

ITEM NO.1

COURT NO.9

SECTION IIIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (Civil) No(s).29719-29720/2010
(From the judgement and order dated 15/03/2010 in WP No.155/1996,
dated 26/07/2010 in NM No.364/2010 in RP No.43/2010 in WP No.155/1996
of The HIGH COURT OF BOMBAY)

REGIONAL DIR.ONGC LTD.& ANR

Petitioner(s)

VERSUS

ASSN.OF SC.& TECH.OFFR.ONGC LTD.& ORS. Respondent(s)
(With appln(s) for directions, impleadment and prayer for
interim relief and office report)

WITH SLP(C) NO. 29855-29856 of 2010
(With applns. For permission to file addl. documents,
prayer for interim relief and office report)

Date: 07/11/2012 These Petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. PATNAIK
HON'BLE MR. JUSTICE H.L. GOKHALE

For the parties Mr. S.K. Bagaria, Sr. Adv.
Mr. Ankul Raj, Adv.
Mr. Krishanu Adhikary, Adv.
Mr. Subramonium Prasad, Adv.

Mr. R.P. Bhat, Sr. Adv.
Ms. Niranjana Singh, Adv.
Mrs. Anil Katiyar, Adv.
Mr. B.V. Balaram Das, Adv.

Mr. Anupam Lal Das, Adv.
Mr. Atrabhavan Singh, Adv.
Mr. Anirudh Singh, Adv.

UPON hearing counsel the Court made the following
O R D E R

These special leave petitions are directed against the order dated 15th March, 2010 in Writ Petition No. 155 of 1996 and the order dated 26th July, 2010 in Notice of Motion No. 364 of 2010 in Review Petition (L) No. 43 of 2010, passed by the Division Bench of the High Court of Bombay.

The facts briefly are that Rule 3 of the Income Tax Rules, 1962 was amended by the Income Tax (Twenty-Second Amendment) Rules, 2001 and by the amendment, the method of fixation of the value of 'perquisites' under Section 17(2) of the Income Tax Act, 1961 (for short 'the Act') was also amended. The Association of Scientific & Technical Officers of the Oil & Natural Gas Corporation Limited (for short 'the ONGC') filed Writ Petition No. 155 of 1996 before the High Court, challenging the vires of the aforesaid method of valuation of perquisites incorporated in the amended Rule 3 of the Income Tax Rules. The High Court, while entertaining the writ petition, granted the interim prayer in terms of the prayer 14(e) of the writ petition. As a result, the ONGC could not deduct tax on the value of the perquisites mentioned in Section 17(2)(ii) of the Act. To make it more clear, 10% of the salary of employees of the ONGC in cities having population exceeding four lakhs as per 1991 census was not included in

the 'salary' by the employees for the purpose of computing the tax that is deductible from the income of the employees for making payment to the Income Tax Department.

While the writ petition was pending before the High Court, this Court in Arun Kumar Vs. Union of India (2007) 1 SCC 732, upheld the vires of the amended Rule 3 of the Rules and declared the method of valuation of perquisites provided in the amended Rule 3 as valid. When, therefore, the High Court took up the hearing of the writ petition on 15th March, 2010 it dismissed the same by the impugned order and observed that the interim order passed in the writ petition shall automatically come to an end and the ONGC shall be liable to quantify the tax liability equivalent to the amount of TDS (Tax Deducted at Source) which was deductible and payable to the Income Tax Department within three months from the date of receipt of the impugned order and in the event of compliance of this direction of the High Court, none of the employers shall be treated as an assessee in default. The ONGC, thereafter, filed Review Petition (L) No. 43 of 2010 before the High Court, but by the impugned order dated 26th July, 2010, the High Court dismissed the review petition.

Mr. Anupam Lal Das, learned counsel appearing for the Association of Scientific & Technical Officers of the ONGC (the petitioner in SLP(C) Nos. 29855-29856 of 2010) submitted that in Arun Kumar (supra), this Court has held that Section 17(2) of the Act declares that the value of any "concession" in the matter of rent respecting any accommodation provided to the employee by his employer would be 'perquisite' and therefore, there has to be a determination as to whether the accommodation provided to the employee of the ONGC was a "concession". He further submitted that in the aforesaid case of Arun Kumar (supra), this Court has very clearly held that, whether there is a "concession" to an employee in the matter of accommodation is a question of fact and unless a finding is recorded on such question of fact, no liability can be fixed on the assessee under Section 17(2) of the Act. He further submitted that this Court in the aforesaid case of Arun Kumar (supra) has also held that the finding as to whether there is a "concession" in a given case or not has to be recorded only after giving due opportunity to the assessee and the assessee in such case can show that there was no "concession" in the matter of accommodation granted to him. Mr. Das submitted that while passing the impugned order, the High Court has not at all considered this aspect of the matter.

