IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2505 OF 2012

Grasim Industries Ltd., Aditya Birla Centre, 'A' Wing, 2nd Fllor, S. K. Ahire Marg, Worli, Mumbai-400 030. ... **Petitioner**

Versus

1. Assistant Commissioner of Income Tax, 6(3), Room No.523, 5th floor, Ayakar Bhavan, M. K. Marg, Mumbai – 400 020.

2. Additional Commissioner of Income-tax, Range 6(3), Room NO.505, Ayakar Bhavan, Mumbai-400 020.

3. Commissioner of Income-tax-6, Room No.501, Ayakar Bhavan, M. K. Road, Mumbai-400 020.

4. Assistant Commissioner of Income-tax, Circle – 12(2), Room No. 123A, Ayakar Bhavan, M. K. Marg, Mumbai.

5. Commissioner of Income-tax-12, Room No.122, Ayakar Bhavan, M. K. Marg, Mumbai-400 020. ... **Respondents**

Mr. J. D. Mistri, Senior Advocate, with Madhur Agrawal & Fenil Bhatt, i/b. Atul K. Jasani, Advocate for Petitioner.

Mr. Akhileshwar Sharma, with Shipla Goel, Advocate for Respondents-Revenue.

CORAM : K. R. SHRIRAM & DR. N. K. GOKHALE, JJ.
DATED : 1st September 2023

ORAL JUDGMENT: (Per K. R. SHRIRAM, J)

1. Petitioner had set up a Gas-based Sponge Iron Plant in India for which it entered into a Foreign Technical Collaboration Agreement dated 22nd October 1989 ("**agreement**") with one M/s. Davy Mckee Corporation ("**DAVY**") and another party. Under the agreement, DAVY agreed to render to Petitioner outside India certain engineering and other related services in relation to the project. Petitioner also entered into another agreement (Supervisory Agreement) with DAVY to provide certain supervisory services to Petitioner in India. Under the agreement DAVY was to deliver to Petitioner the necessary design, drawing and data with respect to the Sponge Iron Plant outside India. DAVY also agreed to train outside India, certain number of employees of Petitioner in order to make available to such employees technical information, scientific knowledge, expertise, etc. for commissioning, operation and maintenance of the Plant.

2. Petitioner agreed to pay a sum of US $ 16,231,000/- net of Indian Income-tax, if any, leviable. In other words, it was agreed that if any withholding tax was required to be deducted, it will be borne by Petitioner and DAVY would be paid the net amount of US $ 16.23 millions.

3. Petitioner, by a letter dated 5th December 1989, sought from Assistant Commissioner of Income Tax ("**ACIT**"), Central Circle-I a 'No Objection Certificate' to facilitate remittance of the amount to DAVY without deduction of tax at source. Petitioner in its application informed the ACIT that the technical services specified in the agreement, having been rendered outside India and the fees required also to be paid outside India in foreign currency, the income embedded in the said fees accrues and arises to DAVY outside India. It was also stated that no operation involved in the execution of the said contract is to take place within India and no activity is to be carried on by DAVY for rendering the technical services in India. It was submitted that as the fees being received by DAVY are not taxable in India and no tax at source was required to be deducted out of the fees payable to DAVY, Petitioner, therefore, Petitioner was entitled to a No Objection Certificate for

remittance of the fees payable to DAVY under the agreement. ACIT, Central Circle-I vide order dated 5th December 1989 held that the amount payable to DAVY was taxable as income in India and Petitioner was required to deduct tax at source and deposit the tax so deducted with the Income Tax Department. The ACIT in fact recorded that "*I have no objection for remitting the amount provided you pay 30% tax in accordance with the provisions of Section 115A of the Income Tax (I.T.) Act, 1961*" Therefore, on 6th December 1989, Petitioner paid under protest a sum of Rs.2,73,73,084/- as withholding tax for the first instalment of payments to be made to DAVY. Petitioner made a further payment on 5th September 1990 of Rs.2,81,83,272/- under protest as withholding tax on the second instalment paid to DAVY.

It was Petitioner's stand that since withholding tax was borne by Petitioner and if the payment made to DAVY was held non-chargeable to tax, then Petitioner would be entitled to the refund of the same.

