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

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\+ **ITA 203/2014**

COMMISSIONER OF INCOME TAX –IV ..... Appellant

Through: Mr Kamal Sawhney, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel and Mr Shikhar Garg, Advocate.

versus

PRITAM DAS NARANG ..... Respondent

Through: Mr M. P. Rastogi and Mr K. N. Ahuja, Advocate.

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

O R D E R

% 16.09.2015

1. This is an appeal under Section 260A of the Income Tax Act, 1961 filed by the Revenue against the order dated 30th August, 2013 by the Income Tax Appellate Tribunal ('ITAT') in ITA No.4158/Del/2011 for Assessment Year ('AY') 2008-09.

2. By an order dated 9th February, 2015, the following questions of law were framed:

(a) Did the ITAT fall into error in holding that the sum of Rs.1,95,00,000/- in the circumstances of the case, was compensation in the hands of the Assessee and could not

be treated as income as profits in lieu of salary?

(b) Did the ITAT fall into error in allowing the order of the CIT (Appeals) in allowing the credit of TDS of Rs.22,09,350 on Rs.1,95,00,000/- to the respondent?

3. The facts are that the Assessee filed return of income on 28th July, 2008 declaring total income of Rs. 1,65,70,750/- and also claiming a refund of Rs.1369/-. The return was processed under Section 143(1) on 26th August, 2009 determining a refund of Rs.860/-.

4. The case was subsequently selected for scrutiny and a notice was issued by the Assistant Commissioner of Income Tax (ACIT) to the Assessee on 12th August, 2009. It was followed by notices under Section 142(1) of the Act. The Assessee was asked to furnish the bank accounts for the period 1st April, 2007 to 31st August, 2008. The Assessing Officer (AO) noticed a credit entry of Rs.1,70,90,650/-. The Assessee filed a letter on 16th November, 2010 explaining the circumstances under which the payment was received from M/s. ACEE Enterprises ('ACEE') against an Employment Agreement entered into between him and ACEE on 10th January, 2007. In terms of the said Employment Agreement, the Assessee was to be employed as Chief Executive Officer ('CEO') and the employment was to commence

from 1st July, 2007. Either party at its option could terminate the employment by giving six months' notice to the other party in writing. In case the notice period was less than six months, then compensation equivalent to the shortfall of the notice period was payable by the party concerned.

5. The Assessee produced two letters before the AO. The first dated 1st May, 2007 was written by ACEE to the Assessee informing him that there was a "sudden change in business plan of the Company vis-a-vis foraying into new financial ventures" and that "the company is extremely disappointed to convey that it shall not be able to take you on board from 1st July, 2007 as per employment contract." ACEE promised to reconsider the Assessee's services "as and when its operation starts". The second letter was dated 15th May 2007 which was the Assessee's response to ACEE that the news was a "big financial loss personally" since there were "many other opportunities available to me". The Assessee stated that since he had opted for ACEE he did not consider "other lucrative opportunities available to me". Since it was not clear when ACEE was going to start its new venture, the Assessee proposed that "your company must consider something for financial loss incurred by me not available other opportunities. I propose that you must

give me at least one year compensation offered to me by your company to cover up the financial loss incurred by me".

6. On 25th August 2007, ACEE informed the Assessee that "as a mark of goodwill/gesture" it was pleased to announce a payment of Rs.1,95,00,000/- to the Assessee subject to income tax compliances as "a one-time payment to you for non-commencement of employment as proposed." Before the AO, the Assessee pointed out that the tax of Rs.22,09,350/- had been deducted at source by a letter dated 7th December, 2010. The Assessee offered an explanation as to why he had not offered the above sum to tax or claimed refund of the TDS.

7. The AO rejected the Assessee's explanation on the ground that under Section 17 (3) (iii) of the Act the receipt by the Assessee of a sum from any person prior to his joining with such person was taxable. The AO was of the view that the condition of a pre-existing relationship of employer and employee was done away with by the use of the words "by any Assessee from any person" introduced by the Finance Act, 2001 with effect from 1st April, 2002. The AO also sought to distinguish the decision in ***CIT v. Rani Shankar Mishra (2010) 320 ITR 542 (Del)*** which was referred to by the

Assessee on the ground that the compensation in that case was received pursuant to a gender discrimination claim stemming from the company's refusal to offer the woman candidate a position whereas in the present case the job was offered and accepted. The AO also drew an adverse inference as regards failure to disclose that TDS had been deducted by ACEE, in particular since the Assessee had not brought a claim in the return regarding such TDS. The AO concluded that the payment was taxable under the head 'salary'. The addition of Rs.1.95 crores was added to the returned income and penalty proceedings were also directed to be initiated.

