IN THE INCOME TAX APPELLATE TRIBUNAL
CHENNAI BENCH 'B'

BEFORE SHRI PRADEEP PARIKH, VICE-PRESIDENT,
SHRI N.BARATHVAJA SANKAR, VICE-PRESIDENT
AND SHRI HARI OM MARATHA, JUDICIAL MEMBER

(SPECIAL BENCH CASE)

I.T.A. No.663/Mds/2003
Assessment Year : 2002-03

The Income-tax Officer, International Taxation, Chennai – 34. (Appellant)	Vs.	M/s. Prasad Production Ltd., 27-28 Arunachalam Road, Saligramam, Chennai – 73. (Respondent)

Appellant by : Shri P.B.Sekaran, CIT-DR
Respondent by : S/Shri R. Vijayaraghavan & Rajan Vora

Interveners : Shri L.V.Srinivasan
Shri T. Banusekar
Shri H.Padamchand Khincha
Shri Arvind Sonde
Shri N.Devnathan
Shri K. Venkatesh
Ms. Rupa

O R D E R

PER PRADEEP PARIKH, V.P.

The Hon'ble President, vide his order dated 22-4-2009 and as modified by the order dated 10-8-2009, has constituted this Special Bench under sec.255(3) the Income-

tax Act, 1961 (the Act) to hear and decide the following question in accordance with law :

> "Whether for the purposes of sections 201(1) and 201(1A), when an assessee responsible for making payment to a Non-resident, has not applied to the Assessing Officer u/s.195(2) for deduction of tax at a lower or Nil rate of tax, he is under statutory obligation to deduct tax at source computed on the entire payment to the non-resident treating the same as income chargeable to tax, in the light of decision of the Apex Court in the case of Transmission Corporation of A.P Ltd v CIT (239 ITR 587)?".

2. All the grounds raised in this departmental appeal, which is against the order of the ld. CIT(A) dated 8.1.2003, are connected with the above question and accordingly, the same are reproduced below :

> "1. The order of the CIT(A) is contrary to the law, facts and circumstances of the case.
> 2. The CIT(A) has erred in holding that the assessee is not liable to deduct tax at source on the remittance of US$ 9,02,500/- (Rupees equivalent 4,31,75,600 at the exchange rate of Rs.47.84) made to IMAX Ltd., Canada a company registered in Canada and cancelling the demand raised u/s 201(1) and 201(1A).
> 3. The assessee has made payment for the provision of the variety of services by M/s. Imax Canada. Since the remittance of US$ 9,02,500 was for the provision of technical services by

IMAX which falls under section 9(1)(vii) of the Income tax Act, wherein it is stated in Explanation 2 to Section 9(1)(vii) that fees for Technical services means any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel), it would be chargeable to tax u/s.44D r.w.s.115A.

4. The CIT(A) has not considered the submissions filed by the assessee vide letter No.378 LD 372, dated 19th November 2002 wherein the assessee furnished the details of technology transfer agreement entered into with IMAX Canada giving details of the technology transfer know-how provided by IMAX. Many of the services such as (i) Training services for Theatre Manager, maintenance and operation training for projectionists, (ii) Theatre Management and marketing services, film programming, film programme development. Ticketing system and reporting etc., are not connected with the system (cost of equipment) and hence cannot be held as "Plant" falling under asset.

5. Hence, the decision of the Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd. in 239 ITR 587, would be applicable in this case and since the assessee has not obtained any order u/s.195(2), 195(3) or Sec 197 for making payment without deduction of tax he ought to have deducted tax on the gross sum remitted (which is chargeable to tax).

6. For these and other grounds that may be adduced at the time of hearing, it is prayed that that order of CIT(A) may be set aside and that of the AO restored."

3. The assessee company was awarded a contract by the Tourism Department of the Government of Andhra Pradesh to establish IMAX Theatre at Hyderabad. The assessee entered into an agreement on 20.12.2000 with IMAX Ltd., Canada for purchase of equipment, maintenance and installation. As per the agreement, the total consideration was to be US$ 13,65,000 for purchase of the system and US$ 9,50,000 as technology transfer fee. During the year under consideration, the assessee remitted US$ 9,02,500 (Rupees equivalent Rs.4,31,75,600/-) on 25.12.2001 to IMAX Ltd. on account of technology transfer fee without deducting tax at source (TDS). The assessee was required to show cause as to why demand should not be raised under sec.201 of the Income-tax Act, 1961 (the Act) for non-deduction of tax. In the course of these proceedings, the assessee filed copies of schedule C to the Agreement for Maintenance, Installation and Trade Mark giving specification of system installation, testing and training services. The Assessing Officer asked for a detailed break up of the amount which was remitted to IMAX. The assessee could not provide the said break up. On the basis of letters and copies of agreement on record, the Assessing Officer found that the payment made by the assessee is for provision of a variety of services to be provided by the personnel of IMAX in India. He also observed that the services to be provided included installation charges, testing and training for projectionists. The training was to be provided with regular service visits. It

was also stated in the agreement that IMAX personnel will be present for supervision in India. Therefore, the Assessing Officer was of the view that the amount remitted by the assessee was for provision of technical services by IMAX which falls under sec.9(1)(vii). The Assessing Officer also relied on the judgment of the Supreme Court in the case of Transmission Corporation of AP Ltd. (239 ITR 587) and concluded that since the assessee has not obtained any order under sec.195(2), 195(3) or under sec.197, the gross sum remitted by the assessee was liable to tax under sec.195 of the Act. Accordingly, he raised a demand of tax amounting to Rs.64,76,340/- and also levied interest under sec.201(1A) amounting to Rs.6,47,634/-.

4. Detailed submissions were made by the assessee before the CIT(A). It was pointed out that where Double Taxation Avoidance Agreement (DTAA) was entered into by India, the provisions of DTAA would prevail over the provisions of the Act. Referring to the agreement, it was contended that providing for supervision of installation work did not amount to having a permanent establishment (PE). It was also contended that the provision of variety of services as pointed out by the Assessing Officer related to maintenance agreement for which separate consideration was payable in course of time. According to the assessee, the Assessing Officer confused the payment for technology transfer envisaged in the original agreement with that of subsequent agreement providing for maintenance, installation and trade mark. It was submitted that installation assistance and initial training are auxiliary and substitutory to the sale of the original equipment and were inextricably and essentially linked to the sale of equipment.

The sophisticated equipment purchased from IMAX would be of no value without these services. It was therefore, contended that the fees for installation assistance and initial training were not the fees for included services since these services were not the predominant purpose for the arrangement. The CIT(A) considered the various terms of the agreement and the submissions made by the assessee. He was of the view that the impugned amount represents consideration for installation, testing and operator training before the theatre is ready for screening. He also observed that though the agreement provides for installation and training in the beginning, the amount of remittance represents a part of sale consideration of the equipment. Accordingly, he held that there is no ambiguity in regard to the portion which is taxable and the portion which is not taxable. According to him, the entire sum is not chargeable to tax at all and therefore, the decision in the case of Transmission Corporation of AP Ltd. (supra) was not applicable. He, therefore, cancelled the order passed by the Assessing Officer under sec.201(1) and 201(1A) of the Act.

5. The ld. D.R. submitted that the assessee has not deducted tax at source on the ground that the remittance made to IMAX was not income chargeable to tax in the hands of IMAX. The main question, therefore, according to the ld. D.R. was whether the assessee has discretion under sec.195(2) to decide whether it should or it should not deduct tax. The ld. D.R. referred to the judgments of the Supreme Court in the case of Transmission Corporation (supra) and in the case of CIT vs. Eli Lilly & Co. (India) Pvt. Ltd. (312 ITR 225) to contend that the deduction to be made is tentative only and is subject to the assessment in the case

of the deductee. It was further submitted that the various circulars issued by the Board were on specific issues and though they were beneficial in nature, they could not negate the main provisions of the Act. The ld. D.R. also relied on the decision of the Chennai Bench of the Tribunal in the case of Poompuhar Shipping Corporation Ltd. in ITA Nos.2841 & 2842/Mds/05 dated 23.6.2006 and also in the case of Frontier Offshore Exploration (India) Ltd. in ITA No.2037/Mds/06 dated 28.2.2007. It was contended that if the assessee is given the discretion to decide whether to deduct tax or not, he will sit in the chair of the Assessing Officer and in that case sec.195 will become totally inoperative.