4. DAVY submitted its return of income for Assessment Year 1990-91 and Assessment Year 1991-92 on 31st March 1992 and

25th November 1992, respectively. Davy declared nil income for the consideration received by them under the agreement on the ground that the income received by DAVY from Petitioner neither accrues in India nor is received in India and hence not chargeable to tax in India. Assessment order dated 30th November 1992 for Assessment Year 1990-91 and 16th March 1993 for Assessment Year 1991-92 in the assessment of DAVY came to be passed whereby Respondent No.4-ACIT, Circle-12(2) held that the amount earned by DAVY under the agreement was chargeable to tax in India. Accordingly, the withholding tax that Petitioner paid was adjusted towards DAVY's tax liability.

5. DAVY challenged both the assessment orders before the Commissioner of Income Tax (Appeals). Thereafter, Petitioner, along with DAVY, filed Writ Petition No.448 of 1994 in this Court challenging the constitutional validity of the provisions of Section 9(1)(vii) of the Act, the assessment orders for Assessment Year 1990-91 and 1991-92 in the case of DAVY and the taxability of the amount received by DAVY under the agreement under Section 9(1)(vii) of the Act. By an order dated 5th May 2010, this Court was pleased to hold that the assessment orders passed by Respondents

No.4 and 5 subjecting the income received by DAVY from Petitioner under the agreement dated 22nd October 1989 was not correct and Respondents were directed to pass fresh assessment orders excluding the income received by DAVY by way of fees for technical services from Petitioner under the agreement.

6. By a letter dated 1st July 2010, Petitioner called upon Respondent No.1-ACIT, Circle 6(3) to pass an order giving effect to the order passed by this Court on 5th May 2010. Reminders were sent, but no action was forthcoming.

7. In the meanwhile, Kvaerner U.S. Inc., New Jersey, USA, which is the successor-in-interest to DAVY, by a letter dated 13th July 2012 addressed to Respondent No.1 and Respondent No.4, gave a 'no objection' to Petitioner receiving the refund in connection with the taxes paid by Petitioner under the said agreement. Copy of the same was also sent to Petitioner. On receipt of the copy of the said letter, Petitioner again wrote a reminder to Respondent No.1 with copy to Respondent No.2, Respondent No.4 and Additional CIT, Range 12(2), Mumbai,

bringing the 'no objection' letter to their notice and once again requesting them to give effect to the order of this Court.

8. Finally, by an order dated 24th August 2012, Respondent No.1 refused to give effect to the order of this Court holding that Petitioner was not entitled to the refund of withholding tax deposited by Petitioner as the same was on behalf of DAVY and, therefore, no effect can be given in the case of Petitioner.

9. Petitioner, therefore, had no option but to approach this Court by way of this Petition.

10. It is Petitioner's case that Respondents were not correct in holding that Petitioner was not entitled to refund of the tax deducted at source ("**TDS**") that Petitioner deposited under the agreement. According to Petitioner, as per the agreement, the withholding tax, if any, was to be borne by Petitioner and DAVY was entitled to receive the full amount. Petitioner has paid the full amount to DAVY and paid the withholding tax from its own pocket and hence it was only Petitioner who is entitled to the refund of TDS since this Court has already held that the amount received by

DAVY was not chargeable to income tax. It is Petitioner's case that it is not correct on the part of Respondents to hold that the TDS deposited by Petitioner was on behalf of DAVY as the amount of TDS is in addition to the full consideration under the agreement and the withholding tax liability was that of Petitioner. It is also Petitioner's case that the order giving effect to this Hon'ble Court's order should be passed in the case of DAVY, but the refund of TDS deposited should be given to Petitioner. Petitioner also submitted that in view of the 'no objection' given by DAVY to Petitioner to receive the refund from the Department, Department has to only accept the no objection from DAVY (through Kvaerner) and handover the refund amount to Petitioner.

11. Mr Mistri also submitted that Petitioner had jointly approached this Court with DAVY challenging the orders of assessment passed by Respondent No.4 and the order in appeal passed by CIT(A). He pointed out that this Court had already held that the income by way of fees for technical services paid by Petitioner to DAVY was not liable to income tax under the Act and the income received by DAVY cannot be deemed to have arisen or accrued in India because the services under the agreement were

not rendered within India. Mr. Mistri submitted that the consequence of the order would be that the income under the agreement would be excluded from the income of DAVY whereby it would become entitled to a refund of the tax deducted at source by Petitioner and if the amount is paid to DAVY, DAVY would remit such refund to Petitioner. Since DAVY is succeeded by Kvaerner and Kvaerner has issued its no objection to Respondents giving the refund amount to Petitioner, the tax ought to be paid to Petitioner.

