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

+ ITA 47/2022 & C.M.No.12833/2022

COMMISSIONER OF INCOME TAX (INTERNATIONAL
TAXATION)-2

..... Appellant

Through Mr.Sanjay Kumar with Ms.Easha
Kadian, Advocates.

versus

GRACEMAC CORPORATION

..... Respondent

Through Mr.Nageswar Rao with Ms.Deepika
Agarwal, Advocates.

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Date of Decision: 15th March, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

MANMOHAN, J (Oral):

1. Present appeal has been filed challenging the order dated 16th November, 2020 passed by Delhi Bench of the ITAT (hereinafter 'Tribunal') in ITA No.947/Del/2012. The relevant portion of the impugned order passed by the Tribunal is reproduced hereinbelow:-

"14. On the aspect of interest under Section 234B, Ld. AR placed reliance on the decision of the Hon'ble Delhi High Court in the case of DIT Vs. GE Packages Power Inc. (2015) 373 ITR 0065 (Delhi). In this case, the Hon'ble High Court of Delhi preferred and followed its decision in the case of Director of Income Tax vs. Jacobs Civil Incorporated (2011) 330 ITR 0578 wherein it was held that Sec. 195 put an obligation on the payer

*i.e. any person responsible for paying any amount to a non-resident to deduct tax at source at the rates in force from such payments, thus, entire tax is to be deducted at source, which is payable on such payments made by the payer to the non-resident, that if the said payer has defaulted in deducting tax at source, the Department can take action against the payer under the provisions of Section 201 of the Act and compute the amount accordingly; that in such a case, the non-resident is liable to pay tax but there is no question of payment of advance tax; and that, therefore, assessee is not liable to pay interest under Section 234B on account of default of the payer in deducting tax at source from the payments made to the assessee. It is pertinent to note that the decision in *Jacobs Civil Incorporated (supra)* relates to the AY 2001-02.*

15. Be that as it may, inasmuch as we held in the preceding paragraphs that there is no royalty income involved in this matter, and for want of Permanent Establishment, the business income of the assessee is not taxable in India, we, therefore, in these circumstances and also while respectfully following the decision of the Hon'ble Jurisdictional High Court, hold this issue in favour of the assessee in all the assessment years."

2. Learned counsel for the appellant states that the charging of interest under Section 234B of the Income Tax Act, 1961 is consequential and mandatory. He submits that since the Assessing Officer in the original assessment order dated 29th December, 2008 had given a specific direction to charge interest, non-levy of interest under Section 234B of the Act while computing tax demand was a mistake apparent on the record and was therefore rectifiable under the provisions of Section 154 of the Income Tax Act.

3. Upon perusal of the impugned order, this Court finds that in the impugned order, the Tribunal has relied upon the judgment passed by this Court in *Director of Income Tax vs. Jacobs Civil Incorporated (2011) 330*

ITR 0578, which has been confirmed by the Supreme Court on 17th September, 2021 in *Director of Income Tax, New Delhi vs. M/s Mitsubishi Corporation, Civil Appeal No.1262/2016*.

4. This Court is also in agreement with the opinion of the Tribunal that the penalty can only be levied in such cases where concealment of income has been proven. If the quantum order itself has been set aside in an appeal preferred by the respondent/assessee, there is no question of penalty being levied. In *Pr. Commissioner of Income Tax (Central) -2 vs. Harsh International Pvt. Ltd., 2020 SCC OnLine Del 1711*, this Court has held as under:-

“11. This court is also of the opinion that levy of penalty cannot be a matter of course, as sought to be contended by the Revenue. It can only be levied in cases where the concealment of income has been proven. If the quantum order itself has been challenged and this Court has framed substantial questions of law in the appeal preferred by the respondent-assessee, it shows that the alleged concealment is not final and the issue is disputable. Consequently, the penalty levied by the assessing officer cannot survive in such a case.

12. It is pertinent to note that this Court in similar cases [CIT Vs. Liquid Investment Ltd, ITA 240/2009, CIT Vs H B Leasing & Finance Co. Ltd. I.T.A. No. 1612/2010 and CIT Vs. Thomson Press India Ltd, ITA 426,440/2013] has upheld the deletion of the penalty on the same ground i.e. the fact that appeals were admitted proved that the issue was debatable. The relevant portion of the orders in CIT Vs. Liquid Investment Ltd (supra) and CIT Vs. Thomson Press India Ltd(supra) is reproduced hereinbelow:-

A) Order dated 5th October, 2010 passed by this Court in CIT vs. Liquid Investment Ltd. (supra):-

“Both the CIT(A) as well as the ITAT have set aside the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Income Tax Act, 1961 on the ground that

the issue of deduction under Section 14A of the Act was a debatable issue. We may also note that against the quantum assessment where under deduction under Section 14A of the Act was prescribed to the assessee, the assessee has preferred an appeal in this Court under Section 260A of the Act which has also been admitted and substantial question of law framed. This itself shows that the issue is debatable. For these reasons, we are of the opinion that no question of law arises in the present case.”

B) Order dated 3rd March, 2014 passed by this Court in CIT Vs. Thomson Press India Ltd (supra :-

“This Court is of the opinion that where the question of law as raised by the assessee has been framed and admitted in the circumstances of this case, imposition of penalty cannot be justified. The appeals being bereft of substantial question of law are dismissed.”

5. Keeping in view the aforesaid, this Court is of the view that no substantial question of law arises for consideration in the present appeal. Accordingly, the present appeal along with pending application is dismissed.

MANMOHAN, J

DINESH KUMAR SHARMA, J

**MARCH 15, 2022
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