6. Shri R.Vijayaraghavan, ld. counsel for the assessee, at the outset agreed that deduction under sec.195 was tentative but still the assessee could contest the demand raised under sec.201(1) of the Act. In this connection, he referred to sections 4 & 5 of the Act. Referring to sec.4(2) in particular, he pointed out that tax was to be deducted at source or paid in advance only if the income was chargeable to tax under any provision of the Act. It was submitted that the obligation of TDS was a vicarious liability and the basic assessability was of the deductee only. Therefore, it was necessary always to determine the correct tax liability of the recipient of the income. Referring to sec.5(2), income was chargeable to tax only if it found part of the total income and not otherwise. It was further argued that sec.5(2) was to be read with sec.9 of the Act and then with the DTAA. If the DTAA provided that the income is not chargeable, then such income would go out of the purview of sec.195 also. Shri Vijayaraghavan then took us to sec.195(1) to lay emphasis

on the words "chargeable under the provisions of this Act" and "deduct income-tax thereon at the rates in force". We were then taken to clause (iii) of sec.2(37A) which provides the meaning of the expression "rates in force". The said clause provides that the expression "rates in force" would mean to be the rate of income-tax specified in the Finance Act or in the DTAA entered into by the Government under sec.90 or an agreement notified by the Government under sec.90A of the Act. Therefore, it was contended that since sec.201(1) covers sec.195 also, the Assessing Officer cannot proceed on a notional basis to raise demand under sec.201(1) of the Act. It was contended that the liability of the deductee and the deductor cannot be different and sec.201(1) does not contemplate to determine any short fall by the deductor. In this connection reference was made to sec.191 as also to the Explanation thereunder. Shri Vijayaraghavan referred to the judgment of the Supreme Court in the case of CIT vs. Wesman Engg. Co. Pvt. Ltd. (188 ITR 327) to contend that the assessee is not debarred from disputing the liability raised under sec.201 of the Act. It was even open for the department to treat the assessee as a representative assessee of non-resident under sec.160/163 of the Act. The next argument was that sec.195(2) was not meant for the legal determination of the chargeability of income but it was meant only to consider if there were any brought forward losses on account of which tax may not be deducted or be deducted at lower rate. In fact, it was meant for procedural relief only. But the assessee was not precluded from saying that the amount determined under sec.201(1) is not correct. Finally, Shri Vijayaraghavan referred to various circulars of the Board and judgments to which we shall advert to later.

7. Shri Rajan Vora, C.A. also appeared for the assessee. He drew our attention to circular No.759 dated 18.11.97 which gives an option to the deductor to furnish an undertaking to the RBI to make remittance without obtaining a No Objection Certificate from the Assessing Officer. In the light of this circular, it was contended that the whole question referred to the Special Bench becomes irrelevant when the department itself has dispensed with the requirement of sec.195(2) by way of the above mentioned undertaking. It was contended that in case an income which is obviously not chargeable to tax, the deductor need not undergo the procedure prescribed in sec.195(2) of the Act. This is the first option available to the assessee. The second option is that if there is a doubt about the chargeability of the amount to be remitted or there is a doubt about the quantum which may be chargeable to tax, then the deductor can furnish the undertaking as prescribed in the above mentioned circular. It was also contended that sec.195(2) is supplementary to sec.195(1) and therefore, if the deductor has a bona fide belief that the amount is not chargeable to tax, then he need not undergo the procedure under sec.195(2) of the Act. To buttress this point further, Shri Vora referred to the following other circulars also :

(a) Board Circular No.10 of 2002 dated 9.10.2002.
(b) Board Circular No. 4 of 2009 dated 29.6.2009.
(c) RBI/2007 – 2008/100
A.P. (DIR Series) Circular No. 03 dated 19.7.2007.
(d) RBI Circular No.FE.CO.FID.5759 dated 11.9.2007.

Reference was made to the decision of the Chennai Bench of the Tribunal in the case of Venkat Shoes Pvt. Ltd. (ITA

No.996/Mds/2008) dated 6.3.2009 wherein the reference to circular No. 786 dated 7.2.2000 has been made and in which it has been mentioned that deduction at source under sec.195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India. Several other decisions were relied upon by Shri Vora to which we shall advert to later.

8. Shri L.V.Srinivas (party in person) appeared as intervener on behalf of Areva T & D India Ltd. His submissions are summarised as follows :

(a) The choice was with the deductor whether to follow the procedure under sec.195(2) or to approach a C.A. as prescribed in the Board's circular. Referring to the judgment of the Supreme Court in the case of Transmission Corporation (supra), it was contended that in that case the court did not have the occasion to consider the above referred circular as the judgment was rendered much prior to the date of issue of circular. Therefore, it was contended that certain observations of the court in that judgment cannot be made applicable. In support of this proposition reliance was placed on the decision of the Chennai Bench of the Tribunal in the intervener's own case in ITA No.2235/Mds/2005 dated 7.4.2006. In any case, referring to the judgment of the Supreme Court in the case of CIT vs. Sun Engg. Works Pvt. Ltd. (198 ITR 297), it was submitted that one should not pick out a word or a sentence from the judgment of the Supreme Court which is divorced from the context of the question under consideration. About the status of the circulars issued by the Board, reliance was placed on the judgment of the Supreme Court in the case of UCO Bank vs. CIT in 237 ITR 889.

(b) The next submission of Mr. Srinivas was as to how sec.195 has evolved over a period of time and how the Board itself has been keeping pace with the development. In this connection reference was made to the Board circular Nos. 695 & 10 dated 29.11.1994 and 9.10.2002 respectively to show the additions made by the Board in the information sought for in the certificate issued by a C.A.

(c) The argument was that if sec.195(2) was mandatory, does it mean that all the circulars issued by the Board are redundant? In this connection reference was made to the Board circular No.4 dated 29.6.2009. It was emphatically submitted that there was a clear alternative between the circular and sec.195(2) of the Act.

9. Shri T. Banusekar, C.A. appeared as intervener on behalf of Asiatic Colourchem Industries Ltd. He referred to the expression "...may make an application..." to contend that it was not obligatory on the part of the deductor to undergo the procedure under sec.195(2) of the Act. Reliance was placed on the decision of the Special Bench of the Tribunal in the case of Mahindra & Mahindra Ltd. vs. DCIT reported in 122 TTJ 577. Reliance was also placed on the judgment of the Kerala High Court in the case of CIT vs. Fertilisers & Chemicals Travancore Ltd. (185 ITR 398). He also referred to the Board's circular No.786 dated 7.2.2000 and posed to himself the question whether the deductor needs to approach the Assessing Officer if the income is not chargeable to tax. At this juncture, the ld. D.R. intervened to point out that the said circular has been withdrawn by the Board. The submission of Shri Banusekar was that the circular was withdrawn because it was abused but it did not

mean that the Board had interpreted the law incorrectly. He referred to clause (ha) of sec.246A(1) and sec.248 to contend that these provisions implied that it was not obligatory for the deductor to always obtain a certificate under sec.195(2) of the Act.

10. Shri Padamchand Khincha, C.A., appeared as intervener on behalf of Sasken Communication Technologies Ltd. His submission was that payments can be classified into three categories, viz., (a) purely capital payments which are not taxable, (b) payments which are of revenue nature but are exempt from tax either under the Act or under DTAA, and (c) payments with pure income characterisation. In the last category, there may be a portion which may not be taxable and the portion which is taxable is generally referred to as trading receipts. It was pointed out that sub-sec.(2) of sec.190 was the guiding provision for entire chapter XVII of the Act. It provides that either TDS or advance payment of tax cannot prejudice the charge of tax under sec.4(1) of the Act. Relying on the judgment of Eli Lilly (supra), it was also pointed out that TDS provision was a machinery provision. Shri Khincha referred to circular No.786 dated 7.2.2000 (referred to by Shri Banusekar also) and contended that it is only the circular that is withdrawn and principle enunciated therein is not withdrawn. Reference was made to the judgment of the Delhi High Court in the case of BASF (India) Ltd. vs. CIT (280 ITR 136) to contend that retrospective withdrawal of circular is not permissible.

11. In his counter-reply the ld. D.R. submitted that circulars cannot substitute a provision and cannot reduce the rigours of any provision. According to him, sec.195 was

very clear in so far as that its heading was "Other Sums" and the provision talked about payment of a "sum". On the other hand, sec.190 and all other provisions following thereafter uses the word "income" and not "sum". Therefore, the contention was that while making any remittance to a non-resident, tax had to be deducted under sec.195 of the Act. The question he posed was as to who decides the taxability of the sum remitted. In this connection, he referred to the decision of the Delhi Bench of the Tribunal in the case of Millennium Infocom Technologies Ltd. vs. ACIT (117 ITD 114). This decision was referred to by Shri Rajan Vora to point out that the Bench has taken note about the Board's circular to the effect that the task of deciding the taxability has been entrusted to C.As. as an alternative to the procedure under sec.195(2). Against this, the argument of the ld. D.R. was that as per the same decision, if according to the assessee the entire sum was not chargeable, then he has to approach the Assessing Officer. It was contended that the assessee cannot decide about the taxability, it can be decided either by the Assessing Officer or the C.A. It was also contended that if TDS is not done then the deductee will be out of the tax net and sec.195 would be rendered irrelevant.

12. At this juncture, we may point out that when the matter had come up for hearing on 11.11.2009, the ld. D.R. had sought an adjournment on the ground that Karnataka High Court has pronounced a judgment in the case of Samsung Electronics Ltd. in I.T.A.No.2808 of 2005 in favour of the Revenue. It was submitted that the adjournment is sought only for a short period till the full text of the judgment is available. We did appreciate the contention of

the ld. D.R. but proceeded with the hearing for the reason that about three interveners and one counsel for the assessee had come from out of Chennai and accordingly we did not want to inconvenience them. We assured the ld. D.R. that if the full text of the judgment comes within a reasonable time and before the order in this case is passed, we shall certainly consider the same. On 20.11.2009, the ld. D.R. brought to our notice that the full text of the judgment is now available and he placed a copy of the same on record. It has since been reported in 320 ITR 209 also. Accordingly, in order to give opportunity to both the parties to explain the judgment and thereby assist the Bench, the matter was reposted for hearing. Therefore, the contentions of the parties in relation to the judgment of the Karnataka High Court are narrated in the paragraphs that now follow.

