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

R-67

\+ **ITA 106/2002**

DIRECTOR OF INCOME TAX ..... Appellant

versus

M/S ERICSSON COMMUNICATIONS LTD. ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Rohit Madan and Mr Zoheb Hossain.

For the Respondent : Mr M.S. Syali, Sr. Advocate with Mr Mayank Nagi & Mr Harkunal Singh.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

% O R D E R
04.09.2015

VIBHU BAKHRU, J

1. The Revenue has preferred this Appeal under Section 260A of the Income Tax Act, 1961 (hereafter the 'Act') against a common order dated 14th December, 2001 passed by the Income Tax Appellate Tribunal (hereafter 'Tribunal') in ITA No. 4494 & 4495/Del/2000, whereby the appeals preferred by the Assessee against the order dated 26th September, 2000 of the Commissioner of Income Tax (Appeals) [hereafter 'CIT(A)']

confirming the demands made by the Assessing Officer (hereafter 'AO') under Sections 201(1) and Section 201(1A) of the Act, were allowed.

2. The controversy in the present appeals relates to the obligation of the Assessee to deduct tax at source (hereafter 'TAS') in respect of the amount of Rs.2,24,96,669/- credited to the account of Telefonaktiebolaget L.M. Ericsson, Sweden (hereafter 'TLME') in the books of the Assessee. The said amount was credited on account of royalty payable; however, the said entry was subsequently reversed, as according to the Assessee, the payment of royalty to TLME was not permissible as per the Industrial policy in force at the material time. Admittedly, no part of the amount in question was ever paid by the Assessee to TLME. According to the Revenue, the fact that such amount had been credited in the books by the Assessee, itself gave rise to an obligation for the Assessee to deduct TAS on such amount as the same represented the accrual of income. This is stoutly disputed by the Assessee. The Assessee contends that in the given facts, no income chargeable to tax accrued in the hands of TLME and, consequently, there was no default on the part of the Assessee to not deduct TAS.

3. The present appeal was admitted and this Court framed the following questions of law on 1st February, 2005:-

> "1. Whether the Tribunal was right in law in holding that the agreement dated 1.1.1997 between the assessee and M/s. L.M. Ericsson, Sweden for payment of royalty is contrary to public policy and void under Section 23 of the Contract Act, 1972 and therefore the order and demand under Section 201 and interest levied under Section 201 (1A) of the Income Tax Act, 1961 are liable to e set aside and deleted?
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> 2. Whether the Tribunal was right in law in holding that the assessee was not liable to deduct TDS under Section 195 of the Income Tax Act, 1961 on 18.8.1998 when it credited a sum of Rs.2,24,96,669/- to the account of M/s. L.M. Ericsson on account of royalty?"

4. We have heard the learned counsel for the parties.

5. In our view, for the reasons stated hereafter, it is not necessary to decide the question whether the contract between the Assessee and TLME was void under Section 23 of the Contract Act, 1882 and it would suffice to address the issue - whether in the given circumstances, the Assessee could be considered to be in default of its obligation to deduct TAS under Section 195 of the Act. The said issue has been articulated in the second question framed by this Court, which is answered hereafter.

6. Briefly stated, the facts necessary to consider the controversy are as under:-

6.1 The Assessee is engaged in the business of installation and commissioning of telecom projects and information technology systems relating thereto. The Assessee is a wholly owned subsidiary of TLME, which is a company incorporated under the laws of Sweden and has its principal place of business situated in Sweden. The Assessee was incorporated in India pursuant to the approval granted by the Government of India, Ministry of Industry on 5th February, 1996.

6.2 The Assessee entered into a "Corporate Visual Identity Agreement" with its holding company TLME on 1st January, 1997 for use of TLME's Trademark 'Ericsson'. In terms of the said agreement, the Assessee was obliged to pay royalty @1% of the total sales to TLME, for use of the trademark 'Ericsson'. In order to account for the royalty payable under the aforesaid agreement, the Assessee passed an entry in the books of accounts debiting 'Royalty Account' and crediting 'Accrued Expenses Account' for a sum of Rs.2,24,96,669/-. On 18th August, 1998, the Assessee passed another entry in its books transferring the credit balance standing in the Accrued Expenses Account to the account of TLME, thereby crediting TLME's Account in the ledger maintained by the Assessee. The Assessee neither deducted nor paid any TAS in respect of the amount credited to the account

of TLME. On 9th October, 1998, a survey under Section 133A of the Act was conducted on the premises of the Assessee and it was noted that the Assessee had not deducted TAS in respect of the aforementioned amount credited to the account of TLME maintained by the Assessee in its books.