In the alternative, since the amount receivable by DAVY under the agreement is not chargeable to tax in India, the directions to Petitioner by the order dated 5th December 1989 to deduct tax at source was not in accordance with law and, therefore, the amount so deducted and paid must be repaid to Petitioner.

12. Section 248 of the Act was amended by the Finance Bill 2007 which envisages and deals with a situation where refund could be made to the person by whom the income is payable and who has borne the withholding tax. The consequence of the provision is that once the appellant succeeds in the Appeal, the

Revenue Authorities have to proceed on the basis that Appellant did not have any obligation to make the impugned deduction of tax at source and the amount wrongly paid to Revenue would become refundable to Appellant, of course subject to the condition that person receiving the payment has not claimed credit for the same nor was it claiming credit for the same.

13. Admittedly, though in the original returns filed, refund was claimed, subsequently DAVY has not claimed any refund. Moreover, DAVY through its successor-in-interest Kvaerner has even given a 'no objection' to Respondents to refund the amount to Petitioner.

14. Mr. Sharma reiterated the various replies filed on behalf of Respondents.

Mr. Sharma also submitted; (a) Respondents have even addressed a notice to DAVY which was returned as undelivered. Mr. Mistri responded to this saying that a notice was addressed to Arthur Anderson & Co., the erstwhile Chartered Accountants of DAVY but Arthur Anderson & Co. itself has ceased to exist.

Respondents could have at least written to DAVY directly or asked Petitioner for the correct address; (b) When this Court disposed Writ Petition No. 448 of 1994, there was no specific direction to allow the refund amount to Petitioner; (c) It was only DAVY who is entitled to credit of the TDS deposited by Petitioner and there is no provision in law which permits Respondents to give benefit of an order passed in the case of one assessee to another assessee; (d) Since Petitioner had paid the tax as TDS on behalf of DAVY and DAVY in its return of income filed for AY 1990-91 and 1991-92 had claimed the credit of such TDS deposited by Petitioner on behalf of DAVY, Petitioner was not entitled to refund of the TDS deposited and, therefore, no effect could be given to the order of this Court in the case of Petitioner; (e) In accordance with Section 199 of the Act credit can only be given to DAVY; (f) The effect of the order of this Court can be given only in the case of DAVY and hence Respondents cannot refund the TDS deposited by Petitioner on behalf of DAVY to Petitioner as there is no provision in the Act for the same.

15. On 11th March 2014, when this Court was pleased to issue rule, the Court also passed an elaborate order. It will be useful to reproduce the said order which reads as under:

> *"1. Rule.*
>
> *2. By this petition under Article 226 of the Constitution of India, the Petitioner has challenged the order dated 24 August 2012 of Respondent no.1-Assistant Commissioner of Income Tax, 6(3), Mumbai declining to grant the Petitioner's claim for refund pursuant to the order dated 5 May 2010 passed by this Court in Writ Petition No.448 of 1994.*
>
> *3. Brief facts leading to filing of this petition are as under.*
>
> *(a) On 22 October 1989, the Petitioner entered into a Foreign Technical Collaboration for Basic Engineering and Training Agreement ('BEAT Agreement') with Davy Mckee Corporation ('Davy') to set up a gas based Sponge Iron Plant in India. In terms of the BEAT agreement, Davy was to deliver to the Petitioner the designs, drawings and data with respect to the Sponge Iron Plant outside India besides training certain number of employees of the Petitioner outside India for commissioning, operation and maintenance of the Sponge Iron Plant. For the above services, the Petitioner agreed to pay as consideration to Davy under the BEAT agreement a sum of US $ 16.23 Millions net of Indian Income-tax, if any, levible. In other words, if any withholding tax was required to be deducted, it will be born by the Petitioner and Davy would be paid the net amount of US $ 16.23 Millions;*
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> *(b) The Petitioner by a letter dated 5 December 1989 sought no objection certificate from the Respondents to remit the consideration payable to*