13. The ld. D.R. relied on the judgment in the case of Samsung Electronics (supra), in particular, the observations made at placitum 38 onwards. In his written submissions, the ld. D.R. has submitted that the facts in the present case are exactly identical to the facts in the case before the Karnataka High Court and hence the said judgment be followed. It is also contended that the interpretation of the Supreme Court of sec.195 in the case of Transmission Corporation (supra) has been followed by the Karnataka High Court and since the law declared by the Supreme Court has to be followed under Article 141 of the Constitution, it becomes all the more incumbent for the Tribunal to follow the judgment of the Karnataka High Court.

14. Shri Vijayaraghavan, Advocate, argued on behalf of the assessee. Firstly, he referred to the judgment in the case of Transmission Corporation (supra) and submitted that the

issue before the High Court was only whether TDS was to be made on net amount or on gross amount. If at all there was a default, it was held to be only in respect of income which was chargeable to tax out of the total amount remitted. Thus, the underlying ratio was that TDS has to be made only in respect of income which is chargeable to tax. The High Court never said that tax was deductible on gross amount. Further, it was submitted that the Supreme Court while deciding the case of Transmission Corporation (supra) never went into the consequences of non-deduction. Coming to the judgment in the case of Samsung (supra), Shri Vijayaraghavan drew our attention to the following observations made by the court :

Placitum 45

"The contentions urged on behalf of the assessee are more in the context of the determination of the tax liability of the non-resident recipient of the price/payment for the supply or sale of shrink-wrapped software packages as though it is an exercise of passing an assessment order for determining, the tax liability of the non-resident assessee receiving the payment although the respondents in all these appeals are quite aware that it is not actually an exercise for determination of the tax liability of the non-resident but is only in the context of the obligation of a resident-assessee making payments to the non-resident as contemplated under section 195 of the Act."

Placitum 57

"As we have already indicated that a question of the nature involving exercise of determining the liability of the non-resident assessee in respect of the payment received by the non-resident from a resident assessee cannot be an exercise that can be resorted to even for the purpose of determining the extent of obligation on the part of the resident payer and to ascertain as to whether there is any scope for relieving the resident payer totally from the obligation of deduction or even partially, as an answer for that can be obtained only by going through the procedure envisaged under section 195(2) of the Act ....."

Placitum 58

".....as they are all virtually exercises to be embarked only at the time of determination of the actual tax liability of the non-resident assessee and in the absence of a return being filed by the non-resident assessee, examination of such questions does not arise while the Assessing Officer is in the exercise of taking consequential action on an assessee who has failed to fulfil his obligation under section 195(1) of the Act and, therefore, goes against the assessees and are answered accordingly."

Placitum 74

".....Also an erroneous order and demand being raised by the Assessing Officer under section 201

of the Act, such as an incorrect description of the resident payer or incorrect computation of the amount to be deducted from out of the payment made by the resident payer either by employing a wrong percentage for deduction, at variance with the rate as indicated in the Finance Act or such arithmetical or factual errors committed by the Assessing Officer, without involving the question of actual determination of the tax liability of the non-resident, etc., alone can constitute the subject-matter for appeal under section 246A of the Act (clause (ha) of sub-section (1) of section 246A of the Act).”

By drawing our attention to the above observations, it was sought to be impressed upon us that the Karnataka High Court has misinterpreted the judgment in the case of Transmission Corporation (supra) and has ignored the ultimate conclusion. It was submitted that the High Court has extended the applicability of the decision in Transmission Corporation (supra) to cases where the entire income may not be taxable. It was reiterated that it is clearly held in Transmission Corporation (supra) that tax is deductible only on that portion of remittance which forms part of taxable income. It was further submitted that the Karnataka High Court has not considered the judgment of the Supreme Court in the case of Eli Lilly (312 ITR 225) and has not applied the judgment of the Supreme Court in the case of Vijay Ship Breaking Corporation (314 ITR 309). Further, the Delhi High Court has clearly held in the case of Delhi Development Authority vs. ITO (230 ITR 9) that an order under sec.201 is an order of assessment and this judgment

has been affirmed by the Supreme Court in 252 ITR 772. It is also submitted that the Karnataka High Court has not followed its own earlier judgment in the case of Jindal Thermal Power Co. Ltd. vs. DCIT (225 CTR 220). Reliance was also placed on the judgment of the Rajasthan High Court in the case of CIT vs. Manager, State Bank of India in 226 CTR 310. Finally, it was contended that if at all two interpretations were possible, the one favourable to the tax payer should be adopted. For this proposition, reliance was placed on the judgment of the Supreme Court in the case of Pradip J. Mehta vs. CIT (300 ITR 231).

15. Shri Rajan Vora also argued on behalf of the assessee. His effort was to draw distinction between collection and recovery of taxes on the one hand and chargeability of income on the other. It was pointed out that the Board issues circular every year for the purposes of deduction of tax at source from salary under sec.192 of the Act. The issuance of such a circular would not have been necessary if tax was to be deducted on the entire amount of gross salary. Drawing analogy from this, Shri Vora argued that any payment in order to attract deduction of tax at source, must partake the character of income. He referred to sec.40(a)(i) of the Act to point out that the words used were "chargeable under this Act" and hence while considering any disallowance under this provision, the Assessing Officer has to consider whether the payment was chargeable to tax or not. Next, Shri Vora referred to the alternate procedure prescribed by the Board of obtaining a CA certificate in lieu of the procedure under sec.195(2) of the Act. It was contended that the Karnataka High Court has not referred to this aspect at all in its judgment. Finally, referring to certain decisions

including that of the jurisdictional High Court in the case of Visvas Promoters Pvt. Ltd. vs. ITAT (30 DTR 65), it was contended that decisions of non-jurisdictional High Courts were not binding on the Tribunal and hence in this case, the judgment in the case of Samsung Electronics (supra) need not be followed.

16. Shri L.V.Srinivasan, India Tax Director of Areva T & D India Ltd. appeared as intervener for the said company. His only contention was that in the case of Samsung (supra) there is no discussion at all about the alternate procedure of obtaining the CA certificate. It was contended that by prescribing the alternate procedure it clearly follows that undergoing the procedure under sec.195(2) is not mandatory. With regard to the judgment of the Madras High Court in its own case dated 11.2.2008 (T.C. Appeal No.1502 of 2007), it was submitted that there was no question before the High Court about the mandatory application of sec.195(2).

17. Shri T. Banusekar, CA appeared as intervener for Asiatic Colourchem Industries Ltd. He drew our attention to the observations of the Supreme Court in the case of Eli Lilly & Co.(supra) at placitum 29 and 30. On the question whether there is any inter-linking of the charging provisions and the machinery provisions under the 1961 Act, the court made a reference to its earlier judgment in the case of CIT vs. B.C. Srinivasa Setty (128 ITR 294) wherein it has been held that the charging section and the computation provisions together constitute an integrated code. In the case of Eli Lilly (supra), it was vehemently urged that TDS provisions being machinery provisions are independent of the charging provisions. In answer to this contention the court

held that sec.4 is the charging section. Under sec.4(1), total income for the previous year is chargeable to tax. Sec.4(2), inter alia, provides that in respect of income chargeable under sub-sec.(1), income-tax shall be deducted at source where it is so deductible under any provisions of the Act . In fact, if a particular income falls outside sec.4(1) then the TDS provisions cannot come in. Shri Banusekar then referred to the judgment of the Karnataka High Court in the case of Jindal Thermal Power (supra) in which it has been held that order under sec.201 is clearly appealable. On the other hand, in the case of Samsung (supra) it has been held to be not appealable. To resolve these conflicting views, Shri Banusekar drew our attention to the judgment of the Andhra Pradesh High Court in the case of Ushodaya Enterprises Ltd. vs. Commissioner of Commercial Taxes in Special Appeal No.22 of 1996 decided on 24.3.1998. At paragraph 21 of the judgment, it has been observed as follows :

> *".... we can safely evolve the principle that in a case of conflict arising from the decisions of co-equal Benches of the Supreme Court, the High Court is free to disregard the decision which is based on an obvious mistake of fact or the one which purports to follow the ratio of an earlier decision though such ratio is found to be non-existent.....We are unable to persuade ourselves to subscribe to the view that the later decision should be automatically followed despite the fact that it rests on a conclusion based on an erroneous impression that an earlier decision took a particular view which in fact it has not taken..."*

Reference was then made to the judgment of the Supreme Court in the case of Sri Venkateswara Rice, Ginning & Groundnut Oil Mill Contractors Company vs. State of Andhra Pradesh (2 SCC 650). Our attention was drawn to the observations of the court at paragraph 9 which are reproduced below :

> *"9. Our approach to the question before us is similar to that adopted by the High Court in the decision under appeal. We are in entire agreement with the reasoning of the High Court. But our attention was invited to a latter decision of the same High Court in M. Nadar Khan & Co. v. Assistant Commissioner (Commercial Taxes), Anantpur and Other, (27 STC 18) which took a view contrary to that taken in the decision under appeal. It is strange that a co-ordinate Bench of the same High Court should have tried to sit on judgment over a decision of another Bench of that Court. It is regrettable that the learned Judge who decided the latter case overlooked the fact that they were bound by the earlier decision. If they wanted that the earlier decision should be reconsidered, they should have referred the question in issue to a larger bench and not to ignore the earlier decision."*

Shri Banusekar also placed before us certain extracts of Salmond on Jurisprudence, 12th Edition. The following observations were particularly referred to :

> *"(4) Inconsistency with earlier decision of higher court. It is clear law that a precedent loses its binding*

force if the court that decided it overlooked an inconsistent decision of a higher court. If, for example, the Court of Appeal decides a case in ignorance of a decision of the House of Lords which went the other way, the decision of the Court of Appeal is per incuriam, and is not binding either on itself (b) or on lower courts (c); on the contrary, it is the decision of the House of Lords that is binding. The same rule applies to precedents in other words, such as the Divisional Court (d).”

