisions of TDS do not apply to "payments made pursuant to Orders and Directions of Court" and directed the party to recover on its own TDS paid from Income Tax department and not to deduct tax at source. On 15/20.08.1994, the Special Court passed an order and accepted the ownership of the appellants-assessee but restrained the appellants-assessee from transferring the shares in any manner whatsoever. On 4th April, 1994, the Special Court clarified that the earlier order was not an interim order, but the same was in the nature of final order.

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4.3. Against the order of the Special Court, the Syndicate Bank as well as the appellants-assessees filed appeals before the Supreme Court of India under the statute. The Apex Court vide order dated 12.09.1994 and 07.10.1994, admitted both the appeals and directed both the parties in each appeal to maintain status quo. However, subsequently, on 20th February, 1995, in one of the matters, Special Court has framed a ruling that Income Tax Department has no priority above the payments under the Special Court Act and the said order is passed after hearing IT department and FFSL Custodian. Relevant paragraph of the said judgment read as under:-

> *...thus no penalty or interest can be imposed for non-fulfillment of an act which a Notified party is prevented from doing by reason of the Special Court Act. In such cases even though the provisions of some other Act or contract lay down consequences for non-performance, the provisions of the Special Courts Act will prevail. This is because in such cases there would be a conflict between the provisions of the Special Courts Act and that other law and/or contract. In cases of such conflict, the provisions of the special Court Act must prevail. To take an example, under Section 234B of the Income Tax Act, every assessee is liable to pay advance tax. All parties were Notified*

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between June, 1992 to August 1992. All of them would be liable to advance taxes for the financial year ending March 1992 and for the subsequent years. However, as seen earlier, taxes only upto Assessment Year 1992-93 and for the subsequent year. However, as seen earlier in priority. Those would have to rank as ordinary debts under Section 11(2)(c). this therefore, can only be released after the entire distribution has taken place. Even if the Notified party were to advance tax, the Court would refused it. Thus monies for payment of advance tax have not been released. Thus a Notified party has been prevented from paying advance tax. Thus, under the Special Courts Act, there is a legal disability to pay advance Tax. Yet under the Income Tax Act there is a compulsion to pay advance tax. There is a conflict between the provision of the Special courts Act and the Income Tax Act. The provisions of the Special Courts Act must prevail. Under the Income Tax Act if Advance tax is not paid, for such non-payment interest can be levied. This obviously on the footing that the assessee is in default. However a Notified party has been prevented by law from paying Advance Tax. He is not a defaulting party. He has not paid advance Tax because of legal restraint on him. The law has prevented him from paying advance Tax. In my view, in such cases i.e. where there is a conflict between the provisions of the Special Courts Act and some other Act/contract, the contrary provisions must necessarily

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give way. If there is this legal disability, then there is no question of the Notified party being foisted with the liability to pay interest and/or penalty. Similarly under Section 220(2) of the Income Tax Act, a Demand Notice may have been served on a party. That demand Notice may be for tax, interest and/or penalty. Under the Income Tax Law, the sum specified in the Notice must be paid within 30 days. Under the Income Tax Act, if the same is not paid within 30 days, the assessee is liable to pay interest at 1.5% per month. Here again by reason of the legal disability, imposed by the special Courts Act, the Notified party is not in a position to pay the amounts demand by that demand Notice. If that is so, then the Notified party cannot be said to be default. Then there is no question of the Notified party become liable to pay interest under Section 220(2)...."

4.4. Thereafter, on 29.03.1995, Special Court passed an order in the suit filed by the Syndicate Bank wherein the Syndicate Bank wanted to declare that it is the owner of the shares or that it must get back the purchase price paid by it. The said suit was stayed by the Court. Therefore, the question of repayment of loan of interest was out of question.

