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

% ***Judgment delivered on: 23.01.2025***

\+ W.P.(C) 9969/2019

M/S SMEC INDIA (P.) LTD. .....Petitioner

Through: Mr. Ved Jain, Mr. Nischay Kantoor, Ms. Soniya Dodeja, Mr. Divyansh Dubey and Mr. Govind Gupta, Advs.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX – 8 .....Respondent

Through: Mr. Debesh Panda, SSC along with Ms. Zehra Khan, JSC, Mr. Vikramaditya Singh, JSC, Mr. K. Sri Aditya, Adv and Ms. Anauntta Shankar, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. The writ petitioner impugns the order passed by the Principal Commissioner dated 25 March 2019 and in terms of which it has proceeded to dismiss an application that had been instituted by the petitioner purporting to be under Section 264 of the **Income Tax Act,**

1961[1].

2. The dispute itself arose in the context of an amount of INR 4,75,00,000/- which was paid by the petitioner on account of reimbursement of expenses incurred by its Associate Enterprise and on which it had not deducted tax at source. According to the writ petitioner, it had at the time of furnishing its **Return of Income**[2] for the concerned **Assessment Year**[3], namely, 2014-15 incorrectly proceeded on the assumption that since the aforesaid remittance was liable to be subjected to tax and no tax thereon had in fact been deducted, it would be liable to be disallowed by virtue of the provisions of Section 40(a)(i) of the Act. Proceeding on that premise, the petitioner had thus suo moto disallowed the same and added the remittance back in its computation of income.

3. Subsequently, and on what the petitioner describes as that mistake coming to light, it was found that the remittance would in fact not be liable to tax at all in light of the provisions made in Article 12 of the **India-Australia Double Taxation Avoidance Agreement**[4]. The contention appears to have been that since the payment made was in respect of services of a technical nature, namely, in the shape of reimbursement of expenses incurred in connection with the work discharged by seconded employees, it would clearly not satisfy the "*make available*" stipulation which appears in Article 12. Article 12 of the DTAA is extracted hereinbelow:

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[1] Act
[2] RoI
[3] AY
[4] DTAA

"ARTICLE 12

ROYALTIES

1. Royalties arising in one of the Contracting States, being royalties to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

2. Such royalties may also be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged shall not exceed:

(a) in the case of :

(i) royalties referred to in sub-paragraph (3)(b) ;

(ii) payments or credits for services referred to in subparagraph (3)(d), subject to sub-paragraphs (3)(h) to (l), that are ancillary and subsidiary to the application or enjoyment of equipment for which payments or credits are made under sub-paragraph (3)(b); or

(iii) royalties referred to in sub-paragraph (3)(f) that relate to equipment mentioned in sub-paragraph (3)(b);

10 per cent of the gross amount of the royalties; and

(b) in the case of other royalties :

(i) during the first 5 years of income for which this Agreement has effect:

(a) where the payer is the Government or a political subdivision of that State or a public sector company: 15 per cent of the gross amount of the royalties; and

(b) in all other cases: 20 per cent of the gross amount of the royalties; and

(ii) during all subsequent years of income:
15 per cent of the gross amount of the royalties.

3. The term "royalties" in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:

(a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trade mark or other like property or right;

(b) the use of, or the right to use, any industrial, commercial or scientific equipment;

(c) the supply of scientific, technical, industrial or commercial knowledge or information;

(d) the rendering of any technical or consultancy services (including those of technical or other personnel) which are ancillary and subsidiary to the application or enjoyment of any such property or right as is mentioned in sub-paragraph (a), or any such equipment as is mentioned in sub-paragraph (b) or any such knowledge or information as is mentioned in sub-paragraph (c);

(e) the use of, or the right to use:

(i) motion picture films;

(ii) films or video tapes for use in connection with television; or

(iii) tapes for use in connection with radio broadcasting;

(f) total or partial forbearance in respect of the use or supply of any property or right referred to in sub-paragraphs (a) to (e);

(g) the rendering of any services (including those of technical or other personnel), which make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or design; but that term does not include payments or credits relating to services mentioned in sub-paragraphs (d) and (g) that are made;

(h) for services that are ancillary and subsidiary, and inextricably and essentially linked, to a sale of property;

(i) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(j) for teaching in or by an educational institution;

(k) for services for the personal use of the individual or individuals making the payments or credits; or

(l) to an employee of the person making the payments or credits or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14.