Thus, the contention of Shri Banusekar was that the judgment in the case of Samsung (supra) should not be followed.

18. Shri Padamchand Khincha appeared as intervener on behalf of Sasken Communication Technologies Ltd., Bangalore. His contention was that if one goes merely by the conclusion written at the end of the judgment in the case of Samsung (supra), it may appear that the decision is wholly against the assessee and that the procedure under sec.195(2) may have to be undergone even in cases where the payments are of capital nature or are otherwise not taxable. However, it is not proper to read the conclusion in isolation but the same has to be read in conjunction of what has been stated by the court itself in the earlier part of its judgment. Such harmonious reading of the judgment is necessary to avoid getting a distorted view of the judgment. For this proposition, the learned counsel referred to the judgment of the Supreme Court in the case of Goodyear India Ltd. & Others vs. State of Haryana & Others (188 ITR 402). The observations of the Karnataka High Court on which Shri Khincha relied upon are reproduced below :

Placitum 50 :

".....the present situations and appeals are not appeals involving such questions but only appeals involving the question as to whether the payment or any part of the payment has a character of income within the meaning of section 9 of the Act read with the charging section and that, the contention being that no part of the payment made to the non-resident can become income either under the Income-tax Act or enjoys an exemption under the Double Taxation Avoidance Agreements,....."

After reproducing extensively the observations of the Supreme Court in the case of Transmission Corporation (supra) from pages 594 to 596 of 239 ITR, the Karnataka High Court observed as follows :

Placitum 54 :

"In this background, the picture that emerges is that while under section 195(1) of the Act, there is an obligation on the part of the person responsible for paying to a non-resident does arise if and only if the payment partakes of the character of income payment, in the sense that, if an amount is not in the nature of income payment at all, then section 195(1) of the Act does not operate,....."

Placitum 62 :

"However, sec.195(2) of the Act provides for a limited extent of a possible reduction in the actual amount to be deducted at source by the resident payer if the resident payer is able to demonstrate before the Assessing Officer that the entire payment does not bear the character of income, but only a part of the payment bears the character of income....."

Placitum 68 :

"The only limited way of either avoiding or warding off the guided missile is by the resident payer invoking the provisions of sec.195(2) of the Act and even here to the very limited extent of correcting an incorrect identification, and incorrect computation or to call in aid the actual determination of the tax liability of the non-resident which in fact had been determined as part of the process of assessing the income of the non-resident.....".

Thus, the contention of Shri Khincha is that Karnataka High Court in the earlier part of its judgment prophesies to follow the judgment in the case of Transmission Corporation (supra), it does follow the judgment but on account of the facts in the case of Samsung (supra) that the payments were in respect of merchandise, it must have resulted in some possible income in the hands of non-resident and the assessee not having invoked the provisions of sec.195(2), the Tribunal should not have modified the order of the CIT(A) while exercising its appellate power. Thus, according to Mr. Khincha the Karnataka High Court went a step further

in its application of the judgment in the case of Transmission Corporation (supra).

19. Shri Arvind Sonde, Advocate, appeared for M/s. KPMG as intervener. At the outset, he laid four propositions before us. They are as follows :

(a) The decision in Samsung is contrary to at least four decisions of the Supreme Court, viz., -

(i) CIT vs. Eli Lilly & Co. (India) Pvt. Ltd. – 312 ITR 225
(ii) Vijay Ship Breaking Corporation vs. CIT – 314 ITR 309
(iii) CIT vs. Wesman Engg. Co. Pvt. Ltd. – 188 ITR 327
(iv) Transmission Corporation of A.P. Ltd. vs. CIT – 239 ITR 587

(b) The judgment in Samsung is contrary to at least five other High Court decisions and one ruling of the Authority for Advance Ruling (AAR), viz.,

(i) Porbandar State Bank vs. CIT – 18 ITR 134 (Bom)
(ii) CIT vs. Cooper Engg. Ltd. – 68 ITR 457 (Bom)
(iii) Czechoslovak Ocean Shipping International Joint Stock Company vs. ITO – 81 ITR 162 (Cal)
(iv) CIT vs. Superintending Engineer, Upper Sileru – 152 ITR 753 (AP)
(v) CIT vs. State Bank of India – 226 CTR 310 (Raj)
(vi) Al Nisr Publishing, In re – 239 ITR 879

(c) The judgment in Samsung (supra) is contrary to some earlier decisions of the Karnataka High Court itself, viz.

(i) Hyderabad Industries vs. ITO -188 ITR 749
(ii) Jindal Thermal Power Co. Ltd. vs. DCIT – 182 Taxman 252/225 CTR 220
(iii) ACIT vs. Motor Industries Co. – 249 ITR 141
(iv) CIT vs. Infosys Technologies Ltd. – 293 ITR 146

(d) The judgment in Samsung (supra) is contrary to the following circulars issued by CBDT :

(i) Circular No.43 dated 20.6.1970
(ii) Circular No.588 dated 2.1.1991
(iii) Circular No.759 dated 18.11.1997
(iv) Circular No.767 dated 22.5.1998
(v) Circular No.786 dated 7.2.2000
(vi) Circular No.790 dated 20.4.2000
(vii) Circular No.10 dated 9.10.2002
(viii) Circular No.7 dated 23.10.2007
(ix) Circular No.4 dated 29.6.2009

The argument of Shri Sonde was that the decision in Samsung (supra) is not binding because :

(i) It is inconsistent with the earlier decisions of the courts of the same or higher rank;
(ii) It is rendered sub-silentio in so far as that it does not refer to the circulars of the Board and does not deal with the decisions of the Supreme Court, Karnataka High Court and other High Courts of the same rank; and

(iii) It is rendered per incuriam because it is contrary to the Supreme Court decisions and other High Court decisions including the decisions of the Division Bench of the Karnataka High Court itself.

He referred to the judgment of the Full Bench of the Andhra Pradesh High Court in the case of CIT vs. B.R. Constructions (202 ITR 222) to contend that a Division Bench of High Court is bound by judgments of another Division Bench and a Full Bench. A single Judge or Benches of High Court cannot differ from the earlier judgments of Co-ordinate jurisdiction merely because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice are of paramount importance. He then referred to the judgment of the Supreme Court in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh vs. Presiding Officer, Labour Court and Others in (1990) 3 SCC 682 (SC). It was particularly pointed out that at paragraph 40 & 41 on page 705 of the judgment, the court has laid down the doctrine of precedents under Article 141 of the Constitution. The Supreme Court has laid down that a High Court decision is per incuriam if it has acted in ignorance of a decision of its own or acted in ignorance of the decision of the Supreme Court. In the background of these facts, Shri Sonde visualised two situations as follows :

(i) Where there are conflicting views of jurisdictional High Court; and

(ii)Where there are conflicting views between non-jurisdictional High Courts.

In case of the first situation it was submitted that the Tribunal should follow the view which is favourable to the

assessee as laid down by the Supreme Court in CIT vs. Vegetable Products Ltd. in 88 ITR 192. In the second situation, the learned counsel submitted that the Tribunal may have the following options :

(i) Follow the view in favour of the assessee or the view which appeals to the Tribunal as laid down by the Special Bench in the case of Rishi Roop Chemical Com. Pvt. Ltd. in 36 ITD 35.

(ii) Follow the view which is the better view in the opinion of the Tribunal as laid down by the Ahmedabad Bench of the Tribunal in Chandulal Venichand vs. ITO in 38 ITD 138.

(iii) Follow an earlier Special Bench decision, if available on the subject as laid down by a Third Member decision of the Ahmedabad Bench in Kanel Oil & Export Industries Ltd. vs. JCIT in 121 ITD 596.

With regard to option (iii) above, it was pointed out that the most appropriate Special Bench decision available on the subject is that in the case of Mahindra & Mahindra vs. DCIT, 313 ITR 263 (AT MUM SB) 310. In this decision, it was submitted that the Special Bench has conclusively dealt with the subject of obligation to deduct tax at source from payments to non-residents. It has been laid down that the pre-requisite of applicability of sec.195(2), sec.197 and sec.201 of the Act is that the amount paid to the non-resident is otherwise chargeable to tax under the provisions of the Act. Thus, if the amount paid or payable to the non-resident is not chargeable to tax under the regular provisions of the Act or the applicable DTAA then the provisions of Chapter XVII about the collection and recovery of tax are ruled out. In these cases, the person responsible for paying such non-taxable sum cannot be fastened with any liability

for deduction of tax at source and cannot under any circumstance be treated as an Assessee in Default.

20. Shri Devnathan, Advocate appeared on behalf of Eagle Press Pvt. Ltd. as an intervener. His submissions were more or less the same as those of the counsel who argued earlier. His emphasis was that the judgments in the case of Eli Lilly, Vijay Ship Breaking Corporation, Jindal Thermal Power and others should have been followed by the Karnataka High Court. While laying stress on the doctrine of precedent, he submitted that in a tradition-dominated country, where custom and tradition, and practices based on them, are respected for their authority, the English doctrine of precedent is neither new nor revolutionary. It was submitted that our *Dharma Sastras* are replete with injunctions which ordain that what is laid down by tradition or in the *Shishtas* should be followed unquestioningly. He quoted the following lines from *Apasthamba Dharma Sutras:*

"यं क्रियामागं आर्याः प्रशसंति सधर्मः
यं विगर्हन्ते सोधर्मः ।
अथा नः सामायाचारिकाम्
धर्मान् व्याख्या स्यामः ।
धर्मज्ञ समयः प्रमाणं वेदाश्च
शाश्वतोयं सदाधर्मः

He summarized his contentions by stating that at the heart of our appellate system which is structured on the common law pattern of hierarchy of courts, the doctrine of precedent exists like a vigilant omnipresence.