6.3 Subsequently, on 17th December, 1998, the Assessee reversed the entries passed in its books of accounts by debiting the account of TLME and crediting Royalty Account; the entries passed earlier were, thus, nullified.

6.4 The AO passed an order dated 2nd March, 2000 under Section 201(1) of the Act holding that the Assessee had defaulted in deducting TAS on the amount of royalty credited by the Assessee to the account of TLME. According to the AO, TAS was deductable at the rate of 48% and, therefore, the Assessee was obliged to deduct a sum of Rs.1,07,98,401/ as TAS and deposit the same with the Income Tax Authorities. The Assessee's contention that no royalty was payable in terms of the prevalent industrial policy of the Government of India and, therefore, no income chargeable to tax under the Act accrued to TLME, was rejected. The AO also passed another order dated 7th March, 2000 directing the Assessee to pay interest of Rs.39,14,420/- under Section 201(1) of the Act. Subsequently, on 16th

March, 2000, the AO rectified the aforementioned orders by passing an order under Section 154 of the Act. According to the Indo-Sweden Double Taxation Avoidance Agreement, the withholding tax rates on royalty was specified as 20%. The AO in the said order dated 16th March, 2000 took note of the same and recomputed the Assessee's liability under Section 201(1) of the Act at Rs.44,99,334/- (being 20% of Rs.2,24,96,669/-). Consequently, the interest payable under Section 201(1A) was also recomputed at Rs.16,31,000/-.

6.5 The Assessee preferred appeals before the CIT(A) against the orders passed by the AO but was unsuccessful. By an order dated 26th September, 2000, the CIT(A) confirmed the orders passed by the AO and held that in terms of the agreement entered into between the Assessee and TLME, income had accrued in the hands of TLME and this attracted withholding tax obligations (i.e. deduction of TAS) under Section 195 of the Act.

6.6 The Assessee carried the common order passed by the CIT(A) dated 26th September, 2000 in appeal before the Tribunal. The Tribunal upheld the contention of the Assessee and held that there was no accrual of income on account of Royalty in the hands of TLME, which resulted in an obligation

on the part of the Assessee to deduct any TAS. The Tribunal accepted the Assessee's contention that its Agreement with TLME was void under Section 23 of the Contract Act, 1882 and did not result in any enforceable debt in the hands of the TLME. The Tribunal's aforesaid order is impugned in this Appeal.

7. Mr Rohit Madan, learned counsel appearing for the Revenue referred to Section 195 of the Act and submitted that the obligation to deduct TAS under that section is not contingent on the payment being made and the payer is required to deduct TAS even on the amounts being credited in its books of accounts. He emphasised that in the present case, the Assessee had, on 18th August, 1998, credited TLME's Account for royalty payable to TLME under the agreement dated 1st January, 1997 and on such entry being passed by the Assessee, its obligation to deduct TAS crystallized. He further submitted that the question whether the amount credited included any element of income or not was not to be determined by the Assessee. He relied upon the judgment of the Supreme Court in ***Transmission Corporation of AP Ltd. v. CIT, (1999) 239 ITR 587*** in support of his contention.

8. Mr Madan had further contended that the issue whether the Agreement dated 1st January, 1997 was void or not, was not relevant. He urged that the payment of income tax is not contingent on the validity of agreements and even payments made under void agreements are chargeable to tax under the Act.

9. Countering the aforesaid contentions, Mr Syali, learned Senior Counsel appearing on behalf of the Assessee, contended that the arguments on behalf of the Revenue proceeded on an erroneous assumption that any payment on account of Royalty had been made to TLME. He submitted that the entries passed by the Assessee in its books of accounts had been reversed as the Assessee had been denied the permission to remit any royalty to its holding company. He submitted that at the material time, the industrial policy of the Government of India did not permit payment of royalty by a wholly owned subsidiary to its holding company. He referred to a letter dated 11th July, 2000 issued by the Government of India to the Assessee, clarifying the above position. He submitted that the aforesaid policy was reviewed and by a Press Note issued by the Government of India [Press Note No. 9 (2000 series)], the payment of royalty within the limit specified was permitted with effect from 8th September, 2000. He contended that in

the circumstances, there was no accrual of income and consequently, obligation of withholding tax was not applicable.

Analysis and Reasoning

10. Before proceeding further, it would be relevant to refer to Section 195 of the Act, which reads as under:-

> "(1) Any person responsible for paying to a non- resident, not being a company, or to a foreign company, any interest (not being interest on securities) 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.
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> *Explanation 1*—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.

