Commissioner Of Income Tax, West Bengal vs Wesman Engg. Co. (P.) Ltd on 24 January, 1991

Equivalent citations: 1991 AIR 570, 1991 SCR (1) 117, AIR 1991 SUPREME COURT 570, 1991 (2) SCC 323, 1991 AIR SCW 320, 1991 TAX. L. R. 13, 1991 ALL TAXJ 841, (1991) 1 JT 229 (SC), 1991 (2) UPTC 898, 1991 KERLJ(TAX) 355, (1991) 1 COMLJ 249, 1991 UPTC 2 898, (1991) IJR 198 (SC), (1991) 55 TAXMAN 348, (1991) 1 SCR 117 (SC), (1991) 188 ITR 327, (1991) 1 KER LT 462, (1991) 5 CORLA 153, (1991) 92 CURTAXREP 62

Author: N.M. Kasliwal

Bench: N.M. Kasliwal, K. Ramaswamy

PETITIONER:
COMMISSIONER OF INCOME TAX, WEST BENGAL

Vs.

RESPONDENT:
WESMAN ENGG. CO. (P.) LTD.

DATE OF JUDGMENT24/01/1991

BENCH:
KASLIWAL, N.M. (J)
BENCH:
KASLIWAL, N.M. (J)
RAMASWAMY, K.

CITATION:
1991 AIR 570 1991 SCR (1) 117
1991 SCC (2) 323 JT 1991 (1) 229
1991 SCALE (1)66

ACT:
Income Tax Act, 1961: Sections 195, 248, 251(1)(c): Jurisdiction of the appellate authority-Whether extends to determining quantum of sum chargeable.
Section 195(2): Order passed by assessing authority-Whether appealable under section 248.

HEADNOTE:
The respondent-assessee, a private limited company and a licensee, under an agreement was required to pay to its

foreign colaborators (licensors) certain amounts towards cost of working drawings and royalty. It applied to the Income Tax Officer to grant the necessary certificate to enable it to approach the Reserve Bank of India for remittance to its foreign collaborators. The Income Tax officr held that the remittance represented payment for supply of technical know-how and for use of the trade name and manufacturing right of the licenser company and that the said amount neither fell within the exempted category nor did the agreement for avoidance of double taxation apply to the case, and directed the assessee to deduct tax @ 65% on the sum to be remitted.

The assessee did not dispute the assessability of the royalty, but challenged in appeal, that since the whole of the sum towards the cost of working drawings exceeded the remuneration, the same was not taxable, and that the assessment was barred by the Double Taxation Avoidance Agreement. The Appellate Asstt. Commissioner rejected the Double Taxation Avoidance plea, but determined the cost of the working drawings at 75% and the net profit chargeable at 25% of the amount to be remitted to the non-resident company.

The Revenue appealed before the Appellate Tribunal challenging the jurisdiction of the appellate authority under s. 248 to determine the quantum of income, and that the Appellate Asstt. Commissioner was wrong in allowing expenses @ 75% of the remittance. The assessee filed cross-objection. Holding that the Appellate Asstt. Commissioner could pass an order regarding the quantum, that the amount fixed by him

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could not be said to be unreasonable, and that the amount brought to charge by the Income Tax Officer was not exempt under the Double Taxation Avoidance Agreement, the Tribunal dismissed the Department's appeal and partly allowed the assessee's cross-objection.

At the instance of the Revenue, the Tribunal referred the question to the High Court which was answered in favour of the assessee.

In the appeal by certificate to this Court, it was contended that: the order passed by the Income Tax Officer under s. 195(2) was not appealable to the Appellate Asstt. Commissioner under s. 248, and that the appellate authority had no jurisdiction to deal with the quantum of the sum chargeable under the provision of the Income Tax Act from which the assessee was liable to deduct tax under s. 195.