8. The Assessee's appeal against the aforesaid order was allowed by the Commissioner of Income Tax (Appeals) [CIT(A)]. The CIT(A) noted that Clause (iii) of Section 17(3) had been brought in to account for 'joining bonus' received from the prospective employer as profit in lieu of salary liable to be included as part of taxable income under the head 'salary' or also the amount paid to an employee 'after the employment comes to an end (termination bonus).' The CIT (A), after analysing the documents on record, came to the conclusion that there was no master and servant relationship between the Appellant and ACEE. No payment had been made by ACEE to the Appellant from the date on which the contract was signed

till the date when the offer of employment was withdrawn. The CIT(A) concluded that the payment was made by the prospective employer as compensation towards breach of promise and not for any services rendered or to be rendered. Such payment could not be taxed under Section 17(3)(iii) of the Act. Nor could it be taxed under some other head. The CIT(A) relied on the decision of this Court in ***Rani Shankar Mishra*** (*supra*) to conclude that the said receipt could not be taxed as a business/professional receipt under Section 28 or as a gift under Section 56 of the Act. The CIT(A) concluded that the receipt by the Assessee was bonafide and, accordingly, deleted the addition. The CIT (A) further ordered that "the appellant is entitled to refund of TDS paid on Rs. 1,95,00,000/- and accordingly the refund of TDS may be adjusted against tax demand if any arising on appeal effect to this order, and further refund due may be given to appellant."

9. The Revenue's further appeal has been dismissed by the ITAT in the impugned order. The two issues addressed by the ITAT were:

> "1. On the facts and circumstances of the case and in law whether the Ld. CIT (A) was correct in deleting the addition of Rs.1,95,00,000/- taxed as revenue receipts by the AO since the same was not offered to tax by the assessee?

2. On the facts and circumstances of the case and in law, whether the Ld. CIT (A) was correct in allowing the credit of TDS of Rs.22,09,350/- on Rs.l.95 crore to the assessee?"

10. On the first issue, the ITAT concurred with the CIT(A) that prior to the coming into existence of any relationship of employer and employee between the Assessee and ACEE, the offer on the basis of which the employment agreement was drawn up had itself come to an end. This was a case where a prospective employee i.e. the Assessee had been compensated for denial of opportunity to be employed by the prospective employer. Therefore, the amount paid could not be said to be *in lieu* of the salary and a benefit of employment. On the second issue the ITAT observed that the finding of the CIT (A) that the receipt of Rs.1.95 crore was taxable as capital receipt has been upheld by it and therefore the second ground also had to be rejected.

11. The Court has heard the submissions of Mr. Kamal Sawhney, learned Senior standing counsel for the Revenue and Mr. M.P.Rastogi, learned counsel for the Assessee.

12. Mr. Sawhney urged that since the wording of Section 17(3)(iii) of the Act was that "any amount received from any person", it was not necessary that the amount had to be received only from an employer in order that such sum be brought to tax in the hands of an assessee under the head 'profits *in lieu* of salary'. It was submitted that the expression "any person" could include a prospective employer as in the present case. It was submitted that the clauses of the Employment Agreement showed that the Assessee had in fact been employed as a CEO and the Assessee had also accepted such employment. Therefore, notwithstanding that the employment was to commence at a later date, the relationship of employer and employee had been brought into existence by the Employment Agreement. Mr. Sawhney sought to distinguish the decision in ***Rani Shankar Mishra*** (*supra*) on facts.

13. This Court is unable to agree with the above submissions on behalf of the Revenue. The Employment Agreement itself mentions that the employment shall commence 'latest by 1st July, 2007'. Although it further states that the employee "shall endeavour to join the company as early as possible", the intention and expectation of the parties was that the employment would commence not earlier than 1st July 2007. This becomes evident from a reading of the letter dated 1st May 2007 written by ACEE to

the Assessee in which it stated that that it would not be possible to take the Assessee "on board from 1st July, 2007 as per employment contract." That the employment did not commence from the date of the Employment Agreement is further evident from the fact that ACEE stated in its letter dated 25th August 2007 that it was making the payment of Rs. 1.95 crores as "a one-time payment to you for non-commencement of employment as proposed."

14. The Court is unable to accept the interpretation sought to be placed on the plain language of Section 17 (3) (iii) of the Act by the Revenue. The words "from any person" occurring therein have to be read together with the following words in sub-clause (A): "before his joining any employment with **that** person". In other words, Section 17 (3) (iii) (A) 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. Likewise, Section 17 (3) (iii) (B) also pre-supposes the existence of the relationship of employer and employee between the person who makes the payment of the amount and the Assessee. It envisages the amount being received by the Assessee "after cessation of his employment". Therefore, the words in Section 17 (3) (iii)

cannot be read disjunctively to overlook the essential facet of the provision, viz., 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.

15. The Court accordingly concurs with the concurrent view of the CIT (A) and the ITAT that this was a case where there was no commencement of the employment and that the offer by ACEE to the Assessee was withdrawn even prior to the commencement of such employment. The amount received by the Assessee was a capital receipt and could not be taxed under the head 'profits in lieu of salary'.

16. The other plea of the Revenue that the said amount should be taxed under some other head of income, including 'income from other sources', is also unsustainable. The decision of this Court in ***Rani Shankar Mishra*** (*supra*) held in similar circumstances that where an amount was received by a prospective employee 'as compensation for denial of employment,' such amount was not in the nature of profits *in lieu* of salary. It was a capital receipt that could not be taxed as income under any other head.

17. Question (a) is accordingly answered in the negative, i.e. in favour of the Assessee and against the Revenue.

18. Consequently, question (b) is also answered in favour of the Assessee and against the Revenue. The order of the CIT (A), as concurred with by the ITAT, that the Assessee is entitled to the refund of the TDS paid on Rs. 1,95,00,000/- and that the refund of TDS may be adjusted against tax demand if any arising on appeal effect being given to the said order of the CIT (A) is upheld.

19. The appeal is dismissed but without any order as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

SEPTEMBER 16, 2015
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