21. Shri Venkatesh and Ms. Rupa adopted the arguments of Shri Vijayaraghavan and Shri Arvind Sonde.

22. We have duly considered the rival contentions and the material on record. After reproducing the question referred to the Special Bench in the first paragraph, we have crossed almost thirty pages and hence it is necessary to recapitulate as to what is the issue before the Special Bench. Simply put, the question is that is it obligatory for the assessee to deduct tax at source on the entire payment if he has not applied to the Assessing Officer under sec.195(2) of the Act for deduction of tax at a lower or nil rate of tax. The question is both, easy as well as difficult to answer. It is easy because scores of decisions are available on the subject from different judicial forums including several decisions from the Supreme Court itself. It is difficult because despite so many authorities available on the subject, the volcano of sec.195 has been sporadically erupting. The issue simply refuses to die down or at least go into a dormant mode for some time. The key judgment is that of the Supreme Court in the case of Transmission Corporation (239 ITR 587). The difficulty gets compounded because both the sides rely on this judgment heavily according to their respective understanding and interpretation of the judgment. The latest judgment on the issue, that by the Karnataka High Court in the case of Samsung (320 ITR 209) has added a new dimension to the controversy. Bewildered as we are in the maze of multiple authorities and are caught in the cauldron, we shall try our best to resolve the dispute. The key decision, as mentioned earlier, is that of Transmission Corporation (supra) and hence, our effort will be to concentrate on this judgment in spite of the fact that several authorities have been cited before us. However, wherever necessary, we shall advert to other authorities as well.

23. To begin with, we reproduce the entire sec.195 for immediate reference :

"195. [(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest [***] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries" [***]) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

[**Provided** that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :]

[**Provided further** that no such deduction shall be made in respect of any dividends referred to in section 115-O.]

Explanation.-For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

(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.

[***]

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the [Assessing] Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3), shall remain in force till the expiry of the period specified therein or, if it is cancelled by the [Assessing] Officer before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.]

[(6) The person referred to in sub-section (1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board.]"

24. Let us take sub-sections (1) and (2) together first. In this sub-section, the crucial expression is "any other sum chargeable under the provisions of this Act". This expression has been explained by the Supreme Court in the case of Transmission Corporation (supra) in the following words :

> *"Consideration would be–whether payment of sum to non-resident is chargeable to tax under the provisions of the Act or not? That sum may be income or income hidden or otherwise embedded therein. If so, tax is required to be deducted on the said sum-what would be the income is to be computed on the basis of various provisions of the Act including provisions for computation of the business income, if the payment is trade receipt. However, what is to be deducted is income-tax payable thereon at the rates in force. Under the Act, total income for the previous year would become chargeable to tax under section 4. Sub-section (2) of section 4 inter alia, provides that in respect of income chargeable under sub-section (1), income-tax shall be deducted at source where it is so deductible under any provision of the Act. If the sum that is to be paid to the non-resident is chargeable to tax, tax is required to be deducted."*

If the above analysis by the Supreme Court is properly construed and understood, it would mean that the person making payment to the non-resident would be liable to deduct tax if the payment so made is chargeable to tax under the Act. Impliedly, if the payment is not chargeable to tax under the Act, the payer would not be liable to deduct tax at source. The chargeability to tax mentioned in the above provision is directly linked with sec.4 of the Act which is the main charging section. In other words, if the charge under sec.4 fails, automatically sec.195 would be inapplicable. This is very clear from the provisions of sub-section (2) of sec.4. It provides that income which is chargeable to income-tax under sub-section (1) of sec.4, the provisions of TDS and advance tax shall apply. Impliedly, if the income is not chargeable to tax, provisions of TDS and advance tax will not apply. This aspect has been again clarified by the Supreme Court in the case of Eli Lilly & Co. (312 ITR 225). In this case, it was argued that TDS provisions are independent of the charging provisions which are applicable to the recipient of income whereas the TDS provisions are applicable to the payer of income. In reply to this contention, the Court observed at placitum 30 as follows:

> *"To answer the contention herein we need to examine briefly the scheme of the 1961 Act. Section 4 is the charging section. Under sec.4(1), total income for the previous year is chargeable to tax. Sec.4(2), inter alia, provides that in respect of income chargeable under sub-section (1), income-tax shall be deducted at source whether it is so deductible under any provision of the 1961 Act which, inter alia, brings in the TDS provisions*

contained in Chapter XVII-B. In fact, if a particular income falls outside sec.4(1) then the TDS provisions cannot come in." (Underline by us).

From the above two decisions of the Supreme Court, it is abundantly clear that sec.195 will be applicable only if the payment made to the non-resident is chargeable to tax. Let us revert to the case of Transmission Corporation (supra). In that case, the argument of the assessee was that sec.195 would be applicable only if the whole of the payment constitutes income chargeable to tax. This argument of the assessee is on page 591 of 239 ITR. The Supreme Court negatived this argument. At page 594 of the report, the Supreme Court observed that the scheme of tax deduction at source applies not only to the amount paid which wholly bears "income" character such as salaries, dividends, interest on securities, etc., but also to gross sums, the whole of which may not be income or profits of the recipient, such as payments to contractors and sub-contractors and the payment of insurance commission. It further observed that a receipt may contain a fraction of the sum as taxable income, but in other cases such as interest, commission, transfer of rights of patents, goodwill or drawings for plant and machinery and such other transactions, it may contain a large sum as taxable income under the provisions of the Act. Whatever may be the position, if the income is from profits and gains of business, it would be computed under the Act as provided at the time of regular assessment. The purpose of sub-section (1) of sec.195 is to see that the sum which is chargeable under sec.4 of the Act for levy and collection of income-tax, the payer should deduct income-tax thereon at the rates in force, if the amount is to be paid to a non-

resident. Thus, the reply of the Supreme Court has to be considered in the light of the assessee's contention that sec.195 is applicable only when whole of the payment is income chargeable to tax. According to our understanding, what the court meant is that even if a fraction of income is embedded in the total payment, sec.195(1) will apply and tax will have to be deducted at source. This observation of the Court is based on the interpretation of sub-section (2). Sub-section (2) provides that if the payer "considers that the whole of such sum would not be income chargeable in the case of the recipient,.....", the payer may make application for deduction of tax at appropriate rates. The expression "the whole of such sum would not be income chargeable", is to be understood as –

* that only part of such sum has income character,
  and it is not to be understood to mean -
* that the entire payment is without income character.

If the payer fails to make an application under sec.195(2), then the payer will have to deduct tax from the entire payment. We repeat, that this ruling of the Supreme Court is applicable only where the entire payment bears income character and also where part of the payment bears income character. To put it differently, if the payer has a bona fide belief that no part of the payment has income character, then sec.195(1) will not apply because as we have observed earlier, sec.195 will apply only if the payment is chargeable to income-tax, either wholly or partly.

25. We now take up the discussion with regard to sub-sections (2) and (3) of sec.195 together. In para 24 above, on the basis of the judgment in the case of Transmission

Corporation (supra), it is observed that where only a part of the payment bears income character, the payer may make an application under sec.195(2) for deduction of tax at appropriate rates. This is the purport of sub-section (2). Sub-section (3) is materially different from sub-section (2) in two ways. Firstly, under sub-section (2), it is the payer who applies to the Assessing Officer for deduction of tax at lower rates. Under sub-section (3), it is the payee who makes an application to the Assessing Officer. The second and the more important difference between the two sub-sections is that under sub-section (2), the payer can make application only for deduction of tax at a lower rate, whereas under sub-section (3), the payee can make application to receive the payment without any deduction of tax. The question that arises is that why it is only the payee who can make an application to receive payment without deduction of tax and why not the payer can make an application to make payment without deduction of tax. The reply is very obvious that when the payer has a bona fide belief that no part of the payment bears income character, sec.195(1) itself would be inapplicable and hence no question of going into the procedure prescribed in sec.195(2) of the Act. Sub-section (3) is enacted to deal with a situation where the payer wants to deduct tax from the payment but the payee believes that he is not chargeable to tax in respect of that payment and hence, sub-section (3) provides an opportunity to the payee to seek approval to receive the payment without deduction of tax.