Dismissing the appeal, this Court,

HELD: 1.1 Once an appeal has been preferred to the Appellate Asstt. Commissioner under s. 248 of the Income Tax Act, 1961, on the matter of liability of the company to deduct taxes, the appellant authority was well within its competence to pass an order on quantum also. [124D]

1.2 Section 251(1)(c) gives full power to the

appellate authority to pass such orders in the appeal as it thinks fit. [125A]

1.3 The right to appeal under s. 248 of the Income Tax Act is clear and it cannot be said that such a right is restricted and the Appellate Asstt. Commissioner was not competent to fix the quantum or to revise the proportion of the amount chargeable under the provisions of the Act as determined by the Income Tax Officer. [124F]

2. The language of s. 248 of the Income Tax Act, 1961 is wide enough to cover any order passed under s. 195. The Appellate Asstt. Commissioner was also competent to pass an order with regard to quantum when once he is seized of the matter. [123F; 124D]

3. Under s. 248 a person having deducted and paid tax under s.195 may appeal to the Appellate Asstt. Commissioner denying his liability to make such deduction and for a declaration that he is not liable to make such deduction. [124E]

Meteor Satellite Ltd. v. Income Tax Officer Companies Circle IX, Ahmedabad, [1980] 121 ITR 311, held inapplicable.

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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1535 (NT) of 1978.

From the Judgement and Order dated 10.2.1976 of the Calcutta High Court in Income Tax Reference No.220 of 1969.

S.C. Manchanda, K.P. Bhatnagar and Ms. A. Subhashini for the Appellant.

C.S.S. Rao for the Respondent.

The Judgement of the Court was delivered by KASLIWAL, J. This appeal by grant of certificate under Section 261 of the Income Tax Act, 1961 by High Court of Calcutta rises the following question for consideration:

> "Whether on the facts and circumstances of the case in an appeal filed under Section 248 of the Income Tax Act, 1961, the A.A.C. had juridiction to deal with the quantum of the sum chargeable under the provision of the said Act from which the assessee was liable to deduct tax under Section 195 thereof?"

Brief facts of the case are that the respondent- assessee is a private limited company incorporated in India. The assessee company carried on some business in collaboration with M/s. Wilhelm Ruppmann, Industrieofenbau, Stuttgart W, Gutenbergstr. By an agreement entered on 1st January, 1963 it was agreed that the foreign collaborators would grant to the Indian company during the

term:

(a) the exclusive right to manufacture the licenses equipment in India.

(b) the exclusive right to sell the licensed equipment in India under the "Wesman Ruppnan" such sale to be effected by the agency agreed upon,

(c) permit licensees to export the licensed equipment freely outside India, except to countries where the licensors have similar license-arrangements.

Clause 5 of the agreement provided for payment to the licensees of the following sums:

(a) "A payment of 5 per cent towards the cost of detailed working drawings in terms of clause 3 (b).

The payment for these drawings shall be admissible in those cases where new drawings are supplied by the Licensors abroad i.e. from their or their associates works design offices at Stuttgart or elsewhere in Europe.

This payment shall not be admissible for minor modification of drawings and designs which have already been purchased from the Licensors and paid for by the Licensees nor on repeat orders executed by the Licensees.

This fee shall be calculated on the ex-factory selling price of the licensed products after deducting the value of imported components used in the manufacture thereof, if any, payment for cost of drawings shall be arranged by the Licensees against supply of individual furnance designs, such payment being effected forthwith against delivery of drawings."

(b) "A royalty at 5 per cent (five) which will be subject to Indian taxes on the annual net ex- factory sale value of each licensed equipment manufactured by the Licensees shall be payable to the Licensors. The value of imported components, if any, that may be used in the manufacture of the Licensed equipment shall be deducted in computing the ex-factory price of the licensed equipment for purpose of payment of royalty. The payment has to be effected together with the report referred to under Clause 6".

The assessment year involved in the case is 1964-65. In the matter of remittance to the non-resident company, the assessee vide applications dated June 4, 1964 and 18.8.64 requested the Income Tax Officer to grant necessary certificate in order to enable them to approach the Reserve Bank of India for remittance to their collaborators. The said applications related to the invoice in regard to supply of drawings for manufacture of furnances in India in accordance with their collaboration agreement. The Income Tax Officer placing reliance on the terms of the agreement came to the conclusion that the payments made by the applicant company to the non-resident collaborators in Germany could be grouped under the heads Royalties and remuneration for labour or personal services. According to the Income Tax Officer neither the remittance fell within the exempted category nor did the

agreement for avoidance of double taxation between Indian and the Federal German Republic apply to the facts of the instant case. According to him, the payment of the remittances in respect of which the applications had been made represented payment for supply of technical know-how and for use of trade name and manufacturing right of the licensor company. He did not agree with the submissions of the assessee company and disposed of the said applications vide order dated 5th September, 1964 under Sec. 195(2) of the Income Tax Act, 1961 directing the assessee company to deduct tax @ 65% on the entire sum proposed to be remitted.