4.5. The Special Court gave another ruling in

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continuation of the 1st ruling after hearing the advocates for the CBDT, Income Tax Department and FFSL that its 1st decision has apply even in case of TDS payment and that no one can pay over to Income Tax Department any amount of TDS in spite of status quo order passed by the Apex Court in case of the petitioner on 12.09.1994 and 7.10.1994. On 13.05.1998, the Apex Court disposed of the both the appeals against the 1st ruling by dismissing the appeal. The Apex Court in paragraph No.26 and 26 observed as under:-

> *26. Every kind of tax liability of the notified person for any other period is not covered by Section 11(2) (a), although the liability may continue to be the liability of the notified persons. Such tax liability may be discharged either under the directions of the Special Court under Section 11(2)(c), or the taxing authority may recover the same from any subsequently acquired property of a notified person (vide Tejkumar Balakrishna Ruia v. A.K. Menon (1997) 9 SCC 123) or in any other manner from the notified person in accordance with law. The priority, however, which is given under Section 11(2)(a) to such tax liability only covers such liability for the period 1.4.1991 to 6.6.1992.*
>
> *27. At what point of time should this tax liability have become quantified by a legal assessment which is final and binding on the notified person concerned ? It is*

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contended before us by some of the parties that only that liability which has become ascertained by final assessment on the date of the Act coming into force should be paid under Section 11(2)(a). Others contended that it should have been so ascertained on the date of the notification. The third contention is that it should have been so ascertained on the date of distribution. Since we have held that tax liability under Section 11(2)(a) refers only to such liability for the period 1.4.1991 to 6.6.1992, it would not be correct to hold that the liabilities arising during this period should also be finally assessed before 6.6.1992 (the date of the Act) or the date of the notification. It must refer to the date of distribution. The date of distribution arrives when the Special Court completes the examination of claims under section 9-A. If on that date, any tax liability for the statutory period is legally assessed, and the assessment is final and binding on the notified person, that liability will be considered for payment under Section 11(2)(a), subject to what follows.

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4.6. Thereafter, on 3.05.1999, Special Court gave further direction in the Misc. petition No.28 of 1999 that there can be no deduction of tax at source and that payers must make payments without deduction of tax at source and that the whole income is to be paid over to the Custodian. Paragraph No.8 of the said order of the Special

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Court reads as under:-

> *8. The law is now well settled by the Supreme Court judgment dated 13th May, 1998 in Civil Appeal No.5326 of 1995. The Income Tax Department can get no priority in respect of any tax which is not for the statutory period i.e. 1st April 1991 to 6th June, 1992. As has been held by the Supreme Court tax for a subsequent or any other period can only be recovered by the Income Tax Authorities under Section 11(2)(c) or from subsequently acquired property or income of the Notified party which do not stand attached. The tax Deduction at source is on interest and dividend accruing on attached assets. Interest and dividends on attached assets are also attached assets. Tax for a subsequent period is sought to be deducted in priority. Attached assets are sought to be taken away in a priority not envisaged by the said Act. Provisions regarding advacne tax and tax deduction at source or in direct conflict with the provisions of Section 11 of the said Act. By virtue of Section 13 of the said Act, the provisions of the said Act must prevail. The reasoning given in this behalf in the Order dated 20th February 1995 applies fully over here."*

4.7. Thus, by the impugned judgment and order, the appellants-assessees were directed to deduct the tax at source and pay the same to the credit of the Central Government. Being aggrieved

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and dissatisfied with the same, the appellants-assessees have filed these appeals.

5. Mr. Soparkar, learned senior advocate for the appellants-assessees submitted that the appellants-assessees have an obligation to pay interest to the Custodian of FFSL, which is notified party. The Special Court conclusively held that the provisions of TDS do not apply to the alleged liability to pay interest to the Custodian by order dated 14.08.1993, 20.2.1995 and 9.9.1996 and 3.5.199. Therefore, he submitted that in view of the above orders, there is no question of the appellants' being guilty of non-deduction of tax at source.

5.1. He further submitted that the Apex Court while admitting the appeals filed by the appellants and Syndicate Bank directed the parties to maintain status quo. Therefore, the appellants were not obliged to pay over the amount of TDS in a separate account or to the Custodian.

