आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

सर्वश्री राजेन्द्र, लेखा सदस्य एवं संजय गर्ग ,न्यायिक सदस्य

Before S/Shri Rajendra, A.M. and Sanjay Garg,J.M.

आयकर अपील सं./ITA No.3303/Mum/2012, निर्धारण वर्ष /Assessment Year: 2009-10

ITO-(TDS)-2(2) Room No.707, Income tax Office Smt. K.G. Mittal Ayurvedic Hospital Charni Road, Mumbai.	Vs.	Kuwait Airways Corporation 902, Nariman Bhavan, 9th Floor Nariman Point, Mumbai-400 021. **PAN: AABCK 1636 Q**

(अपीलार्थी **/Appellant**) (प्रत्यर्थी / **Respondent**)

प्रत्याक्षेप/C.O. No.209/Mum/2015

Kuwait Airways Corporation Mumbai-21.	Vs.	ITO-(TDS)-2(2) Mumbai.

प्रत्याक्षेपक(Cross Objector) (प्रत्यर्थी / **Respondent**)

Revenue by: Shri Pavan Kumar Beerla

Assessee by: S/Shri G.N. Gupta & Abhijit Roy

सुनवाई की तारीख **/ Date of Hearing: 18.01.2017**

घोषणा की तारीख / **Date of Pronouncement: 15.02.2017**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य,राजेन्द्र के अनुसार -Per Rajendra,AM:

Challenging the order,dated 02/01/2013,of the CIT(A)-20,Mumbai the Assessing Officer (AO)has filed the present appeal.The assessee has filed cross objections.Assessee-company is an international airline engaged in the business of passenger and cargo transportation.

Brief Facts:

2.A survey operation under section 133A was carried out at the business premises of the assessee on 25/02/2010.During the survey proceedings,it was noticed that the assessee had paid an amount of Rs.78.50 lakhs without deducting any tax to five of its ex-employees during the year under consideration.The AO issued a show cause notice to the assessee asking it as to why it should not be treated as an assessee in default(A-I-D),as per the provisions of section 201(1) and 201 (1A) of the Act. After considering the explanation of the assessee, he held that payment made to the five employees were there legitimate dues, that same had to be treated as profit in view of salary, that the amount was assessable under the head income from salary, that tax was required to be directed by the assessee as per the provisions of section 192 of the Act.Vide his order dated 02/07/2010, he held that the assessee an A-I-D and raised the demand of Rs. 32, 00, 725/-[Rs. 25.60 lakhs as tax under section 201 (1)+ interest of Ruby 6.40 lakhs under section 201 (1A)].

3.Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority(FAA).Before him, it was stated that 69 employees were retrenched on 25/10/2001, that the issue had arisen with regard to payment made to five persons out of the group of 69 ex-employees, that settlement had taken place with all the ex-employees,who were retrenched,above a decade back,that full retrenchment compensation, gratuity, leaves salary and all other due employment benefits were paid all the 69 ex-employees at the time of their retrenchment/ secession of employment,that tax was deducted at source on payment of the dues, that the employees raised and Industrial Dispute before the Central Government Industrial Tribunal (CGIT),Mumbai, that the dispute was decided in their favour as per the Award dated 30/12/2002, that a writ petition was filed by the assessee before the honorable Bombay High Court, that out of the group of 69 employees five employees approached the assessee for an out of court settlement,that these employees had reached superannuation age and were not desirous of seeking reinstatement,that an amicable settlement was arrived at with those employees, that Memorandum of Settlement was signed on 17/07/2006 at New Delhi with the Regional Manager that the memorandum was without the prior approval of the head office in Kuwait, that in the memorandum the ex-employees had agreed that they would be liable to pay their own individual taxes as per applicable law and no liability would accrue to the assessee for the same, that they also agreed to give up all their claims monetary/ non-monetary against the assessee and not to file any other claim/proceedings of civil/ criminal nature,that the head office of the assessee did not approve the memorandum,that same was not acted upon, that the ex-employees filed an application before the Regional Labour Commissioner (RLC)under section 33-C (1) of the Industrial Dispute Act, 1947, that the matter travelled to honorable Bombay High Court, that vide its order dated 08/01/2008 the honorable court directed the RLC to decide the matter on merits, that the ex-employees in their reply before the RLC stated that the assessee would deduct taxes at source and would pay to the income tax Department, that they further stated that they were entitled to the net amount (after tax deducted at source), that vide his order dated 02/04/ 2008 the RLC decided the issue in favour of the ex-employees and issue a recovery certificate to the Collector Mumbai city for recovery of Rs. 78.50 lakhs as arrears of land revenue, that the amount in question was forcibly recovered from the assessee from its bank account,that the assessee had not made any payment to the ex-employees directly, that provisions of section 201 (1) were not attracted to the payments made to the ex-employees, that there had been no failure on part of the assessee to deduct tax in accordance with the provisions of section 192 (1A) of the Act, the assessee could not be treated as an A-I-D, that the amount paid to the ex-employees was