The assessee company preferred an appeal to the Appellate Assistant Commissioner. It did not dispute the assessability of the royalty @ 5% mentioned in Clause 5(b) of the agreement aforesaid. It, however, challenged that the whole of the sum of 5% specified in clause 5(a) was not chargeable to income tax in India. In regard to the same the assessee submitted that there was no liability to deduct tax in terms of the order of the Income Tax Officer as, in its opinion, (a) the services, if any, enumerated under clause 5(a) of the agreement were performed outside India and the payments were also being made outside India so that the amount paid was not chargeable to tax under the Indian Statute, (b) there was a bar to assessment under the Income Tax Act, 1961 in terms of an agreement for avoidance of Double Taxation between India and the Federal German Republic referred to above and (c) in the alternative, since the cost of the work drawings to the foreign collaborators exceeds the remuneration, the same was not taxable.

The Appellate Assistant Commissioner did not accept the first two of the aforesaid contentions of the assessee. With regard to the third contention, however, the Appellate Assistant Commissioner came to the conclusion that it would be reasonable to determine the said cost by estimate which he did at 75 per cent of the amount paid to the non- resident. In his opinion the net profit chargeable to tax was accordingly 25% of the amount paid.

The department filed an appeal against the aforesaid order of the Appellate Assistant Commissioner and the assessee filed a cross objection, before the Income Tax Appellate Tribunal. Both the departmental appeal and the assessee's cross objections were heard together and decided by a consolidated order of the Tribunal. The departmental representative made two submissions. The first was that the A.A.C.was wrong in holding that the quantum of income could be determined in an appeal under Section 248. The second was that the A.A.C. was wrong in allowing expenses at 75% of the remittance. The first point of the assessee's cross objection was covered by the first ground of the departmental appeal mentioned above. The second point raised in the assessee's cross objection was to the effect whether the payment for the cost of drawings were exempt from the tax under the provisions of Double Taxation Avoidance Agreement or not. The Tribunal, taking the points raised in the departmental appeal first, came to the conclusion that it was difficult to accept the argument that a total denial enable an appeal to be filed but not a part denial with reference to part of the payment subjected to deduction of tax. In the opinion of the Tribunal the interpretation of Section 248 of the Income Tax Act as given by the A.A.C. was correct. According to the Tribunal the A.A.C. could pass an order regarding the quantum. The Tribunal held that the same could not be said to be unreasonable. In the result the departmental appeal was dismissed. In regard to the assessee's cross objection, the Tribunal held that first part of the cross-objection had already been dealt with in the appeal preferred by the departmental and to that extent the assessee's cross objection on the said

issue automatically succeeded. In regard to the second issue, the Tribunal came to the conclusion that the amount brought to charge by the Income Tax Officer was not exempt under the Double Taxation Avoidance Agreement between India and the Federal Republic of Germany vide Articles 3(1) and 16 of the Agreement. The assessee;s cross objection was thus, partly allowed.

At the instance of the Commissioner of Income Tax, West Bengal-1 the Tribunal referred the above mentioned question for the opinion of the High Court. The High Court followed its earlier Judgement dated 12th August, 1970 in Income Tax Reference No. 31 of 1970 (Commissioner of Income Tax West Bengal-1 Calcutta v. M/s. Beni Ltd., Calcutta) and answered the said question in the affirmative and in favour of the assessee by order dated 10th February, 1976. The department filed an application for leave to appeal to the Supreme Court and the High Court by order dated 8.9.1977 certified it to be a fit case for appeal to the Supreme Court under Section 261 of the Income Tax Act, 1976 and issued a certificate accordingly.

We have heard Mr.S.C. Manchanda, Sr. Advocate for the appellant but nobody appeared for the respondent. The High Court in answering the reference placed reliance on its earlier Judgement dated August 12, 1970 but the copy of the said Judgement has not been supplied in the paper book as such we were derived to go through the reasoning given by the High Court in answering the reference in the affirmative and in favour of the assessee.