Davy under the BEAT agreement without deduction of tax at source. The Respondents did not accept the Petitioner's contention and by order dated 5 December 1989 directed the Petitioner to deduct tax at source on the amounts being remitted to Davy. Accordingly, the Petitioner initially paid tax of Rs.2,73,73,084/- on 6 December 1989 under protest as withholding tax for the first installment of payments to Davy. The Petitioner again on 5 September 1990 paid tax of Rs.2,81,83,272/- under protest as withholding tax on the second instalment of payment to Davy. These amounts were paid by the Petitioner over and above the total amount payable to Davy by Petitioner under BEAT agreement;

(c) In its return of income-tax for the A.Ys.1990-91 and 1991-92, Davy declared nil income as chargeable to tax in India. This was on the ground that the income received by Davy from the Petitioner under the BEAT Agreement head had not accrued in India. However, by assessment order dated 30 November 1992 for the A.Y. 1990-91 and by assessment order dated 16 March 1993 for the A.Y. 1991-92, the A.O. of Davy held that the amounts received by Davy under BEAT agreement were chargeable to tax in India. Accordingly, the withholding tax paid by the Petitioner was adjusted towards Davy's tax liability arising on account of Respondents holding that the receipt by Davy under the BEAT agreement is taxable in India;

(d) Aggrieved by the above assessment orders dated 30 November 1992 and 16 March 1993 respectively, Davy filed appeals before Commissioner of Income Tax (Appeals). We are informed that the Commissioner of Income Tax (Appeals) dismissed the appeals. The Petitioner and Davy thereafter filed Writ Petition No.448 of 1994 before this Court on 27 January 1994 challenging:

(i) the constitutional validity of the provisions of Section 9(1)(vii) of the Income Tax Act, 1961 ('the Act'); and

(ii) the assessment orders for the A.Ys.1990-91 and 1991-92 dated 30 November 1992 and 16 March 1993 respectively;

(e) At the hearing of Writ Petition No.448 of 1994, the challenge to the constitutional validity of Section 9(1)(vii) of the Act was not pressed but the Court adjudicated other controversites and rendered its judgment on 5 May 2010. The operative part of the judgment read as under:

"17. Examined on this test, the income received by the Petitioner no.2 cannot be deemed to have arisen or accrued in India because the services under the BEAT agreement were not rendered within India though the drawings, designs received from Petitioner no.2 may have been utilized by the Petitioner no.1 in India. The law requires both the conditions to be satisfied viz services rendered in India and utilized in India. For these reasons, we are of the view that the income by way of fees for technical services by the Petitioner is not liable to the Indian income tax under the Act. Consequently, petition is allowed and the assessment order made by the Respondent nos.2 and 3 in original or in appeal subjecting the income received by the Petitioner no.2 form Petitioner no.1 under the BEAT agreement dated 22 October 1989 to Indian income tax are quashed and set aside. The Respondents are directed to pass fresh orders excluding the income received by Petitioner no.2 by way of a fees for technical services from Petitioner no.1 under the BEAT agreement. Rule is made absolute in the extent indicated above."

(f) The present Petitioner was Petitioner no.1 while Davy was Petitioner no.2 in the Writ Petition No.448 of 1994. Post the above order dated 5 May 2010, the Petitioner herein time and again requested the Respondents to comply with the same and give effect to it. The Petitioner also submitted letter dated 13 July 2012 of Kvaerner U.S. Inc. addressed to the Respondents informing that Kvaerner U.S. Inc. is the successor in interest of Davy has no objection to Petitioner receiving the refund in connection with taxes paid relating to agreement dated 22 October 1989. The letter was signed by the President and General Counsel of Kvaerner U.S.Inc. Ultimately, by reply dated 24 August 2012, the Respondent no.1 herein informed the Petitioner as under:

> *"Sub: Order of Hon'ble Bombay High Court dt.05.05.10 in Writ Petition No.448 of 1994 in the case of Grasim Industries Ltd.-Regarding.*
>
> *Ref : Your letter dated 24.07.2012*
>
> *Kindly refer to your above mentioned letter wherein it is requested to pass order giving effect to the order of the High Court and release the refund of TDS. It is stated here that you have paid the tax as TDS on behalf of Davy and Davy, in its return of income filed for A.Ys.1990-91 and 1991-92 had claimed the credit of such TDS deposited by you on its behalf. In such circumstances, it is clear that you are not entitled for refund of the TDS deposited by you on behalf of Davy and no effect to the order of the Hon'ble High Court can be given in your case."*