4. The provisions of paragraphs (1) and (2) shall not apply if the person beneficially entitled to the royalties, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the royalties arise, through a permanent establishment situated therein, or performs in that other State

independent personal services from a fixed base situated therein, and the property, right or services in respect of which the royalties are paid or credited are effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself or a political sub-division or local authority of that State or a person who is a resident of that State for the purposes of its tax. Where, however, the person paying the royalties, whether the person is a resident of one of the Contracting States or not, has in one of the Contracting States or outside both Contracting States a permanent establishment or fixed base in connection with which the liability to pay the royalties was incurred, and the royalties are borne by the permanent establishment or fixed base, then the royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, owing to a special relationship between the payer and the person beneficially entitled to the royalties, or between both of them, and some other person, the amount of the royalties paid or credited, having regard to what they are paid or credited for, exceeds the amount which might have been expected to have been agreed upon by the payer and the person so entitled in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the amount of the royalties paid or credited shall remain taxable according to the law, relating to tax, of each Contracting State, but subject to the other provisions of this Agreement."

4. The Principal Commissioner, however, has borne in consideration the undisputed fact that the petitioner had neither revised its RoI nor sought any certification of the remittance not being chargeable to tax as is contemplated under Section 195 of the Act. Suffice it to note that Section 195 envisages an inquiry being undertaken consequent to a remitter taking the position that the sum paid is not chargeable to tax under the Act. Viewed in that light and undisputedly, therefore, Section 195 stands on a pedestal distinct and distinguishable from the other provisions pertaining to deduction of tax at source as found in Chapter XVII of the Act.

5. Basis the aforesaid, the Principal Commissioner proceeded to record the following conclusions:

> "The contention of assessee has been duly considered. In my view, since payment on account of reimbursement was part and parcel in the nature of service which is technical in character or having been made available to the assessee company it would attract provisions of section 195 of Income Tax Act. The amount paid to its parent company embedded an element of income and therefore tax was required to be deducted at source. The assessee has also failed to furnish any exemption certificate u/s 195 of the Income Tax Act from the concerned TDS officer. Moreover, in its submission too, the assessee has failed to point out any manifest error in the assessment order. In the subsequent assessment years too similar addition has been made in the case of assessee and the assessee has availed the remedy by filing an appeal before the appellate authority instead of making an application u/s 264. Therefore, the assessee's request for allowing expenditure of Rs. 4.5 crore on account of reimbursement cannot be entertained u/s 264 of the Income Tax Act."

6. The Principal Commissioner while rendering those findings in the impugned order, has additionally alluded to the provisions of Section 9(1)(vii) of the Act to hold that the remittance was in fact chargeable to tax in the sense of the same being liable to be construed as income which had arisen or accrued in India.

7. In our considered opinion, the aforesaid finding has evidently come to be rendered without the Principal Commissioner having either adverted to or examined the case of the writ petitioner on the basis of Article 12 of the DTAA. We further find ourselves unable to sustain the impugned order, since once the Commissioner had come to conclude that the amendment to the RoI was necessary prerequisite and a primordial condition for the purposes of maintaining the grant of reliefs as was claimed in the revision petition, clearly no occasion arose for a finding being returned on merits. However, since it has

chosen to do so, we shall deal with that aspect in the latter parts of this decision.

8. That leads us to examine whether an amendment of the RoI was necessary before the application under Section 264 could have been maintained. We find that this aspect has been duly examined and answered in two decisions rendered by our Court, and which would have a bearing on the challenge which stands raised in the instant writ petition. In **Vijay Gupta v. Commissioner of Income Tax**[5], a Division Bench of the Court, while expounding upon the scope of the power that a Commissioner could exercise under Section 264 rendered the following pertinent observations:

> "**35.** From the various judicial pronouncements, it is settled that the powers conferred under section 264 of the Act are very wide. The Commissioner is bound to apply his mind to the question whether the petitioner was taxable on that income. Since section 264 uses the expression "any order", it would imply that the section does not limit the power to correct errors committed by the subordinate authorities but could even be exercised where errors are committed by assessees. It would even cover situations where the assessee because of an error has not put forth a legitimate claim at the time of filing the return and the error is subsequently discovered and is raised for the first time in an application under section 264.
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> **36.** An assessee is liable to tax only upon such receipt as can be included in his total income and is assessable under the Income-tax Act. There is nothing in section 264, which places any restriction on the Commissioner's revisional power to give relief to the assessee in a case where the assessee detracts mistakes because of which he was over-assessed after the assessment was completed. Once it is found that there was a mistake in making an assessment, the Commissioner had power to correct it under section 264(1). When the substantive law confers a benefit on the assessee under a statute, it cannot be taken away by the adjudicatory authority on mere technicalities. It is settled proposition of law that no tax can be levied or recovered without authority of law. Article 265 of the Constitution of India and section 114 of the State Constitution imposes an embargo on

[5] 2016 SCC OnLine Del 1961

imposition and collection of tax if the same is without authority of law."