capital compensation, that employees had already been effectively discharged from service, that they were paid the amounts after the withdrawal of their case/petition of any claim for retrenchment,that the payment was in consideration of their withdrawing/concluding litigations pending between them and the assessee, that the payments were not in the nature of salary or profit in view of salary, that there was no servant must relationship between the recipient of the amount and the assessee, that the AO had wrongly held that RLC had adjudicated the dues of ex-employees, that every receipt did not constitute income. It relied upon several case laws.

3.1. After considering the available material,the FAA held that the settlement with the ex-employees had taken place without the prior approval of the head office, that the assessee did not act upon the settlement, that the ex-employees approached the various judicial forums, that whole of the amount were forcibly recovered from the assessee,that the ex-employees arm twisted the assessee to recover their compensation as per the settlement arrived at, that their actions and commitments had not been consistent with regard to their tax liability, that initially they had claimed that they were entitled to the net amount, that they agreed that they would be liable to pay their own individual tax as per the applicable law and no liability would accrue to the assessee for the same,that the ex-employees had received the full amount of the compensation without deduction of tax, that they had become liable for payment of taxes on the payments received from the assessee, that the assessee had been taken for a ride by the ex-employees so far as the payment/deduction of tax on compensation received by them was concerned. The F AA refer to the provisions of section 192 of the Act and held that as per the provisions of the section the persons making payment are required to deduct tax at source only if they make payment under the head salaries,that in the case under consideration the assessee had not made any payment to the five ex-employees, that the money had been recovered from the assessee forcibly, that it had,in the month of April,2010.intimated the Additional CIT Range-26, Mumbai about the payment made to 5 ex-employees in term of the memorandum of settlement, that it had furnished the PAN.s to the Addl.CIT.The F AA made enquiries with the officers of Range 26. He was informed that assessment in all the five cases for the AY.2009-10 had been completed and the compensation received by the concerned individuals had been brought to tax,that no credit for tax deducted at source had been given to the ex-employees as they had not produced any certificate about deducting the tax at source, that the tax liability raised against the ex-employees had been discharged by them,that the out of court settlement could not be said to be related with their past services,that the assessee was under bona fide belief that payment made to the ex-employees was in nature of capital

compensation and that same was not taxable in the hands of recipients, that the provisions of section 201(1) and 201 (1A) of the Act were not applicable,that the demand raised by the AO was not justified. He deleted the entire demand consisting of tax and the interest and allowed the appeal of the assessee.

4.During the course of hearing before us, the Authorised Representative (AR) argued that the assessee had dismissed 69 employees,that out of them 5 entered into an agreement with the assessee, that the matter travelled up to Hon'ble Bombay High Court,that money was forcibly recovered by the land revenue authorities,that the ex-employees had paid the taxes.He referred to page No.42-44 of the paper book and relied upon the cases of Arun Bhai R. Naik (379ITR511),Captain,H.C.Dhanda(76ITR404)and Shyam Sundar Chhaparia (305ITR 181). The Departmental Representative (DR) supported the order of the AO.

5.We have heard the rival submissions and perused the material before us.We find that the assessee had retrenched 59 employees,that there was a lot of litigation between the both the parties i.e.employer and the employees,that five ex-employees,who were nearing their superannuation age,entered in to an agreement with the Regional office of the assessee,that the HO did not approve the agreement,that in the agreement the employees had agreed to pay taxes if they were paid their dues,that matter travelled up to Hon'ble Bombay High Court,that in pursuance of the judgment of the Hon'ble Court RLC ordered recovery of dues,that the Collector attached the bank account of the assessee and recovered the amount,that there was no occasion for the it to deduct the taxes,that the employees had paid taxes on the amounts received from the assessee ,that by the time FAA was deciding the appeal assessment of the ex-employees was also over,that there is a substantial time gap between the retrenchment and the attachment of the bank account of the assessee.Here,two things are noticeable first the assessee had not made any payment to its ex-employees.Section 17(3)(iii)of the Act pre-supposes the existence of an employment i.e.,a relationship of employee and employer between the assessee and the person who makes the payment of "any amount" in terms of section 17(3)(iii)of the Act.So,the words in section 17(3)(iii) cannot be read disjunctively to overlook the essential facet of the provision,the existence of employment i. e.,a relationship of employer and employee between the person who makes the payment of the amount and the assessee.In the case before us,the essential fact is missing.There was no employer-employee relationship between the assessee and the ex-employees.Secondly the ex-employees had paid the due taxes on the disputed amount.The assessee had claimed that it was under the bonafide belief that the amount received by the ex-employees was capital receipt.