4. Aggrieved by the above communication, Mr. Mistry, learned Senior Advocate appearing on behalf of the Petitioner submitted that the Petitioner had to pay the withholding tax under protest in view of the stand of Revenue in the order dated 5 December 1989 that the amount payable by the Petitioner to

Davy under BEAT agreement was taxable in India. This resulted in the Petitioner paying amounts aggregating Rs.5.54 crores to the Revenue out of its funds under protest, in December-1989 and in September-1990, as tax deducted at source. It is submitted that once this Court holds by order dated 5 May 2010 that the income by way of fees for technical services paid by the Petitioner to Davy under the BEAT Agreement was not liable to Indian Income Tax, then the amounts paid by the Petitioner out of its own funds as withholding tax, becomes refundable to the Petitioner. The counsel also invites our attention to the letter given by Kvaerner U.S. Inc. who is the successor in interest of Davy that it has no objection if the above amounts of the tax paid as tax deducted at source are paid to the Petitioner. It is submitted that under Clause 5.1 of the BEAT agreement between the Petitioner and Davy, it was specifically provided as under:

> *"5.1 TAXES, CHARGES AND DUTIES:*
>
> *… … … In the event that DAVY is able to obtain any tax credit in U.S.A. Or elsewhere in respect of tax paid in India as aforesaid by GRASIM, then DAVY shall refund to GRASIM an amount equivalent to such credit obtained. DAVY will provide GRASIM with a certificate issued by DAVY's auditors, of the amount so credited."*

In any case after the order of this Court dated 5 May 2010 quashing and setting aside the assessment orders, the Respondents were bound to pass fresh assessment orders excluding the amounts received by Davy by way of fees for technical services from Petitioner as its income under the BEAT agreement. However, the Respondents are not complying with the above directions of this Court only with a view to deprive the Petitioner of the funds legitimately due to them.

It is, therefore, submitted that the Petitioner has been deprived of its funds for about twenty five years and, therefore, this Court should direct the Respondents to refund the above amounts to the Petitioner with interest in accordance with law.

5. Mr. Mistry also placed reliance upon the Circular No.769 dated 6 August 1998 as also a subsequent Circular being Circular No.790 dated 20 April 2000 issued by CBDT substituting the earlier Circular No.769, dated 6 August 1998. However, it is submitted that the underlying principle even under the new Circular dated 20 April 2000 would apply in cases where ultimately it is found that no tax was payable by the foreign entity, the refund of the tax paid by the Indian enterprise as tax deducted at source should be given to the Indian enterprise. It is submitted that the Petitioner is, therefore, entitled to get the benefit of the said principle even if the present case may not strictly fall under the circular dated 20 April 2000.

6. On the other hand, the petition has been opposed by the learned counsel for Revenue relying upon submissions made in the affidavit-in-reply of Mr. Anil Gupta, Deputy Commissioner of Income Tax, Range 6(3). It is submitted that since tax was deducted at source at the relevant time on behalf of Davy in accordance with Section 199 of the Act, credit can only be given to Davy and the benefit of the order of this Court rendered on 5 May 2010 can only be given to Davy who had filed its return of income for the A.Y. 1990-91 and 1991-92. It is, therefore, submitted that the Petitioner cannot claim refund of tax deducted at source which was deposited by the Petitioner on behalf of Davy, as there is no provision in the Act for the same. Besides, attention of the Court was also invited to Section 195A of the Act. It is further stated that Davy has been assessed with ITO3(1)(4), Mumbai to whom the matter has been forwarded for taking necessary action. The said

officer had issued notice to Davy, however, Davy was not available at the address. It is submitted that the Petitioner has no locus standi to claim refund on behalf of Davy. Learned counsel for Respondents also places on record a copy of letter dated 30 December 2013 issued by ITO 3(1)(4) to Davy.

7. In rejoinder, learned counsel for Petitioner points out that the letter dated 30 December 2013 sent by ITO 3(1)(4) was sent on the following address:

> "To, The Principal Officer,
> Davy McKee Corporation,
> C/o.Arthur Anderson & Co;
> 66, Maker Towers, 'F',
> Cuffe Parade, Mumbai-400005"

It is submitted that Arthur Anderson & Co, was a Chartered Accountant's firm, and were Chartered Accountant of Davy. The said firm has been closed down in Mumbai and Davy had also merged with Kvaerner U,S, Inc. Hence, the Department has deliberately sent notice to an address which was not the address of Davy. The officer could have at the very least sent a notice to Davy at its address shown in the cause title of Writ Petition No.448 of 1994.