9. The aforesaid position in law has been more lucidly explained in a subsequent decision of this Court in **Interglobe Enterprises Pvt. Ltd. v. Pr. Commissioner of Income Tax**[6] and where the principles which would govern were summarized in the following terms:

> "**17.** Undisputedly, if the records for the assessment year 2014-15 are recalled, it would reveal that the sum of Rs. 1,51,67,868, received on account of interest on Income-tax, was assessed as income for the previous year 2013-14 relevant to the assessment year 2014-15. However, as stated above, the said amount was brought to tax by the Income-tax authority in the assessment year 2012-13. Clearly, the same amount cannot be taxed twice over.
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> **18.** It is settled law that an assessee is liable to pay Income-tax only on the income that is chargeable under the Act. Merely because an assessee has offered a receipt of income in his return does not necessarily make him liable to pay tax on the said receipt, if otherwise the said income is not chargeable to tax. In CIT v. Shelly Products [2003] 261 ITR 367 (SC) ; (2003) 5 SCC 461, the Supreme Court held that if the assessee had, by mistake or inadvertently, included his income or any amount, which was otherwise not chargeable to tax under the Act, the Assessing Officer was required to grant the assessee necessary relief and refund any tax paid in excess.
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> **19.** It is also well settled that the powers conferred under section 264 of the Act are wide. In Vijay Gupta v. CIT [2016] 386 ITR 643 (Delhi) ; 2016 SCC OnLine Del 1961, a Co-ordinate Bench of this court held that powers under section 264 of the Act were not limited to correcting any errors committed by the authorities but also extended to errors committed by the assessee.
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> **20.** In Dwarka Nath v. ITO [1965] 57 ITR 349 (SC) ; (1965) 3 SCR 536 the Supreme Court had in the context of section 33A of the Indian Income-tax Act, 1922, which is pari materia with section 260A of the Act, observed that the jurisdiction conferred under the said section is a judicial one. In Aparna Ashram v. DIT (Exemptions) [2002] 258 ITR 401 (Delhi) ; 2002 SCC OnLine Del 1538, a Co-ordinate Bench of this court had observed that even if a power under section 264 is considered to be administrative, it obliged the concerned authority to act judicially. Further, the court

[6] 2023 SCC OnLine Del 462

> held that the power conferred on the Commissioner is coupled with the duty to exercise the same "in the interest of doing real justice between the parties."
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> **21.** As observed above, it is clear that the amount of Rs. 1,51,67,868 cannot be taxed twice. In the aforesaid view, it was apposite for the Commissioner to have revised the assessment order for the assessment year 2014-15 in the light of the reassessment order dated December 8, 2017, whereby the amount of Rs. 1,51,67,868 was brought to tax in an earlier assessment year (assessment year 2012-13)."

10. As is manifest from the exposition of the legal position and the scope of the power which the Commissioner could have exercised under Section 264 in the two judgments noticed above, it was clearly not imperative for the petitioner to have amended its RoI. As was pertinently observed both in *Vijay Gupta* and *Interglobe Enterprises*, an assessee could be taxed only in respect of such part of its total income as was exigible under the Act. The judgments noted above further hold that an assessee could invoke the power conferred by Section 264 in order to rectify a mistaken stand taken earlier and where it may have offered income to tax even though the law placed no such liability. It was pertinently observed that an assessee is liable to pay tax only on such income which is otherwise chargeable under the Act. Our Court thus held that merely because certain income or receipt may have been mistakenly offered to tax, the same would not be conclusive if it were found and established that the same was not chargeable at all. The said principles would equally apply to the suo moto disallowance which the petitioner had made under the bona fide and yet mistaken belief that the same was liable to be offered for taxation. The said stand, in our considered opinion, could not have been negated merely because the RoI had not been amended. The

conclusion so reached by the Commissioner in this regard clearly fails to bear in consideration the salutary power that Section 264 creates and confers. The power that the statute vests in the Commissioner could have been validly invoked if the assessee were to assert that it had erred or proceeded on the mistaken assumption that the said item of income or expenditure was liable to be taxed under the Act.

11. Insofar as the findings rendered in the context of Section 9 are concerned, as noted hereinabove, the Commissioner has failed to either advert to or examine the aspect on the anvil of the DTAA and the stand of the petitioner that the *"make available"* condition was not satisfied and the expenditure thus not liable to be viewed as royalty on which tax could have been validly imposed.

12. We, accordingly, allow the instant writ petition and quash the order dated 25 March 2019. The revision application shall consequently be taken up for consideration afresh, bearing in mind the observations appearing hereinabove.

13. All rights and contentions of respective parties on merits, including with respect to whether Article 12 of the DTAA would apply, are kept open for the consideration of the Principal Commissioner.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

JANUARY 23, 2025/RW