Explanation 2—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(*i*) a residence or place of business or business connection in India; or
(*ii*) any other presence in any manner whatsoever in India.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than interest on securities, and 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 subsection, 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).”

11. A plain reading of Section 195(1) of the Act indicates that any person responsible for paying any interest or any sum chargeable to tax under the Act is obliged to deduct TAS at the time of credit of such income to the Account of the non-resident/foreign company or at the time of making payment thereto, whichever is earlier. In view of the plain language of Section 195(1) of the Act, there can be no dispute that the obligation of a payer to deduct TAS arises when the amounts payable are credited into the accounts of the payee, even if the same is credited prior to making the payment thereto. However, this obligation is contingent on the amount credited being chargeable to tax under the provisions of the Act. Thus, all sums credited/paid are not to be subjected to withholding tax and the provisions of Section 195(1) of the Act are only applicable where the sums in question – either credited to the account of the intended recipient or actually paid – are chargeable to tax under the Act.

12. In the present case, the Assessee stoutly disputes that any income chargeable to tax arose or accrued in relation to or as a result of the entries in question, passed by the Assessee in its books of accounts. It is necessary to bear in mind that the provisions of Section 195 of the Act fall in Chapter XVII of the Act, which relates to collection and recovery of tax. The

machinery sections of collection and recovery of tax cannot be read in isolation of the charging provisions. By virtue of Section 4 of the Act, income tax is chargeable on the total income of a person computed in accordance with the provisions of the Act. Section 5 of the Act defines the scope of total income. By virtue of Section 5(1) of the Act, the total income of a non-resident would include income, which is received or deemed to be received in India or deemed to accrue or arise in India. Section 9 of the Act defines the scope of income deemed to accrue or arise in India. Section 195 of the Act which is a part of the machinery provisions for collection of tax would, therefore, be applicable only in respect of a total income of a non-resident which falls within the scope of Section 5(2) of the Act. Reading the language of Section 195(1) of the Act in the aforesaid perspective, it is clear that credit of any amount to the account of a non-resident or foreign company, maintained in the books of the payer, would be subject to withholding tax only if credit of such amount reflects accrued income in the hands of the payee, which is chargeable to tax under the Act.

13. The Supreme Court in the case of ***GE India Technology Centre P. Ltd. v. Commissioner of Income Tax and Another (2010) 327 ITR 456 (SC)*** explained the statutory scheme as under:-

"One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in section 195. For example, section 194C casts an obligation to deduct TAS in respect of" any sum paid to any resident". Similarly, sections 194EE and 194F, inter alia, provide for deduction of tax in respect of "any amount" referred to in the specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in section 195(1). Therefore, this court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the Income-tax Officer (TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, section 195 has to be read in conformity with the charging provisions, i.e., sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in section 195(1). The fact that the Revenue has not obtained any information per se cannot be a ground to construe section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that no mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from section 195(1). While interpreting a section one

> has to give weightage to every word used in that section. While interpreting the provisions of the Income-tax Act one cannot read the charging sections of that Act de hors the machinery sections. The Act is to be read as an integrated code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of CIT v. Eli Lilly and Co.(India)(P.) Ltd. [2009] 312 ITR 225 the provisions for deduction of TAS which are in Chapter XVII dealing with collection of taxes and the charging provisions of the Income-tax Act from one single integral, inseparable code and, therefore, the provisions relating to TDS apply only to those sums which are "chargeable to tax" under the Income tax Act. It is true that the judgment in Eli Lilly [2009] 312 ITR 225 was similarity between the two. If one looks at section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly, section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under the provisions of the Act", which expression, as stated above, do not find place in other sections of Chapter XVII. It is in this sense that we hold that the Income-tax Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the Income-tax Act.

14. It is also necessary to understand that once tax has been deducted by any person, he has an obligation to deposit the same with the Income Tax Authorities. Such amount is treated by the Authorities as tax paid to the credit of the person whose account is credited. The payer ceases to have any control over the said amount deducted and deposited with the Income Tax Authorities and cannot seek refund of the TAS deducted and deposited with

the Authorities. It is only the payee who can interact with the Income Tax Authorities (for the purposes of adjusting or seeking a refund) in respect of such amount deposited in its favour.