5.1. Here,we would like to refer to the case of Arun Bhai R Naik(supra).Facts of the case were that the assessee was discharged from his service.Against the order of termination, he preferred an appeal to the higher authority in the company but did not succeed. On a writ petition challenging the discharge, the single judge held that (i) the employer was State within the meaning of article 12 of the Constitution, and (ii) the order of discharge was by way of a punishment and the assessee was entitled to reinstatement of his services. During the pendency of the appeal preferred by the employer against the order of the single judge, the assessee and the employer arrived at a settlement, in terms whereof, the amount was to be computed in the manner stated therein and was to be paid to the assessee. The Division Bench held that the employer was not State or authority under article 12. However, the court recorded the agreement arrived at between the parties and disposed of the appeal in terms of the agreement.The assessee's claim that the payment of Rs. 3,51,308 was a capital receipt was not accepted by the AO and the amount was added to the total income. The FAA held that the amount received by the assessee was not taxable and deleted the addition made by the Assessing Officer. The Tribunal held that the payment was not in the nature of an ex gratia payment or without there being any obligation on the part of the employer as claimed by the assessee. The payment was taxable within the meaning of section 17(3) which provides for inclusion of compensation received by an assessee from his employer or former employer at or in connection with the termination of his employment, as it could not be said that the payment received by the assessee was without any connection with the termination of his employment.Reversing the order of the Tribunal the Hon'ble Gujarat High court has held that amount paid in terms of the settlement,without there being any obligation on the part of the employer to pay any further amount to the assessee in terms of the service rules,would not take the character of compensation as envisaged under section 17(3)(i)of the Act. It further observed that the employer,voluntarily at its discretion,agreed to pay the amount to the assessee ***with a view to bring an end to the litigation***,that there was no obligation cast upon the employer to make such payment,that the amount would,therefore,not fall within the ambit of the expression profits in lieu of salary,as contemplated under section 17(3)(i).

5.2. It is said that under clause (i) of section 17(3) of the Act, in order to characterise a particular payment received from the employer, on termination of the employment, as "profits in lieu of salary", it has necessarily to be shown that this amount is due or received as "compensation". The word "compensation" is not defined under the Act. Therefore, one has to take into consideration the ordinary connotation of this expression in common parlance. It

has to be in the nature of something awarded to compensate for loss,suffering or injury. When translated in the context of employment, it would imply a monetary and non-monetary amount to be given to the employee in return for some services rendered by him. Inherent in this would be the obligation of the employer to pay some amount to the employee to "compensate" him.It would also mean that the employee gets a vested right to get such an amount.In the case under consideration there the ex employee did not get vested right to receive the amounts in question.A settlement was arrived at to avoid litigation-there was no obligation on part of the employer to pay some amount to the employees to compensate them.

5.3. Considering the peculiar facts and circumstances of the case, and relying upon the case of Arun Bhai R Naik(supra),we are of the opinion that the order of the FAA does not suffer from any legal or factual infirmity and that the assessee could not be treated A-I-D.So, upholding his order,we decide the effective ground of appeal against the AO.

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6.While deciding the appeal filed by the AO,we have held that assessee was not to be treated as A-I-D and that the payment did not constitute profits in lieu of salary.Considering the fact that the appeal filed by the AO has been dismissed and the issue raised by the assessee is related with the same issue,we allow the CO for statistical purposes.

As a result,appeal filed by the AO is dismissed and CO of the assessee is allowed statistically.
फलतः निर्धारिती अधिकारी की अपील नामंजूर की जाती है और निर्धारिती का प्रत्याक्षेप सांख्यिकी प्रयोजनों के लिए मंजूर किया जाता है.

Order pronounced in the open court on 15th February, 2017.
आदेश की घोषणा खुले न्यायालय में दिनांक 15 फरवरी, 2017 को की गई।

Sd/-	**Sd/-**
(संजय गर्ग /Sanjay Garg)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 15.02.2017.
Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR " A " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**