26. A pertinent question was raised by the ld. D.R. as to who decides whether the payment bears any income character or not. In his view, it could be either the

Assessing Officer or a Chartered Accountant as prescribed by the Board, but certainly not the assessee (the payer). The role of the Chartered Accountant comes into play in the alternative procedure prescribed by the Board and to which we shall advert to it a little later. However, we are not in agreement with the ld. D.R. that the assessee (i.e. the payer) has no role to play. The Income-tax Act is enacted to levy taxes on income earned by a person. It is the statutory obligation of the person earning income to prepare his tax return, determine his tax liability, pay the same and furnish the return. He also pays tax in advance during the financial year as he earns income. All these obligations are on the person earning the income and he is to fulfill these obligations according to his understanding of the various provisions of the Act. The question is, if he is expected to know what income is taxable or not taxable in his own case, why can't he decide in respect of the payment he is making to non-resident. It is to be appreciated that the payer has not to determine the tax liability of the total income of the payee. He has to consider the chargeability only in respect of the payment he is making to the payee. Further, sub-section (2) states, "Where the person responsible for paying (emphasis supplied) any such sum chargeable under this Act to a non-resident considers (emphasis supplied) that the whole of such sum would not be income chargeable in the case of the recipient,..." (emphasis supplied). Consider the words which are underlined by us. They clearly indicate that it is the payer who will first consider whether the payment or any part of it bears income character. Therefore, in our view, it is the payer who is the first person to decide whether the payment he is making bears any income character or

not. Now we can visualise various situations that can arise for the applicability of sec.195:

(a) If the bona fide belief is that no part of the payment has any portion chargeable to tax, sec.195 would be totally inapplicable.
(b) If the payer believes that whole of the payment is income chargeable to tax, he will be liable to deduct tax under sec.195(1) of the Act.
(c) If he believes that only a part of the payment is chargeable to tax, he can apply under sec.195(2) for deduction at appropriate rates.
(d) If the payer believes that a part of the payment is income chargeable to tax, and does not make an application under sec.195(2), he will have to deduct tax from the entire payment.
(e) If the payer believes that the entire payment or a part of it is income chargeable to tax and fails to deduct tax at source, he will face all the consequences under the Act.
(f) If the payer believes that he has to deduct tax and expresses this duty of his to the payee, it is for the payee then to apply under sec.195(3) to receive the payment without any deduction at source.
(g) If the payee fails to obtain certificate under sec.195(3), the payer, based on his belief will certainly withhold the tax.

Thus, in our opinion, these are the various situations which one can visualise for the application of the entire provision of sec.195. The above discussion goes to show that in case of a bona fide belief by the payer that no part of the payment bears income character, it is not mandatory for him to undergo the procedure of sec.195(2) before making any payment to a non-resident.

27. Having visualised the various situations, let us consider the fallout of each situation and how the interests of both, the tax payer as well as the tax collector are safe-guarded under the Act.

(a) If the bona fide belief of the payer is that no part of the payment has any portion chargeable to tax, he will not enter into any procedure under sec.195. However, if the department is of the view that the payer ought to have deducted tax at source, it will have recourse under sec.201 of the Act. Thus, here the interest of the revenue is protected. In the proceedings under sec.201, the Assessing Officer will determine the portion chargeable to tax according to the provisions of the Act and determine the tax payable by the payer. The Assessing Officer is bound to determine the income chargeable to tax in accordance with the provisions of the Act for two reasons. Firstly, because it is the mandate of the Supreme Court in the case of Transmission Corporation (supra) as observed at page 595 of 239 ITR. Secondly, the Delhi High Court has held in the case of D.D.A. Vs. ITO (230 ITR 9) that an order passed under sec.201(1) is an assessment order and the said decision has been affirmed by the Supreme Court in 252 ITR 772. In any case, the liability of the payer cannot exceed that of the payee. And if the payer is dissatisfied with the order under sec.201, he will have recourse to appeal against the said order. Thus, interests of both the parties are protected.

(b) If the payer believes that whole of the payment is chargeable to tax and if he deducts and pays the tax, no problem arises.

(c) If the payer believes that only a part of the payment is chargeable to tax, he can apply under sec.195(2) for

deduction at appropriate rates and act accordingly. No interest is jeopardised.

(d) If the payer believes that a part of the payment is income chargeable to tax, and does not make an application under sec.195(2), he will have to deduct tax from the entire payment. This is the mandate of the judgment in the case of Transmission Corporation (supra) and the relevant observation is on page 595 of the report. Thus, the interest of the revenue stands protected.

(e) If the payer believes that the entire payment or a part of it is income chargeable to tax and fails to deduct tax at source, he will face all the consequences under the Act. The consequences can be the raising of demand under sec.201, disallowance under sec.40(a)(i), penalty, prosecution etc. The interest of the revenue stands protected.

(f) If the payee wants to receive the payment without deduction of tax, he can apply for a certificate to that effect under sec.195(3) and if he gets the certificate, no one is adversely affected.

(g) If the payee fails to get the certificate, he will have to receive payment net of tax. No interest is jeopardised.

Thus, in all the possible situations described above, the interests of all the parties are protected. Further, one cannot lose sight of one underlying principle in the above processes that the entire exercise is tentative as has been held in the case of Transmission Corporation (supra). From the above discussion, one important point we are trying to drive home is that if the payer is under a bona fide belief that no part of the payment is chargeable to tax, he will have the right to defend that belief in the proceedings under sec.201 of the Act. Number of such proceedings have taken place and have

been adjudicated upon by various High Courts as well as by the Supreme Court. To repeat, the payer is an assessee under the Act and the order under sec.201 is an assessment order. Therefore, the payer has the right to get his liability determined as per the provisions of the Act despite the entire exercise being tentative in nature. The ultimate result would depend on what is determined in the assessment of the recipient. The ultimate result in the case of the recipient will determine whether the payer can be treated as an assessee in default or not. Yet, the entire tentative exercise described above may have to be undergone. This has been held in a recent decision (so far unreported) of the Delhi High Court in the case of Van Oord ACZ India (P) Ltd. (ITA No.439 of 2008) decided on 15.3.2010.

28. We now come to the alternative procedure prescribed by the Board. Let us first consider the origin of the alternative procedure. This procedure was first announced by the Board by its circular No.759 dated 18.11.1997. First two paragraphs of the said circular are relevant and we reproduce the same below :

> *"1. Section 195 of the Income-tax Act, 1961, provides that <u>any person responsible for paying to a non-resident any sum chargeable under the Act</u> shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by cheque or draft or any other mode, whichever is earlier, deduct income-tax thereon at the rates in force. (Underline by us).*

> *2. The Reserve Bank of India have provided in their Office Manual that no remittance shall be allowed unless a No Objection Certificate has been obtained from the Income-tax Department. It has since been decided that henceforth remittances may be allowed by the Reserve Bank of India without insisting upon a No Objection Certificate from the Income-tax Department and on the person making the remittance furnishing an undertaking (in duplicate) addressed to the Assessing Officer accompanied by a certificate from an accountant (other than an employee) as defined in the Explanation below section 288 of the Income-tax Act, 1961, in the form annexed to this circular. The person making the remittance shall submit the undertaking along with the said certificate of the accountant to the Reserve Bank of India, who in turn shall forward a copy thereof to the Assessing Officer." (Underline by us).*

Two important aspects are noteworthy in the above circular. Firstly, in the first paragraph the Board confirms that the payer has to deduct tax at source only when he is paying any sum chargeable under the Act. Secondly, it was the Office Manual of RBI which compelled the payer to obtain a No Objection Certificate from the department. The Board must have appreciated the difficulty faced by the remitters that even where the sums paid to the non-resident were not chargeable under the Act, the RBI Manual compelled the remitter to obtain the No Objection Certificate. To mitigate this hardship, the Board evolved the procedure of filing an undertaking by the remitter and a certificate obtained from a

Chartered Accountant. Considering the circumstances in the background of which the procedure was evolved, it is clear indication that as per Board's interpretation also, the payer need not enter into the procedure of sec.195 if no part of the payment was chargeable to tax. Again, it needs to be appreciated that the procedure prescribed is only to comply with the provisions of the RBI Manual and not that of the statute because statutory compliance would be necessary only when the entire payment or a part of it is chargeable to tax under the Act. Therefore, there is no gainsaying that the payer ought to undergo the procedure of sec.195 irrespective of the fact whether the payment is chargeable to tax or not. The fact that the procedure of obtaining C.A. Certificate is alternative to the procedure under sec.195(2) is clear from what is stated in paragraph 4 of circular 767 dated 22.5.1998 which is reproduced below :

> *"4. It is also clarified that Circular No.759 will cover those remittances for which the Reserve Bank of India has prescribed the production of a no objection certificate from the income-tax authorities under its Exchange Control Manual. Further, if an order under section 195(2) has been obtained by a person responsible for reducing tax, the new procedure of filing an undertaking along with a certificate prescribed in Circular No.759 would not be applicable."*

29. The undertaking to be furnished by the payer and the format of the C.A. Certificate were amended by the Board by its circular No.10/2002 dated 9.10.2002. Considering the amendments made, it is interesting to note that it covers any

type of payment, viz., be it purely capital, or revenue in nature but exempt either under the Act or the relevant DTAA or payments bearing pure income character. So far as the undertaking by the assessee is concerned, except for some more details, the substantial requirement remains the same as it was in the earlier undertaking. However, the Certificate to be given by the C.A. has been made more elaborate. It is elaborate almost to the extent of determining whether the sum paid is chargeable to tax or not. It covers remittances for royalties, fees for technical services etc. It also covers remittance for supply of articles or things, computer software and so on. It also necessitates an enquiry whether the beneficiary of the remittance has a permanent establishment (PE) in India or not and the remittance attributable to such PE. Column No.8 in the certificate is with regard to business income and asks a question, amongst others, whether it is liable to tax in India or not, and if not, the reasons thereof. Finally, column No.9 requires the C.A. to state the reasons for non-deduction of tax at source if no tax is deducted. The new format of the C.A. Certificate clearly establishes the legal position of sec.195 that the payer need not undergo the procedure of sec.195 at all if he is of the bona fide belief that no part of the payment is chargeable to tax in India. If at all the payer believes that the entire payment is chargeable to tax, he has to deduct tax at source under sec.195(1) of the Act. If he is of the bona fide belief that only part of the payment is chargeable to tax, he may apply for deduction at appropriate rates under sec.195(2) of the Act. We just mentioned above that the payer need not undergo the procedure of sec.195 at all if he is of the bona fide belief that no part of the payment is chargeable to tax. In this situation, the payer has the option to furnish the undertaking

and the C.A. Certificate. He may also furnish these documents in case the tax is deducted at lower rates. However, we may clarify that in our considered view, if the payer has a bona fide belief that no part of the payment is chargeable under the Act, -

(a) he may not undergo the procedure under sec.195 at all and,
(b) he may not furnish the C.A. Certificate also except for complying with the RBI Manual for the purpose of making remittance.