8. Having heard the learned counsel for parties, we are of the view that when this Court in its order dated 5 May 2010 specifically directed the Respondents to pass fresh assessment orders excluding the income received by Davy for providing technical services to Petitioner pursuant to BEAT agreement, the Respondents are duty bound to comply with the said direction. There appears to be some substance in the grievance made by the counsel for Petitioner that notice was sent to the address of Chartered Accountant of Davy which has been closed down and, therefore, the notice on Davy would never be served. In any case, the Respondents have not challenged the judgment and order dated 5 May

2010 in Writ Petition No.448 of 1994 rendered by this Court. We are, therefore, of the view that the Petitioner has made out a case for grant of interim relief.

9. By this interim order, we direct the ITO-3(1)(4) to pass a fresh assessment orders in case of Davy for the A.Ys. 1990-91 and 1991-92 after excluding the income received by Davy as fees for providing technical services to the Petitioner under BEAT agreement dated 22 October 1989. Thereafter the ITO-3(1)(4) i.e. the A.O. (according to Respondent) will pass consequential orders including refund, if any, in accordance with law.

10. As regards the question whether the Petitioner is entitled to get such refund, we do not express any opinion at this stage. However, we direct that if any amount deducted at source for the A.Ys.1990-91 and 1991-92 is required to be refunded to Davy pursuant to the judgment dated 5 May 2010 in Writ Petition No.448 of 1994 of this Court, the Respondents shall deposit the said amount along with interest in accordance with law in this Court. The Respondents shall carry out the above exercise by 30 April 2014.

11. Stand over to 15 May 2014."

16. The Department has given effect to the order dated 5th May 2010 passed by this Court in Writ Petition No. 448 of 1994. As directed by this Court in its order dated 11th March 2014 in this Petition, the Income Tax Department has arrived at net amount refundable as on 6th August 2014 at Rs.8,92,08,881/- for Assessment Year 1990-91 and Rs.8,67,76,753/- for Assessment Year 1991-92 and after deducting TDS of Rs.2,61,13,257/- for

Assessment Year 1990-91 and Rs.2,47,43,964/- for Assessment Year 1991-92, has deposited with the Prothonotary and Senior Master, High Court, Bombay, a sum of Rs.6,30,95,624/- and Rs.6,20,32,789/- for Assessment Years 1990-91 and 1991-92, respectively. These amounts have been invested by the Prothonotary and Senior Master in fixed deposit pursuant to an order dated 14th July 2014. The amount has continued to be invested in fixed deposit.

17. The indisputable position is that it has always been Petitioner's stand that the technical services specified under the agreement with DAVY was rendered outside India and the fees also were paid outside India in foreign exchange and the income imbedded in the said fees accrues and arises to DAVY outside India. There is no operation involved in the execution of the said agreement to take place within India. No activity was also carried out in India under the said agreement. The fees received by DAVY, therefore, are not taxable in India and consequently, no tax at source was required to be deducted out of the fees payable by Petitioner to DAVY. When Petitioner made these submissions and requested for issuance of a 'No Objection' Certificate by its letter

dated 5th December 1989, it was the ACIT, Central Circle-I, who insisted that no objection would be issued only if Petitioner deposited 30% of the amount to be remitted to DAVY. The agreement between Petitioner and DAVY was that US $ 16.23 millions were to be paid net of tax and withholding tax, if any, by Petitioner to DAVY and hence Petitioner had no option but to deposit the 30% extra under protest. Petitioner's stand was finally vindicated by an order passed by this Court on 5th May 2010 in Writ Petition No. 448 of 1994. Technically, even though the amount deposited by Petitioner would be called as 'tax deductible at source', what Petitioner paid was 'an *ad hoc* amount not technically a TDS amount'. Moreover, since it is also confirmed by this Court that the amount paid to DAVY was not chargeable to tax in India, Respondents' insistence on Petitioner paying that amount was not in accordance with law and the amount so paid over must be refunded to Petitioner.