5.2. According to the learned senior advocate for the appellants, in view of the order dated 14th August, 1993, i.e. much before 31st March 1994, the date on which the alleged TDS liability

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arose, passed by the Special Court in Misc. Application No.158 of 1993, the appellant was bonafidly under the impression that there was no obligation cast upon him to deduct any tax at source.

5.3. Learned senior advocate for the appellants-assessee further submitted that the dispute between the Syndicate Bank and the appellants-assessee is pending where Syndicate Bank claims to be the owner of the shares. Therefore, it is difficult to determine the exact rights and obligations of the parties and ultimately, if the said suit is decreed and it is held that the appellant has sold away its shares to the said Bank, then in that event the amount of loan received by the appellants would not be regarded as a loan at all.

5.4 Learned senior counsel for the appellant has submitted that considering the aforesaid facts, it is very clear that the appellants-assessees were constrained/restrained/prohibited under the statute and by the orders of the Special Court and the Supreme Court. In spite of that the Tribunal while considering the issue in paragraph No.49, 50, 53, 54, 55 observed that the order of the Special Court would not prohibit the appellants in any manner whatsoever.

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5.5. He has relied on the provisions of Section 198 and 199 of the Income Tax Act, which reads as under:-

Tax deducted is income received.

198. All sums deducted in accordance with the foregoing provisions of this Chapter shall for the purpose of computing the income of an assessee be deemed to be income received.

***Provided** that the sum being the tax paid, under sub-section (1A) of section 192 for the purpose of computing the income of an assessee, shall not be deemed to be income received.*

Credit for tax deducted.

199. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.

(2) Any sum referred to in sub-section (1A) of section 192 and paid to the Central government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made."

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5.6. Mr. Soparkar, learned senior advocate has strongly relied on the decision of the Bombay High Court in the case of ***Sir Joseph Kay, K.B.E. v. Commissioner Income Tax,*** reported in ***[1956] 29 ITR 774***.

5.7. By relying on the above decision, learned senior counsel for the appellants-assessees submitted that all the authorities namely the Assessing Officer, the Commissioner of Income Tax (Appeals) and the Tribunal have committed grave error in directing the appellants-assessees to deduct TDS, which is contrary to order of the Special Court, which was confirmed by the Supreme Court. Therefore, he urged that this Court may allow these appeals and quash and set aside the the orders of all the authorities below.

6. On the other hand, Mr. Mehta, learned advocate for the respondent-revenue has supported the impugned judgment and order of the Tribunal and submitted that the submissions canvassed by the learned senior advocate for the appellants-assessees does not deserve consideration since the order of restrainment was passed on 9th September, 1996 and the same shall apply from the Assessment Year 1997-98 onwards. He submitted that Section 158 of the Income Tax Act shall not

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apply in the case of the appellants-assessess, but it is in the case of third party.

6.1. He further submitted that the present appeals deserve to be dismissed in view of the concurrent findings of the authorities below as also the Tribunal. Therefore, he urged that this Court may dismiss the present appeals and confirm the order of the Tribunal.

7. We have heard Mr. Soparkar, learned senior advocate appearing for the appellants-assessee and Mr. Mehta, learned advocate appearing for the respondent-revenue and perused the material on record. It is not in dispute that Special Court Ordinance came into force on 30th June, 1992 and the Custodian was appointed on 2nd July, 1992. Needless to say that the provisions of a Special statute would come into force from the date on which the Notification is issued. Any clarificatory order by Special Court or Supreme Court which is in the nature of interim order or final order regarding interpretation of law will have an effect from the date on which the Act or Ordinance comes into force.

8. In the present case, we find that the Tribunal has committed serious error in interpreting the provisions of law. It goes

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without saying that Special Court was created for fast tracking the economy. The purpose for which the Special Court was enacted will prevail over the other law. Hence, we are of the opinion that the Tribunal has committed grave error in holding that the order of the Special Court will not prevail and that the TDS is required to be deducted by interpreting that it will apply only from the date of the order of the Supreme Court i.e. 9th September, 1996. In our view, the Tribunal has committed an error of law in restraining / prohibiting / constraining. Apart from that the appellants-assessees have not made any payment to the Department but have so simply made provision for it.