This is so because, as mentioned earlier, the undertaking and the C.A. Certificate are not the conditions of the statute but are only for the purpose of complying with the RBI Manual. It may be noted that even in the absence of an undertaking by the payer, the department will have the power under the Act to proceed against the payer if later it is found that the payment made was chargeable to tax. The payer in that event will face all the consequences under the Act depending on the fact whether entire payment was chargeable or only a part of it was chargeable.

30. From the details to be furnished in the C.A. Certificate, it is evident that the payer, through his Chartered Accountant, would be almost determining whether the payment is chargeable to tax or not. Since the undertaking is to be furnished to the Assessing Officer having jurisdiction over the remitter, he too would be making almost an assessment about the chargeability of the payment made by the payer. Of course, this entire exercise, both by the payer as well as by the Assessing Officer would be tentative in nature. However, if the Assessing Officer comes to the

conclusion that the payment or a part of it is chargeable to tax, it will culminate into an order under sec.201 of the Act. It is noteworthy that because of the exercise that precedes the making of the order under sec.201 of the Act, the Supreme Court has held it to be an assessment order. And since quite an intense exercise precedes the order under sec.201, the payer has every reason to be aggrieved if the order is adverse to him and hence the same is appealable under sec.246A of the Act. We may repeat that whatever may be the final outcome of the proceedings under sec.201, the ultimate liability of the assessee including the consequences provided under sec.40(a)(i) would depend on the assessment in the case of the payee. This is the ratio laid down by the Delhi High Court in Van Oord ACZ India (P) Ltd. referred to by us earlier in paragraph 27. This is so far as the alternative procedure is concerned.

31. We now refer to certain judicial pronouncements cited at the Bar. Though scores of decisions have been cited by the appellant and the interveners, we shall be referring only to a few of them. In the case of Vijay Ship Breaking Corporation vs. CIT (314 ITR 309), the question before the Supreme Court was whether usance interest partakes the character of purchase price and therefore TDS is not deductible. Of course, when the Supreme Court delivered its judgment, the Act had been amended by adding Explanation 2 to sec.10(15)(iv)(c) exempting the said income from Indian Taxation. Nonetheless, the court did observe that since tax was not assessable in India, there was no question of TDS being deducted by the assessee. It has been argued by the department that since the TDS provisions are tentative in nature, and hence not prejudicial

to the interests of the payer, it is mandatory for the latter to undertake the exercise under sec.195 of the Act. In this connection, the Supreme Court has held in the case of Bhawani Cotton Mills Ltd. vs. State of Punjab (AIR 1967 SC 1616) that if a person is not liable for payment of tax at all, at any time, the collection of tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid; because, if particular sale or purchase are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax. In the case of CIT vs. Manager, State Bank of India (13 DTR [Raj] 294), the Rajasthan High Court held that when interest income received by the depositors under TDR/STDR are not subject to tax as per sec.10(15)(iv)(fa), the question of deduction of tax at source does not arise. Bombay High Court has held in the case of CIT vs. Cooper Engineering Ltd. (68 ITR 457) that unless any payment of interest is such that that interest is chargeable under the Act, the liability upon the person responsible for paying it to deduct the tax at source is not there. In the case of CIT vs. Wesman Engineering Co. Pvt. Ltd. (188 ITR 327), it was argued on behalf of the department that under sec.248, a person could deny his liability to make deduction of tax at source but there was no power to determine the quantum and to say as to what extent the said remittance will be taxed. The Supreme Court negatived this argument and held that once an appeal has been preferred to the AAC on the matter of liability of the company to deduct taxes, the AAC is well within his competence to pass an order on the quantum also. This judgment takes care of the argument of the department

made before us also that the payer cannot challenge on merits the order under sec.201 of the Act.

32. The department has relied mainly on the judgment in the case of Transmission Corporation (supra) and of the Karnataka High Court in the case of Samsung Electronics (supra). The former has been dealt with by us elaborately in the earlier part of the order. So far as Samsung Electronics is concerned, there are other judgments of the same High Court to the contrary. In the case of Jindal Thermal Power Co. Ltd. vs. DCIT (225 CTR 220), the Karnataka High Court after referring to the judgment in the case of Transmission Corporation (supra) stated that the decision does not lay down that the person who is obliged to effect TDS under sec.195 has no right to question the assessment of tax liability. The conjoint reading of sections 195, 201 read with sec.246(1)(i) and 248 makes it clear that Jindal as a payer has every right to question the tax liability of its payee to avoid the vicarious consequences. Therefore, the contention that Jindal has no right of appeal is to be rejected. In the case of CIT vs. Infosys Technologies Ltd. (293 ITR 146), the Karnataka High Court held that the stock option did not amount to perquisite and did not come under "salary" and hence the order under sec.201(1) was not valid. In the case of ACIT vs. Motor Industries Co. (249 ITR 141), the Karnataka High Court held that the assessee was not obliged to deduct tax at source in respect of the amounts credited to the suspense account in its books of account as at that point of time the collaboration agreement was not in force.

33. Only two decisions of the jurisdictional High Court have been cited before us. One is in the case of CIT vs. India Pistons Ltd. (282 ITR 632). In that case, the Assessing

Officer had disallowed interest paid on foreign bills under sec.40(a)(i) on the ground that no TDS was deducted. The High Court gave a finding that since the amount was not a loan and the amount of interest paid was not interest on loan, deduction of tax at source is not attracted. The second decision is in the case of Areva T & D India Ltd. vs. ITO (299 ITR 76). This matter arose from the order of the Tribunal in ITA No.408/Mds/04 dated 15.5.2007. In this decision the Tribunal held that it is not open for a person while making payments to a non-resident to take unilateral decision that the payments made by him are the sum "not chargeable to tax". It also observed that it was sine qua non to have the concurrence of the Assessing Officer as provided in sec.195(2) of the Act. On the submission of the assessee, the High Court observed that though the terms of contract between the assessee and the non-resident payee were placed on record, Tribunal failed to consider the same and accordingly remanded the matter to the Tribunal for fresh decision. Thus, it can be seen that there is no direct decision of the jurisdictional High Court on the issue which is before the Special Bench in this case. The scene, therefore, before us is that there are certain Supreme Court judgments on the issue and quite a number of non-jurisdictional High Court decisions. The unequivocal view of the Supreme Court in all its judgments is that sec.4 cannot be delinked from sec.195 and that the latter provision will apply only if the payment made to the non-resident bears income character, either wholly or in part. This is also the view of several High Courts including that of the Karnataka High Court in its decisions prior to the judgment in the case of Samsung Electronics (supra). The predicament before us, therefore, is similar to the one faced by the Special Bench (Del) in the case of

Lalsons Enterprises vs. DCIT (89 ITD 25). The Special Bench has provided excellent guidance as to how a lower Tribunal should deal with such a situation. We cannot resist the temptation to reproduce those words of wisdom contained in paragraph 14 of the order. They are as follows :

> *"The general argument (raised by all the learned counsel and learned representatives for the assessees and interveners) that there is no direct judgment of the Delhi High Court on the issue (in fact, on all the three issues before us) which is binding on the Special Bench sitting at Delhi and hence, we are free to take a view different from the view taken by other High Courts puts us in considerable predicament as it cannot be postulated at all that a lower Court or Tribunal can take a view inconsistent with or unguided by a judgment of a superior Court or Tribunal, albeit of a different State, in the absente of any judgment of the jurisdictional High Court on the point. The golden rule of interpretation of taxing statutes that where two reasonable views are possible, the view in favour of the taxpayer must be adopted is a simple rule which could be followed by a Division Bench of the Tribunal when confronted with judgments of High Courts other than those of the jurisdictional High Court, but that rule may not always work effectively when a Special Bench is constituted to decide the issue, for, if the*

Special Bench is merely to adopt the rule the same can be done with equal ease by a Division Bench also and a reference to a Special Bench can turn into an academic exercise. Therefore, there is a duty cast on the Special Bench to examine the issue in the light of the various views expressed by the High Courts of other States and take guidance from them with utmost respect and humility. But even so, such an examination can cover only a limited sphere, for, as already pointed out, no lower Tribunal can afford to take the weight of the judgments of High Courts, though of different States, lightly and proceed to consider the entire issue afresh, as if for the first time, in a spirit of judicial adventurism. Perforce, the enquiry into the problem will have to be circumscribed by the parameters of judicial decorum, discipline and propriety. But the problem gets compounded because any attempt at a solution to the questions posed before the Special Bench, which are concluded one way or the other by judgments of High Courts of other States (States other than the State where the Special Bench is sitting), would necessarily involve the making of a conscious choice to follow one view or the other which in turn involves the giving of reasons for the choice. The Special Bench is thus placed in a somewhat tricky position where it must act

with great circumspection and responsibility. The reasons given for making the choice and the language used should not be adventuristic or attempt to cross the frontiers that are never to be crossed. The Special Bench has to guard against any such tendency. However, having been constituted it has to decide the issue, taking guidance from the judgments and giving cogent and acceptable reasons, tempered with judicial dignity, discipline and decorum and without crossing the well-demarcated frontiers, if it feels judicially inclined to prefer one decision over the other. For instance, if the provisions of law considered in those judgments were different, or if there has been an amendment of the law thereafter, or if the judgment was rendered per incuriam without reference to earlier judgments of the Supreme Court or binding judgments of the same High Court, or if the facts of the case or the context or the controversy were different, or if the correct legal position does not appear to have been brought to the notice of the Court-in such cases (which are only illustrative) it is only by explaining the judgments properly and by giving reasons as to why it prefers one judgment over the other that the Special Bench has to come to one or the other conclusion. We felt the need to make these observations because in this case we have preferred the view taken by

the Bombay High Court in deciding the first question, though a contrary view has been expressed by the Kerala High Court which is in favour of the assessee, and in doing so have departed from the rule that if there are two views possible the view in favour of the taxpayer must be adopted."