18. In fact, in view of such problems faced by various parties, in our view, Section 248 of the Act was amended by the Finance Bill 2007 which envisages and deals with a situation where a refund could be made to the person by whom the income was payable

who has borne the withholding tax. Clause 63 of Notes on Clauses to Finance Bill 2007 reads as under:

> "*Cause 63 of the Bill seeks to substitute section 248 of the Income-tax Act relating to provision of appeal by a person denying liability to deduct tax.*
>
> *The provisions of section 248 lay down that where any person has deducted and paid tax in accordance with the provisions of sections 195 and 200 in respect of any sum chargeable under this Act, other than interest and who denies his liability to make such deductions, may make an appeal to the Commissioner (Appeals) to be declared not liable to make such deductions. In such situation claim of refund of tax deducted and paid, may be, by deductee as well as deductor.*
>
> *It is proposed to substitute section 248 so as to provide that where under an agreement or other arrangement, the tax deductible on any income, other than interest, under section 195 is to be borne by the person by whom the income is payable, and such person having paid such tax to the credit of the Central Government, claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income.*
>
> *It is therefore proposed to amend clause (a) of sub-section (2) of Section 249 providing that where the appeal is under section 248, the prescribed time shall be counted from the date of payment of tax.*
>
> *This amendment is consequential in nature and will take effect from 1st June, 2007.*"

19. The memorandum explaining the provisions in Finance Bill 2007 reads as under:

> "*Provision of appeal a person denying liability to deduce tax.*
>
> *Under the existing provisions of section 248, it is provided that where any person has deducted and paid tax in accordance with the provisions of section 195 and 200 in respect of any sum chargeable under the Act, other than interest and who denies his liability to make such deductions, may make an appeal to the Commissioner (Appeals) to be declared not liable to make such deductions.*
>
> *It is proposed to substitute section 248 so as to provide that where under an agreement or other arrangement, that tax deductible on any income other than interest, under section 195 is be borne by the person by whom the income is payable, and such person having paid such tax to the credit of the Central Government, claims that on tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income.*"

20. In our view, the consequence of the above provisions is that once the appellant succeeds in the Appeal, the Revenue Authorities must proceed on the basis that the Appellant did not have any obligation to make the payment. Thus the amount wrongly deducted or paid to the Revenue Authorities where it was not required to be paid would become refundable to Appellant. Of

course, that is subject to the condition that the person receiving the payment has not claimed credit for the same or is not claiming credit for the same.

21. It is indisputable that for the past over 13 years neither Kvaerner nor DAVY has claimed any amount from the Revenue Authorities under the issue at hand. Moreover, Kvaerner, who is the successor-in-interest of DAVY has also addressed its 'no objection' to Respondent No.1 conveying that the amount can be returned or refunded to Petitioner.

22. The Department had also issued two Circulars No. 769 dated 6th August 1998 and No. 790 dated 20th April 2000. Though Petitioner is not claiming any relief under those Circulars, these Circulars are also pointers to the effect that in appropriate cases Revenue Authorities must grant refund and/or return the sums collected without lawful authority, independent of the provisions of the Act.

The Central Board of Direct Taxes ("**CBDT**") issued a Circular No.7 of 2007 dated 23rd October 2007 highlighting further

problems regarding procedure for refund of tax deducted at source. Based on representation received from tax payers to take into account situations where genuine claim for refund arises to the person deducting tax at source from payment to the non-resident, the CBDT amended Circular No. 709 dated 20th April 2000. In Circular No.7 of 2007 dated 23rd October 2007, the CBDT was conscious of situation where non-resident may not apply for refund which would put the resident deductor to genuine hardship as he would not be able to deduct and deposit as tax. The Circular states that where no income has accrued to the non-resident due to cancellation of contract or where income has accrued but no tax is due on that income or tax is due at a lesser rate the amount deposited to the credit of government to that extent under Section 145 cannot be said to be "tax". The Circular further states that this amount can be refunded with prior approval of the Chief Commissioner of Income Tax or the Director General of Income Tax concerned, to the persons who deducted it from the payment to the non-resident under Section 195 of the Act.

23. In our view, the refusal of the Department to return the amount and retaining the same is unauthorized by law and would

only amount to unjust enrichment by the Department on technical grounds.

24. The Apex Court in ***Commissioner of Income Tax v. Shelly Products***[1], as relied upon by Mr. Mistri, has held that where an assessee chooses to deposit by way of abundant caution advance tax or self-assessment tax which is in excess of his liability on the basis of return furnished or by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of income tax or is not an income within the contemplation of law, he can certainly make such claim before the concerned authority for refund and he must be given that refund on being satisfied that refund is due and payable. Non giving the refund, in our view, would be in breach of Article 265 of the Constitution of India which states, "no tax shall be levied or collected except by authority of law".