15. The rationale for imposing an obligation to deduct TAS on a credit entry being passed by a payer in favour of payee, is that such entry represents an acknowledgement of debt by a payer in favour of a payee; the debt acknowledged is in respect of an income that has accrued in favour of the payee; and such income is exigible to tax under the Act. Once a payer has unequivocally acknowledged the debt payable by crediting the account of payee in its books or has actually paid the same (whichever is earlier), the provisions of Chapter XVII of the Act relating to deducting TAS and depositing with the Income Tax Authorities are triggered and not otherwise.

16. It is also necessary that the question whether a transaction results in an obligation to deduct TAS, be viewed from the standpoint of the payer and not from the standpoint of a person claiming any amount from the payee. Thus, if a debt owed by a person is not acknowledged as payable, there would be no obligation to withhold or deposit any tax. The obligation imposed on a person to deduct TAS and deposit the same with the

Authorities is an obligation similar in nature to the directions in garnishee proceedings where the person obliged to deduct TAS stands as a garnishee and Income Tax Authorities stand as a garnisher; there cannot be an obligations to pay, where the debt allegedly payable is disputed by a garnishee.

17. To summarise the above, the obligation of a person to deduct TAS under Section 195(1) of the Act would arise only if the following conditions are met:-

(a) The payer owes a sum to the non-resident (not being a company) or a foreign company on account of interest or any other sum chargeable to tax under the Act; and

(b) Such sum is acknowledged as a debt payable by the person to the non-resident/foreign company by crediting the account of such non-resident/foreign company or is paid to non-resident/ foreign company.

18. Now applying the aforesaid principles to the facts of the present case, it is apparent that the Assessee has, in no uncertain terms, denied any

obligation for payment of royalty to its holding company in respect of or a period prior to 8th September, 2000 [i.e. the date of issuance of Press Note (2000 series) by the Government of India]. The entries passed by the Assessee in its books of accounts were indisputably reversed and consequently its effect nullified. The Assessee has also not charged the amount of royalty for the relevant period as an expense in its books. This is in conformity with the Assessee's view that no amount was payable to TLME during the period in question. There is also no allegation that this position asserted by the Assessee is not *bona fide*; it is not the case of the Revenue that nullifying the entries passed by the Assessee is a subterfuge to avoid any obligation.

19. The Assessee had provided an explanation for the reversal of entries relating to royalty in its books by referring to the industrial policy issued by the Government of India. The Guidelines issued by the Ministry of Industry (Department of Industrial Policy and Promotion) for considering Foreign Direct Investment (FDI) proposals by Foreign Investment Promotion Board (FIPB), *inter alia*, expressly provide as under:-

> "6. The Board should examine the following while considering proposals submitted to it for consideration.

xxxx xxxx xxxx xxxx xxxx

(ii) whether the proposal involves technical collaboration and if so (a) the source and nature of technology sought to be transferred, (b) terms of payment (payment of royalty by 100% subsidiaries is not permitted)."

20. By a letter dated 28th June, 2000 addressed to the Under Secretary, FIPB, the Assessee had also sought a clarification whether it could proceed to pay royalty payment to its holding company as there was no restriction to do so, which was imposed under the letter of approval dated 5th February, 1996 granted by the FIPB. In response to the Assessee's aforesaid letter dated 20th June, 2000, the Under Secretary, Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion sent a letter dated 11th July, 2000 the relevant extract of which reads as under:-

"I am directed to refer to your letter dated 28.6.2000 on the above mentioned subject and to clarify that neither the FC approval dated 5.2.96 permits payment of royalty to the foreign collaborator nor does the extant policy provide for royalty payment to the parent foreign collaborator by the Indian wholly owned subsidiary."

21. The Assessee had not contested the above position and had accepted that no royalty was to be payable by the Assessee to TLME at the relevant time. The Assessee having accepted the above position that no royalty was payable had also not charged the same as an expense in its books and as indicated earlier, the entries passed for payment of royalty has been reversed. Indisputably, the Assessee neither paid royalty during the period nor reflected the same as payable. In such circumstances, it is difficult to accept that there was any income chargeable to tax which had accrued in favour of TLME. In any view, the Assessee cannot be held to have acknowledged the same by crediting the account of TLME, as admittedly, that entry had been reversed.

22. In our view, mere passing of the book entries, which are reversed, would not give rise to an obligation to deduct TAS by the Assessee, as clearly, there is no debt that can be said to be acknowledged by the Assessee. Imposition of an obligation to deduct TAS in these circumstances would amount to enforcing payments from one person towards a tax liability of another, even where the person does not does not acknowledge that any sum is payable. This, in our view, is contrary to the scheme of provisions relating to collection of TAS under the Act.