9. Further, the observations of the Tribunal that TDS is income of the department, in our view is contrary to the observations of the Bombay High Court in the case ***Sir Joseph Kay, K.B.E. (supra)***, wherein it is held in as under:-

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> " *What is urged by Mr. Palkhivala is that under this rule there is no liability upon Sir Joseph Kay to pay the tax. It is not his liability to pay the tax that is being discharged by the insurance companies. He say that the law imposes a liability upon the payer himself and it is that liability, a substantive liability, which is being discharged when the payer pays tax to the revenue in*

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England. The contention therefore is put forward that what Sir Joseph kay is entitled to in view of this provision of law is not 500 pound but only 225 pound. Attention is drawn to the provisions of Section 18 of our Act and it is pointed out that the scheme of deduction under the two Acts is fundamentally different. It is said that under Section 18, although an obligation is cast upon the payer of salaries etc. to deduct the tax at the source, the person who is entitled to the salary still remains liable to pay the tax if the tax has not been deducted, and it is made clear by section 18 that the person deducting the tax at the source is deducting it on behalf of the person entitled to the salary. It is also pointed out that under section 18(4) it is expressly provided:-

> *"All sums deducted in accordance with the provisions of this section shall, for the purpose of computing the income of an assessee, be deemed to be income received."*

It is said that in absence of these provisions under the English law the only part of the annuity which became the income of Sir Joseph kay is 225 pound and not 500 pound, that when the insurance companies deducted 275 pound they were not deducting the sum on behalf of Sir Joseph Kay in order that they should pay the tax on behalf of Sir Joseph Kay, but they were deducting it because the English statute cast an obligation upon the insurance companies to retain this

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sum and it was by reason of this statutory obligation that this sum was being paid. What we must really look at is the substance of the legal provisions to which reference has been made and on which reliance has been place and we must look at the substance of the matter from only one simple point of view. Whose income was this 275 pound which was retained by the Insurance companies under the provisions of rule 19 ? It is clear that the tax was payable on the annuity due to Sir Joseph Kay and it was by a legal fiction that the income of Sir Joseph Kay was deemed to be the income of the insurance companies. That legal fiction was imported by the English law in order to collect the tax from the prayer of the annuity rather than from the annuitant himself. But the legal fiction cannot be possibly changed the patent fact that the annuity is that of Sir Joseph Kay and the whole of 500 pound is the income of Sir Joseph Kay and no part of it is the income of the Insurance companies. It is then urged that even though 500 pounds may be due as a debt by the insurance companies to Sir Joseph Kay, the fact that a debt had accrued to Sir Joseph Kay did not result in law in an income accruing to Sir Joseph Kay. That proposition of law is perfectly sound. A distinction has been drawn (See Seth Lalbhai v. Commissioner of Income Tax [1952] 22 ITR 13) between a debt accruing or arising and an income accruing or arising, and the debt does not become income till it comes in, or put in a different language, the debt does not become income till it has been

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discharged. What Mr. Palkhivala argues is that although the debt might have been 500 pounds, 275 pounds were extinguished by statute and only 225 pounds was discharged by the insurance companies, and therefore, the only amount which became the income of Sir Joseph Kay was 225 pounds and not 500 pounds. This is completely misreading both the position in law and the actual facts that emerge in this reference. This is no extenguishment of the debt of part of it by statute. What the statute provides is that on the insurance companies statute. What the statute provides is that on the insurance companies paying 225 pound to Sir Joseph Kay the full debt is discharged because the insurance companies have retained 275 pound which are to be paid as tax on 500 pound. Therefore, this is not a case of extinguishment of part of the debt viz. 275 pound but a discharge of the debt in the manner provided by law. Nor is Mr. Palkhivala right when he contends that the debt is only partly paid and not fully paid. He says that even if there is no extinguishment, only part of the debt in fact has been paid to Sir Joseph Kay and that part is 225 pounds and not the whole of 500 pound. In substance the whole debt of 500 pound has been paid to Sir Joseph Kay. The mode of payment is this. 225 pounds have been actually paid in case to Sir Joseph Kay, and the balance of 275 pounds is retained by the insurance companies in order to pay the tax which is payable on the sum of 500 pound. It is difficult to understand how the position is different from what it