In ***New India Industries Ltd & Anr. v Union of India & Anr.***[2] the Court held that taxes illegally levied must be refunded. The

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1 (2003) 261 ITR 367 (SC).

2 AIR 1990 Bom. 239.

doctrine of unjust enrichment has to be applied after having regard to the facts of each case.

25. In ***Nirmala L. Mehta v. A. Balasubramanian, Commissioner of Income-tax,***[3] the Court relying on a Constitution Bench Judgment of the Supreme Court in ***Amalgamated Coalfies Ltd. v. Janapada Sabha***[4] opined that acquiescence to illegal tax for a long time is not a ground for denying the party the relief that he is entitled to.

26. In ***Balmukund Acharya v Deputy Commissioner of Income-tax, Special Range***[5] the Court held that the authorities under the Act are under an obligation to act in accordance with the law. Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconceptions or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. Paragraphs No. 31,32 and 33 of *Balmukund Acharya* (supra) read as under:

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3 (2004) 269 ITR 1 (Bombay).

4 AIR 1961 SC 964.

5 (2009) 310 ITR 310 (Bombay).

> *"31. Having said so, we must observe that the Apex Court and the various High Courts have ruled that the authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconceptions or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected (see S.R. Kosti v. CIT [2005] 276 ITR 165 (Guj.), CPA Yoosuf v. ITO [1970] 77 ITR 237 (Ker.), CIT v. Bharat General Reinsurance Co. Ltd. [1971] 81 ITR 303 (Delhi), CIT v. Archana R. Dhanwatey [1982] 136 ITR 355 (Bom.).*
> *32. If particular levy is not permitted under the Act, tax cannot be levied applying the doctrine of estoppel. (See Dy. CST v. Sreeni Printers [1987] 67 SCC 279.*
> *33. This Court in the case of Nirmala L. Mehta v. A. Balasubramaniam, CIT [2004] 269 ITR 1 has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. In the case on hand, it was obligatory on the part of the Assessing Officer to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field."*

27. In the circumstances, the rule is made absolute in terms of prayer clauses (a) and (b) which read as under:

> "a. this Hon'ble Court may be pleased to issue a writ of Certiorari, or a writ in the nature of Certiorari, or any other appropriate writ, order or direction under article 226 of the Constitution of India, calling for

> the records of the Petitioner's case so far as they relate the impugned order (Exhibit "P") refusing to pass an order giving effect to the order of this Hon'ble Court in WP No. 448 of 1994 and granting refund to the Petitioner and after going through and examining the question of the validity, propriety and legality thereof, be pleased to quash the impugned order;
>
> b. this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, ordering and directing the Respondents to **(a)** pass the orders giving effect to the order of this Hon'ble Court in Writ Petition No. 448 of 1994; **(b) forthwith** grant refund of tax along with interest in accordance with the law and as per the direction of the Hon'ble Supreme Court of India in respect of amounts which have been wrongfully detained by the Department;"

28. The amounts having been deposited with Prothonotary and Senior Master, High Court, Bombay, the Prothonotary and Senior Master shall foreclose the fixed deposit and pay over the amount including interest to Petitioner.

29. The statement of Mr. Mistri on instructions that Petitioner shall pay the entire income tax on the interest earned in the Financial Year in which the amount is received is accepted as an undertaking to this Court. Petitioner will, of course, be entitled to credit of any TDS that the bank would have deducted and also to

the TDS that Respondents had deducted while depositing the amounts with the Prothonotary and Senior Master, High Court, Bombay as per the figures mentioned above in the same financial year when the tax is being paid.

30. Mr. Mistri's statement on instructions that if there is any claim made by DAVY or Kvaerner, its successor-in-interest, Petitioner will indemnify and keep indemnified the Department harmless including legal fees, if any, is accepted as an undertaking to this Court.

No order as to costs.

31. Mr. Sharma seeks for a stay of this order for 90 days. Stay is refused, particularly in view of the fact that (a) the money is out of the hands of the Department and already stands deposited in Court and (b) this amount does not belong to the Department.

(DR. N. K. GOKHALE, J.) **(K. R. SHRIRAM, J.)**