Keeping the above guidance in view we have chosen not to follow the decision in the case of Samsung Electronics (supra). Further, in substance we have followed the Supreme Court judgments discussed above and also the other High Court judgments discussed earlier. As mentioned in the case of Lalsons (supra), even the Division Benches could have followed those decisions. However, being conscious of the fact that this is a Special Bench, we have tried to examine and explain the issue in the light of various views expressed by various High Courts and have taken guidance from them with respect and humility. In our examination of the various views, we found it necessary to explain the practical application of the principles laid down by the superior Courts. Two specific issues, in our opinion, required such explanation. One issue is as to who decides whether the payment made to the non-resident is chargeable to tax or not. Based on the language used in sec.195(2) (explained by us in paragraph 26) and on the basis of the principles laid down by the superior Courts we have come to the conclusion that at the first instance it is the payer who decides whether the payment has any income character or not. The second issue is whether the payer can enter into an exercise which almost amounts to determining the tax liability of the payee which further entails action on the part of the Assessing

Officer to enter into the said exercise. On the basis of the alternative procedure (explained by us in paragraph 29) and on the basis of various judgments, we have come to the conclusion that the assessee and the Assessing Officer both may enter into such an exercise.

34. While we are almost approaching the end of this order, we cannot lose sight of another order on the issue by an earlier Special Bench in the case of Mahindra & Mahindra Ltd. vs. DCIT reported in 313 ITR (AT) 263. As a matter of fact, we have largely followed the findings given therein. We have not in any manner deviated from the principles laid down therein. At the most, as mentioned earlier we may have only explained them as to how the provisions would operate practically. The findings which we have followed are, firstly, that the order under sec.201(1) is to be treated as an order of assessment or atleast akin to the assessment order. In the case of Mahindra & Mahindra (supra), this finding is given at paragraph 16.5 of the order. At paragraph 18.4, the Special Bench has held that if the amount paid or payable to the non-resident is not chargeable to tax under the regular provisions of this Act or such amount is not taxable by virtue of the provisions of DTAA, then the provisions of Chapter XVII about the collection and recovery of tax are ruled out and the person responsible for paying such sum cannot be fastened with any liability for deduction of tax at source and cannot under any circumstance be treated as assessee in default. Based on this conclusion, we have held that it is the payer who is the first person to decide whether the payment or a part of it is taxable or not. Also on this basis, we have concluded that if the payer holds a bona fide opinion that no part of the payment bears income

character, he need not enter into the arena of sec.195 at all. A question may arise as to why the decision of the Special Bench is preferred over the judgment of the Karnataka High Court in the case of Samsung Electronics (supra). This situation has been explained by the Ahmedabad Bench of the Tribunal in a Third Member decision in the case of Kanel Oil & Export Industries Ltd. (121 ITD 596). In that case, the Tribunal was confronted with a Special Bench decision and a decision of a non-jurisdictional High Court. The Third Member observed that simple answer would be to follow the judgment of the High Court, though not of the jurisdictional High Court, on the ground that it is above the Tribunal in the judicial hierarchy. However, the Third Member took note of two exceptions to this simple view. One is that when there are several decisions of non-jurisdictional High Courts expressing contrary views, it has been recognised that the Tribunal is free to choose to adopt that view which appeals to it. Following this principle, the Ahmedabad Bench in the case of Chandulal Venichand (38 ITD 138), which was also cited before us chose the decision of a particular High Court because it appealed to them the most. The second exception mentioned by the Third Member is when a judgment is rendered per incuriam. In the present case, as mentioned earlier, we do not have any direct decision of the jurisdictional High Court. Amongst the non-jurisdictional High Courts, we have contrary decisions from Karnataka High Court itself. Since the decisions rendered by the said High Court rendered prior to the decision in Samsung Electronics (supra) appeal to us more, we have tried to follow the same. Moreover, from the judgment in the case of Samsung Electronics (supra), it appears that perhaps the alternative procedure was not brought to the notice of the

Court. Since the conclusion in the case of Mahindra & Mahindra (supra) that the provisions of Chapter XVII are ruled out if the payment is not chargeable to tax, is in consonance with the alternative procedure, we have held that the assessee and the Assessing Officer may have to enter into the exercise of determining the tax liability of the non-resident to a limited extent. We need not reiterate that this entire exercise is tentative and the ultimate liability of the payer will depend on as to what happens in the assessment of the payee. We also need to state very emphatically that when the payer is of the view that no part of the payment bears income character, such a view has to be bona fide. If the bona fides are doubtful, the payer will have to face all the consequences under the Act.

35. In the final analysis, our answer to the question placed before us is that if the assessee has not applied to the Assessing Officer under sec.195(2) for deduction of tax at a lower or nil rate of tax under a bona fide belief that no part of the payment made to the non-resident is chargeable to tax, then he is not under any statutory obligation to deduct tax at source on any part of the payment.

36. We may now deal with the issue on merits in the appeal before us. Of course, the question referred to the Special Bench is worded in general terms and the order of the Hon'ble President also does not contain a specific direction to dispose of the appeal on merits. However, such a specific direction is not necessary particularly when there is a single ground of appeal pertaining to the question referred to the Special Bench. In the case of National Thermal Power vs. IAC (24 ITD 1)(SB), an objection was raised by the ld. D.R. about the question framed for the consideration of the

larger Bench viz., it was different from the assessee's ground of appeal No.2 which merely stated that the sum of Rs.1,07,29,848/- was not income at all. He submitted that in that ground there was neither any reference to there being no surplus fund nor to the taxability of interest income under the head "Income from other sources". The Special Bench consisting of five Members held that the objection of the ld. D.R. is based on a misunderstanding about the scope of the controversy which existed at the back of the brief ground of appeal. It further held as follows (page 10 of 24 ITD):

> *"The question referred for the consideration of the larger Bench highlights the various aspects including its factual background on which the assessee based its claim that the sum of Rs.1,07,29,848 was not income at all. The stand of the Revenue is also reflected in the question when reference is made to the assessability of the aforementioned amount under the head 'Income from other sources'. The question is framed in order to enable the possible interveners to understand the issue or the range of controversy going to be considered by the Special Bench, so that they could assist the Bench by placing their views on the issue concerned. However the entire appeal is open before the Special Bench, and is not confined to the question framed like a question of law framed and referred to the High Court u/s 256 of the Income-tax Act, 1961. We overrule the preliminary objections of the Revenue." (Underline by us).*

In the present case, the grievance of the department reflected in the grounds of appeal is covered by the question referred to the Special Bench. We have mentioned this fact in paragraph 2 of this order. Further, sec.255(3) also provides that the President may, for the disposal of any particular case, constitute a Special Bench consisting of three or more members. Therefore, in the light of the decision of the Special Bench in the case of National Thermal Power (supra) and also in the light of the statutory provision, we proceed to dispose of the appeal on merits.

37. The facts of the case are mentioned in paragraphs 3 and 4 of this order and hence are not repeated. The agreement entered into by the assessee with IMAX is very clear. The total purchase price for the system and the technology transfer fee is stated to be US$ 23,15,000. It also specifies that out of the above sum, US$ 13,65,000 are for the purchase of the system and US$ 9,50,000 is the fee for transfer of technology. Schedule C to the agreement is also very clear to point out that IMAX is to install the equipment, test it and also provide training for upto four projectionists. The Assessing Officer has mistaken these services to be as payment of technology transfer whereas they are auxiliary to the sale of the equipment. The department has not been able to show that these services are independent of the equipment. The maintenance agreement which provided for provision of variety of services and for which separate consideration was payable in the course of time was different from the main purchase agreement. However, the payment of US$ 9,02,500 is a part of the equipment price which includes the services of installation and training. Therefore, it follows that the said

sum of US$ 9,02,500 is not chargeable to tax in India and hence the assessee was justified in not deducting any tax at source. Accordingly, we uphold the order of the CIT (A) cancelling the demand raised by the Assessing Officer under sec.201(1) and 201(1A) of the Act.

38. In the result, the appeal of the department is dismissed.

39. We thank the learned Departmental Representatives as well as all the learned Counsel, both for the assessee and the interveners for their excellent assistance to the Bench.

The order was pronounced in the court on 9.4.2010.

Sd/-	Sd/-	Sd/-
(Hari Om Maratha)	(N.Barathvaja Sankar)	(Pradeep Parikh)
Judicial Member	Vice-President	Vice-President

Chennai,
Dated the 9th April,2010
mpo*

Copy to : Appellant/Respondent/CIT/CIT(A)/DR