23. It is also not disputed that TLME had not claimed royalty payable from the Assessee and, concededly, no royalty for the period has been paid either. In the circumstances, we are unable to accept that any income had accrued or arisen or deemed to have accrued or arisen, which is chargeable to tax in the hands of TLME. It is not disputed that the agreement dated 1st January, 1997 was not acted upon at the material time. In the absence of any income chargeable to tax arising on account of royalty in the hands of TLME at the material time, the question of withholding TAS would not arise.

24. In our view, reliance placed by the Revenue on the decision of ***Transmission Corporation of AP Ltd.*** *(supra)* is wholly misplaced. In that case, the Supreme Court had clarified that where payments of any amount(s) on account of trade payables (i.e. payments in the nature of Revenue) were made, the payer was obliged to deduct tax at the relevant rates on the entire amount paid and it was not open for the payer to deduct TAS at a lower amount on the ground that the income embedded in the payments made would be lower than the amounts paid. The Supreme Court had explained that it was not open for the payer to *suo moto* take a decision as to the quantum of income embedded in the payments and withhold tax

accordingly. And, the question of the quantum of income embedded in the receipts would be determined, subsequently in the assessment proceedings with respect to the payee. The Supreme Court had also noted that in the case where the Assessee had contended that a lower TDS should be deducted, it would be open for the payer to make an application to the AO under the provisions of Section 195(2) of the Act, to determine an appropriate proportion of payment chargeable to tax. This decision of the Supreme Court is not an authority for the proposition that TAS has to be deducted and paid where there is neither any payment nor any acknowledgement of debt which reflects any accrual of income chargeable to tax or in cases where no income accrues or arises which is chargeable to tax under the Act.

25. It is not disputed that TLME also did not claim the aforesaid amount of royalty in question and no such amount had in fact been paid. Thus, where the parties by their understanding and conduct are *ad-idem* that no liability to pay any amount arises, it would not be open for the Revenue to insist on collection of any tax. In the case of ***Commissioner of Income Tax, Bombay City I v. M/s Shoorji Vallabhdas & Co. 46 ITR 144*** the Supreme Court had considered the case where the Assessee firm was a managing

agent of *inter alia* two shipping companies and as per its agreements with the concerned shipping companies, was entitled to managing commission @10% of the freight charged and entries for the same had also been passed in the books of accounts. The Assessee floated two private companies and desired that the said private companies be substituted as managing agents in its place. In this background one of the shipping companies managed by the Assessee received a letter from two of its shareholders, who objected to the quantum of management agency commission being charged by the Assessee. In this context, the Assessee was invited to make an offer to reduce the commission charged. The Assessee agreed for reduction in the agency commission in order to put the concerned managed companies on a firm financial footing and at the Extraordinary General Body Meeting of the managed companies held subsequently, the private companies floated by the assessee were accepted as the managing agents in place of the Assessee. The Income Tax Officer as well as the Appellate Assistant Commissioner had concluded that larger commission had accrued during the relevant period and was thus assessable to tax. The Tribunal accepted the Assessee's contention and held that the income on account of larger commission had neither accrued nor was paid to the Assessee and, thus, was not chargeable

to tax. The Bombay High Court agreed with the Tribunal, however, certified the case as fit under Section 66A(2) of the Income Tax Act, 1961, to be considered by the Supreme Court. The Supreme Court referred to the earlier decision of the Bombay High Court in ***Commissioner of Income Tax v. Chamanlal Mangaldas & Co.*** **(1956) 29 ITR 987,** which was approved by the Supreme Court in ***Commissioner of Income Tax v. Chamanlal Mangaldas & Co.*** **(1960) 39 ITR 8** and held as under: -

> ".....Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a "hypothetical income", which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account. This is exactly what has happened in this court. Here too, the agreements within the previous year replaced the earlier agreements, and altered the rate in such a way as to make the income different from what had been entered in the books of account. A mere book-keeping entry cannot be income, unless income has actually resulted, and in the present case, by the change of the terms the income which accrued and was received consisted of the lesser amounts and not the larger. This was not a gift by the assessee firm to the managed companies. The reduction was a part of the agreement entered into by the assessee firm to secure a long-

> term managing agency arrangement for the two companies which it had floated."

26. In view of the aforesaid, we are of the view that the Assessee was not obliged to deduct tax at source. Accordingly, the question of law is answered in favour of the Assessee and against the Revenue and the appeal is dismissed.

27. In the circumstances, parties are left to bear their own costs.

VIBHU BAKHRU, J

S. MURALIDHAR, J

SEPTEMBER 04, 2015
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