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

\+ ITA 417/2023

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-2 .....Appellant

Through: Mr. Sanjay Kumar, SSC with Ms. Monica Benjamin and Ms. Easha Kaidan, Advs.

versus

M/S MONDON INVESTMENT LTD. .....Respondent

Through: Dr. Rakesh Gupta, Mr. Somil Agarwal, Mr. Dushyant Agarwal and Mr. Saurav Verma, Advs.

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

O R D E R

% **11.02.2025**

1. Having heard Mr. Kumar, learned counsel who represents the appellant and on going through the order passed by the **Income Tax Appellate Tribunal**[1] on 30 November 2022, the following issues appear to arise and which would merit further consideration.

2. We note that the Tribunal while passing the order impugned before us has principally taken into consideration the judgment rendered by its Coordinate Bench in ITA No. 3303/Del/2016 to come to the conclusion that the word 'paid' as appearing in Article 11 of the **India-Cyprus Double Taxation Avoidance Agreement**[2] would not extend to a notional liability. The aforesaid decision also appears to

[1] Tribunal

have been followed by another Bench of the Tribunal in ITA No. 879/Del/2016.

3. However, Mr. Kumar draws our attention to paragraphs 9 and 10 of an order passed by the Mumbai Bench of the Tribunal and which has made a reference to a Special Bench alluding to Section 43(2) of the **Income Tax Act, 1961**[3] in the following terms.

> "9. A plain reading of the above decision shows, even though the issue in this case was materially similar inasmuch in this case also it was inferred that since the expression used is "paid" it refers to the taxation on receipt basis, apart from the fact that this decision is in respect of royalty and fees for technical services, that it pertains to the another DTAA, ie. old double taxation avoidance agreement between India and the Federal Republic of Germany (as it then was) which came to an end on 1" April 1997 and incidentally it was with effect from the same date that hybrid method of accounting also came to an end. Considering that essentially business concerns prepare their accounts on the basis of mercantile method of accounting in general, even accounting of any income, such as interest and royalties, on cash basis was no longer permissible. To suggest, therefore, that interest or royalty income could be taxed in the hands of the foreign company on cash basis on the first principles is no longer permissible, and, as for the connotations of the expressions "paid" in the light of article 2(2), as it was numbered in the old Indo German tax treaty, read with section 43(2), this issue never came up for consideration at any stage at all. As article 2(2) was not even discussed, the relevance of section 43(2) or of Hon'ble Supreme Court's decision in the case of **Standard Triumph Motor** (*supra*) did not come up for Their Lordships' kind consideration at all. It is also important to note that so far as article 3(2) of the Indo Cyprus treaty is concerned, it uses the expression "**the meaning that it** (*i.e. the undefined treaty term*) **has at that time under the law of that State** *(i.e. under the Indian law*)". It is also worth examining whether, in this context, the scope of 'Indian law' will include not only the law legislated by the Parliament but also the law laid down by Hon'ble Courts above. A view is thus indeed worth exploring as to whether the meaning assigned to the expression "received by an assessee", which essentially corresponds to and has to treated as equivalent to "paid to the payee", by Hon'ble Supreme Court is to be assigned to the treaty of the undefined treaty expression "paid". Obviously, this

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[22]DTAA
[3] Act

exercise was not done by the coordinate bench, nor this aspect of the matter was pointed out by the learned counsel appearing before Their Lordships, and thus Their Lordships had no occasion to examine this aspect of the matter either. To this extent, the impact of judgment of Hon'ble Supreme Court's judgment in the case of **Standard Triumph Motor** (*supra*) remained unexamined. That aspect of the matter is thus, *de hors* the judgment of Hon'ble jurisdictional High Court, does seem to be in an unchartered territory on which call may indeed be taken by the Tribunal."

10. As we part with this note recommending constitution of a special bench, we may add that, in our humble understanding, such a reference is not contrary to the principles of judicial discipline. In the event of a doubt about the correctness of the earlier decision or, extending that logic a little further, correctness of the path the earlier decisions have traversed to come to a conclusion, it is open to the bench to make a reference to for constituting a larger bench for considering the same. In the case of **Union of India v. Paras Laminates (P.) Ltd. [(1990) 186 ITR 722 @p 726 (SC)]**, Hon'ble Supreme Court recognized the right of the President to constitute Special Benches, and observed that "**It is true that a Bench of two members must not lightly disregard the decision of another Bench of the same Tribunal on an identical question..... The rationale of this rule is the need for continuity, certainty and predictability in the administration of justice. Persons affected by decisions of Tribunals or courts have a right to expect that those exercising judicial functions will follow the reason on ground of the judicial decision in the earlier cases on identical matters. ……….. <u>It is, however, equally true that it is vital to the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings bring to light what is perceived by them as an erroneous decision in the carlier case. In such circumstances, it is but natural and reasonable and indeed efficacious that the case is referred to a larger Bench</u>. This is what was done by the Bench of two members who, in their reasoned order, pointed out what they perceived to be an error of members who, in their reasoned stated the points for the President to make a reference to a larger Bench."** It is not sinful either, and is perfectly natural- as we will see in a short while, to entertain doubts about correctness of the path that the coordinate benches have traversed. On this aspect, one may usefully refer to the observations of Justice Cardozo, in his classic book "The Nature Of Judicial Process', (first published by Yale University Press, United States, in December available also online at <u>http://www.constitution.org/cmt/cardozo/jud_proc.htm</u>) that, **"I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief**

experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition. The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others." That is equally, and perhaps much more, true for many of us too. As Hon'ble Supreme Court has said, in the case of **Distributors (Baroda) (P.) Ltd. v. Union of India [(1985) 155 ITR 120 1 (SC)), "To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce v. Delameter (A.M.Y. at page 18): 'a judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead and courageous enough to acknowledge his errors."** There is, thus, no heroism in perpetuating an error in approach to a judicial exercise. The conclusions, even after the exercise of detailed analysis as discussed earlier is conducted, may or may not be the same as the coordinate benches have arrived, even if rather serendipitously, but that does not really matter. Once we realize that there was something lacking in our approach last time, there cannot be any justification in continuing to adopt the same approach yet again. It is, after all, one of the fundamental duties, under article 51A(h) of the Constitution of India, of every citizen to have, *inter alia*, the "spirt of inquiry of reform". It is in this backdrop, and without making any observations on correctness or otherwise of the conclusions arrived at by the coordinate benches, we deem it fit and proper to refer the additional grounds of appeal raised before us to a special bench of three or more Members.

11. Let the matter be placed before Hon'ble President for his kind consideration, and appropriate orders. In the meantime, as also prayed for by the learned counsel, the matter stands adjourned, and, in the light of this special bench reference, it stands adjourned *sine die*."

4. The submission essentially appears to be that while it is true that Article 11 of the DTAA proceeds to define the word 'interest', since the Convention does not define the expression 'paid' as forming part of Article 11(1), the same would have to draw colour from Section 43(2) of the Act.

5. We consequently admit this appeal on the following question of

law:-

> "C. Whether on the facts and circumstances of the case and in laws, the Hon'ble ITAT has erred in ignoring Section 43(2) of the Act which specifically states that "paid" means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head Profit and gains of business or professions"; which means if the assessee is following accrual or mercantile system of accounting, "payable/accrued' also comes under the expression of 'paid'?"

6. The written submissions tendered by Mr. Kumar be included on our digital record. We also accord liberty to learned counsels for respective sides to place a compilation of judgments which are proposed to be relied upon.

7. Let the appeal be called again on 11.03.2025 in the category of "End of Board" matters.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

FEBRUARY 11, 2025/DR