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would have been if the insurance companies had paid the full sum of 500 pounds to Sir Joseph Kay and Sir Joseph Kay would have paid 275 to the Income Tax authorities which he was liable to pay. Surely Mr. Palkhivala then could not have contended that the full sum of 500 pounds has not been paid to him or that the debt has not been discharged. Instead of permitting the insurance companies to pay the full sum of 500 pounds to Sir Joseph Kay and then collecting 275 from him, the taxing machinery set up in England provides that the taxing authorities will recover 275 pounds from the Insurance companies themselves and permit the insurance companies only to pay 225 pounds to Sir Joseph Kay, but you cannot get away from the salient fact that they are paying 275 pounds on the income of Sir Joseph Kay and not on their own income.

It is pointed out that in the absence of provision like section 18(4) you cannot consider 275 pound as the income of Sir Joseph Kay. Section 18(4) does not make something, which is not the income of the person to whom the salary is due, his income. The legal fiction introduced by section 18(4) is that the person, part of whose salary has been deducted at the source, shall be deemed to have received that part of the income for the purpose of tax. But what he is deemed to have received was his income and to repeat, there is no fiction introduced in section 18(4) which makes something the income of the person which was not in fact his

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income. But the fiction that has been introduced in the English law is that the income of Sir Joseph Kay is to be considered the income of the payer of the annuity. But what we are concerned with is not the fiction but the fact and the fact remains and no argument can undermine that fact that 500 pound was the income of Sir Joseph Kay and no part of it was the income of the payer or of any one else.

Any doubt that there might be with regard to the true position is completely set at rest by the provisions to which our attention has been drawn with regard to the refund of income tax. If Sir Joseph Kay was not liable to pay tax on this sum of 500 pound which tax has been paid by the insurance companies by reason of his total income, he would be entitled to get either a refund of the full amount or a proportionate refund. It is impossible to contend that sir Joseph Kay should obtain a refund with regard to payment of tax in respect of something which is not his income. The answer given by Mr. Palkhivala is that the Income Tax Act of 1918, Schedule V, paragraph 17, statutorily makes the deduction which has been made by the payer of the annuity part of the total income of the annuitant, and it is because of this that the annuitant becomes entitled to claim the refund. But the very reason why the annuitant is allowed to include in his total income the deduction made by the payer is that the payer is paying tax out of the income of the annuitant and when the annuitant prepares a

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statement of his total income he is entitled to include in it what has been deducted out of his income for the purpose of payment of tax. Therefore, looking to the whole scheme both of deduction and of provisions with regard to refund, it is clear that the English law does not overlook or ignore the fact that the annuity payable is the income of the annuitant. Indeed it would be extraordinary if the British Parliament overlooked the obvious fact, and that the annuity being the income of the annuitant the easier and the more convenient way of rather than from the annuitant himself. But having made that provision it proceeds to make it clear that the annuitant has received the full amount of the annuity, that the payer receives a proper discharge, and that in proper cases the annuitant is entitled to refund of tax if he was not liable to pay tax which the payer of the annuity has paid. "

10. In that view of the matter, the interpretation put forward by the Tribunal that TDS is income of the Department is misconceived. Therefore, in our view, restrained TDS could not have been deducted.

11. In that view of the matter, we are of the considered opinion that the Tribunal was not right in passing the impugned judgment and in holding that appellants-assessees were liable to

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deduct tax at source as required under under Section 194A of the Act, in spite of the order of the Special Court.

12. For the foregoing reasons, all these appeals deserve to be allowed and the same are accordingly accordingly. The impugned judgment and order of the Tribunal as well as the order of the Assessing Officer and CIT(A) are hereby quashed and set aside. Accordingly, we hold that the Tribunal was not right in law in holding that the the appellants-assessess were liable to deduct tax at source as required u/s. 194A of the Act

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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