Mr. S.K. Bagaria, learned senior counsel appearing for the ONGC (the petitioner in SLP(C) Nos. 29719-29720 of 2010), on the other hand, submitted that the ONGC is not the assessee liable to tax under Section 4 of the Act on the value of the perquisites constituting part of the salary of the assessee. He submitted that the ONGC would only be an assessee by virtue of Section 2(7)(c) of the Act, if it is in default under any provision of the Act. He submitted that the ONGC was under duty under Section 192(1) of the Act to deduct the tax on the valuation of the perquisite and credit the same in favour of the Central Government, but the ONGC was prevented from doing so by virtue of the interim order passed by the High Court on 20th February, 1996 by which the ONGC was restrained from deducting tax on the 10% of the salary of the employees as provided in the amended Rule 3 challenged before the High Court in the writ petition. He submitted that in the peculiar facts and circumstances, therefore, the ONGC was not an assessee in default under Section 192(1) and Section 200 of the Act.

Mr. R.P. Bhat, learned senior counsel appearing for the Department, on the other hand, submitted that the ONGC was in default of the provisions of the Act as it failed to deduct the tax and pay the same in favour of the Central Government in accordance with the provisions of Section 192(1) and Section 200 of the Act. He submitted that under Section 201 (1A) of the Act, the ONGC would be liable to pay interest in addition to the principal amount of the tax which it did not deduct and pay to the Central Government during the period 20-02-1996 and thereafter.

We have considered the aforesaid submissions advanced by the learned counsel and we are of the view that by the interim order of the High Court passed on 20th February, 1996 in the writ petition, the ONGC was prevented to deduct the tax on 10% of the salary and to pay

the same to the Central Government. In the interim order dated 20th February, 1996, the High Court had not held that the ONGC was not liable to deduct the tax under Section 192(1) of the Act. Thus, when the writ petition was dismissed on 15th March, 2010 by the High Court, the interim order passed by the High Court on 20th February, 1996 had to be vacated and the parties were required to be put back in the same position as they would have been before the interim order was passed by the High Court on 20th February, 1996 in accordance with provisions of Section 144 of the Code of Civil Procedure. The argument of Mr. Bagaria, learned senior counsel that the ONGC was not liable to deduct tax under Section 192(1) of the Act and pay the same to the Central Government under Section 200 of the Act, therefore, has no force.

We are also of the opinion that during the period the interim order of the High Court was in force, i.e. from 20th February, 1996 to 15th March, 2010, the ONGC cannot be held to be in default under the provisions of the Act inasmuch as the ONGC was prevented by the Order of the High Court from deducting the tax on 10% of the salary of its employees under Section 192(1) of the Act, and to pay the same to the Central Government under Section 200 of the Act. Hence, during the period from 20th February, 1996 to 15th March, 2010, the ONGC cannot be deemed to be an assessee in default under the provisions of the Act. Consequently, the provisions of sub-section (1A) of Section 201 of the Act for payment of interest by an assessee in default under the provisions of the Act will not be applicable to the payments not made by the ONGC because of the interim order passed by the High Court which was in force from 20th February, 1996 to 15th March, 2010.

As a matter of fact, we find that in the impugned order, the High Court directed the ONGC to quantify the tax liability equivalent to the amount of TDS which was deductible and payable to the Income Tax Department and remit the same to the Income Tax Department within three months from the date of the receipt of the copy of the impugned order. In the impugned order, the High Court also observed that in the event of compliance of the said direction, the ONGC shall not be treated as an assessee in default. By subsequent orders, the High Court appears to have extended the time by another three months for compliance of the said directions. Within the period of three months and within the extended period of three months thereafter, however, the ONGC did not comply with the said directions of the High Court. The consequence would, therefore, be that the ONGC shall be deemed to be in default with effect from 16th March, 2010, soon after the writ petition was dismissed and the interim order was vacated on 15th March, 2010 and it is thus liable to pay interest with effect from 16th March, 2010 in accordance with the provisions of sub-section (1A) of Section 201 of the Act as an assessee deemed to be in default.

Regarding the submission made by Mr. Anupam Lal Das, learned counsel, that the assessee is entitled to claim that the value of the accommodation provided to the assessee was not really a "concession" and no opportunity whatsoever was given to the assessee to establish this claim before the Assessing Officer, in our considered opinion, this stand can only be taken by the assessee before the Assessing Officer in his own assessment proceedings and not by the employer. This stand also cannot be taken by the Association of Scientific & Technical Officers of the ONGC (the writ petitioner and the petitioner in the special leave petitions) as the said Association is not an assessee under the Act. This is because the scheme of the Act provides that after the employer deducts from the salary of the employee the tax and pays the same to the Central Government, a Tax Deduction Certificate is furnished to the employee and it is for the employee to claim before the Assessing Officer in the assessment proceedings and get a determination done and in case he succeeds before the Assessing Officer, he will be entitled to refund out of the amount of tax deducted at source by the employer. We, therefore, leave it open to the employees concerned of the ONGC to make their respective claims before the Assessing Officer for the deduction made by the ONGC on 10% of the salary towards 'perquisite' in respect of any concession given to the assessee.

With the aforesaid observations, these special leave petitions stand disposed of. The respondent shall grant to the ONGC time upto 28th February, 2013 to make the payment of the tax on 10% of the

salary and interest calculated with effect from 16th November, 2010.

| (G. SUDHAKARA RAO)
| COURT MASTER

| | (SHARDA KAPOOR)
| | COURT MASTER

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