It was contended by Mr. Manchanda that the order passed by the Income Tax Officer under Sec. 195(2) of the Income Tax Act, 1961 (hereinafter referred to as the Act) was not appealable to A.A.C. under Sec. 248 of the Act. His further contention was that the order passed by A.A.C. was totally without juridiction and the only remedy available to the assessee was to file a writ petition to High Court under Article 226 of the Constitution of India. In our opinion this question does not arise before us nor such question was raised in the reference before the High Court. The Commissioner of Income Tax only sought to refer the following question for the opinion of the High Court:

> "Whether, on the facts and circumstances of the case in appeal filed under Section 248 Income Tax Act, 1961, the Appellate Assistant Commissioner had jurisdiction to deal with the quantum of the sum chargeable under the provision of the said Act from which the assessee was liable to deduct tax under Section 195 thereof?"

The above question does not contain the objection that no appeal was maintainable under Section 248 of the Act against the order of the Income Tax Officer passed under Section 195(2) of the Act. The High Court was not called upon to decide any question of juridiction as sought to be raised by Mr. Manchanda before us nor the High Court has granted any certificate in this regard. So far as the question referred to the High Court is concerned, its language shows that there was no controversy about the appeal filed under Sec. 248 of the Act and the only question raised was whether the A.A.C. had jurisdiction to deal with the quantum of the sum chargeable under the provisions of the said Act from which the assessee was liable to deduct tax under Sec. 195 thereof. The argument thus raised by Mr. Manchanda before us that Order under Sec. 195 (2) was not appealable under Sec. 248 of the Act, is not available. Even otherwise the language of Sec. 248 of the Act is wide enough to cover any order passed under Sec. 195 of the Act. The case Meteor Satellite Ltd. v. Income Tax Officer,

Companies Circle-IX, Ahmedabad, [1980] 121 ITR p. 311 cited in support of the above contention by Mr. Manchanda is of no relevance.

It was next contended by Mr. Manchanda that the A.A.C. was wrong in holding that the quantum of income could be determined in an appeal under Section 248. It was also argued that the A.A.C. was also wrong in allowing the expenses at 75% of the remittance. It would be proper to reproduce Section 248 of the Act which reads as under:

> Section 248: Appeal by Person Denying Liability to Deduct Tax:
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> "Any person having in accordance with the provisions of Sections 195 and 200 deducted and paid tax in respect of any sum chargeable under this Act, other than interest, who denies his liability to make such deduction, may appeal to the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) to be declared not liable to make such deduction."

It was argued by Mr.Manchanda that under Section 248 a person could deny his liability to make such deduction but there was no power to determine the quantum and to say as to what extent the said remittance will be taxed. We find no force in the above contention. Section 248 makes a mention of Sections 195 and 200 and it does not speak of the sub- clauses of Sec. 195 either (1) or (2). When once an appeal has been preferred to the A.A.C. on the matter of liability of the company to deduct taxes, the A.A.C. is well within his competence to pass an order on the quantum also. In our opinion the A.A.C. was also competent to pass an order with regard to quantum when once he is seized of the matter. Under Section 248 a person having deducted and paid tax under Section 195 may appeal to the A.A.C. denying his liability to make such deduction and for a declaration that he is not liable to make such deduction. It is thus difficult for us to accept the arguments that total denial may enable an appeal to be filed but not a part denial with reference to part of the payment subjected to deduction of tax. The right of appeal given under Section 248 is clear and we cannot accept the view sought to be propounded by Mr. Manchanda that such a right is restricted and the A.A.C. was not competent to fix the quantum or to revise the proportion of the amount chargeable under the provisions of the Act as determined by the Income Tax Officer. Sec. 251 of the Act provides with the powers of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals). Clause (c) of Sub-Sec. (1) of Sec. 251 reads as under:

> "Sec. 251(1)(c):
>
> "In any other case, he may pass such orders in the appeal as he thinks fit".

The above provision gives full power to the Appellate authority to pass such orders in the appeal as he thinks fit. There is no controversy before us that appeal could lie before A.A.C. under Sec. 248 of the Act. We are thus in agreement with the view taken by the High Court and the Income Tax Appellate Tribunal. The appeal thus fails and is dismissed with no order as to costs as nobody has appeared on behalf of the respondent.

R.P. Appeal dismissed.