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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1332 OF 2013

INCOME TAX APPEAL NO.1380 OF 2013

INCOME TAX APPEAL NO.1381 OF 2013

INCOME TAX APPEAL NO.1383 OF 2013

INCOME TAX APPEAL NO.1384 OF 2013

INCOME TAX APPEAL NO.1398 OF 2013

INCOME TAX APPEAL NO.1478 OF 2013

Director of Income Tax (IT)-II, Mumbai ..Appellant.
V/s.
Booz Allen and Hamilton (India) Ltd. & Co. Kg.USA ..Respondent.

Mr.Tejveer Singh for the appellant in all the appeals.
Mr.SunilMoti Lala with Mr.Paras S. Savla for the respondent in all the appeals.

CORAM : S.C.DHARMADHIKARI AND A.K. MENON, JJ.

DATED : 10TH APRIL, 2015

P.C. :-

1. All these appeals are by the revenue and raising the common questions. The questions are reproduced herein below :-

i) Whether on the facts and circumstances of the case, the

ITAT is correct in holding that the amount payable to BAH India to USA entity did not constitute its income chargeable to tax in the year under consideration ?

ii) Whether on the facts and circumstances of the case, the ITAT is correct in holding that the amount payable to BAH India to USA entity could not be brought to tax in India as fees for technical services as per the relevant provisions of Act ?

2. The Income Tax Appellate Tribunal, Mumbai passed an order and all the appeals of the assessee for the assessment years 1998-99 onwards were partly allowed.

3. The Tribunal held that the assessee BAH India, namely, M/s.Booz Allen and Hamilton (India) Ltd. and Co. is a foreign partnership firm established in Germany. It was aggrieved by an order passed by the Commissioner of the Income Tax (Appeals), Mumbai. The argument was that during the years under consideration, the management and technical consultancy services were rendered to the assessee and the assessee having remitted certain sums from abroad, the Indian the tax laws and the complete tax structure can be invoked in so far as the assessee is concerned. All that the Tribunal has done and after hearing both the sides is to apply

its own decision and rendered in the case of M/s. Siemens.

4. The Tribunal has found that the only contention of the revenue was that against the decision in the case of M/s. Siemens, it has approached the jurisdictional High Court, namely, this Court and the appeal is pending.

5. In para 17 of the order passed by the Tribunal and impugned in the first matter, the reliance on M/s.Siemens case is placed.

6. After the hearing concluded on the earlier occasion, what has been produced is an order passed by this Court in Income Tax Appeal No.124 of 2010 [Director of Income Tax (International Taxation) V/s. M/s.Siemens Aktiengesellschaft] rendered on 22nd October, 2012. This Court after hearing both sides held as under:-

> " 1. This appeal is filed by the Revenue raising following questions of law.
>
> i) Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that the Royalty and fees for technical services

should be taxed on receipt basis without appreciating the fact that the Hon'ble Supreme Court has held in the case of Standard Drum Motors Private Limited V/s. CIT 201 ITR 391 that the credit entry to the account of the assessee nonresident in the books of the Indian company amounted to receipt by the nonresident ?

(ii) Whether on the facts and I the circumstances of the case the Tribunal was right in law in confirming the order of the CIT (A) in deciding that as the assessee is a nonresident, its entire income is tax deductible, the question of levy of interest under Section 234B will not arise ?

2. As regards first question is concerned, the Income Tax Appellate Tribunal referring to para1 to 3 under Article IIXA of the Double Taxation Avoidance Treaty with the Federal Germany Republic as per Notification dated 26th August 1985 held that the assessment of royalty or any fees for technical services should be made in the year in which the amounts are received and not otherwise. Counsel for the Revenue relied upon the Special Bench decision of the Tribunal in the assessee's own case, which in our opinion, has no relevance to the facts of the present case, as it relates to the period prior to the issuance of Notification dated 26th August 1985. In this view of the matter the decision of the Income Tax Appellate Tribunal in holding that the royalty and fees for technical services should be taxed on receipt basis

cannot be faulted.

3. As regards second question is concerned, counsel for the parties state that the said question is covered against the Revenue by the judgment of this Court in the case of Director of Income Tax (International Taxation) V/s. NGC Network Asia LLC Limited reported in (2009) 313 ITR 187 (Bom.). Accordingly, the second question cannot be entertained."

7. We inquired from Mr.Tejveer Singh whether any contrary decision has been rendered either by this Court or whether this view taken in the case of M/s.Siemens has been interfered with or set aside by the higher Court. Mr.Tejveer Singh, appearing for the revenue in support of these appeals, beyond seeking accommodation and adjournment was unable to point out anything to the contrary. We have accommodated the revenue enough and do not intend to grant any further adjournment.

8. Additionally, we find that in the two appeals to which our attention has been invited, the Tribunal in the order impugned in those appeals in para 12 has relied upon this Court's decision. Paras 12 & 13 of the Tribunal's impugned order read as under:-

"12. In our opinion, the judicial pronouncements discussed above clearly support the stand of the assessee that income on account of the amounts payable to BAH India to the overseas group entities could be said to have accrued to the said entities only on receipt of the required approval from RBI and there being no such approval received during the year under consideration, the same could not be taxed as income in that year. It is observed that the learned CIT (Appeals), however, has not accepted this stand relying on the decision of Hon'ble Supreme Court in the case of LIC of India vs. Escorts Ltd. (supra) wherein it was held that permission granted by the RBI is to be construed to mean both permission granted previously or obtained subsequently. As rightly contended by the learned counsel for the assessee, the said decision, however, was not rendered by the Hon'ble Supreme Court in relation to income-tax proceedings and there was no issue of accrual of income involved in that case. Moreover, the said decision was rendered in the context of section 29 of Foreign Exchange Regulation Act under which permission of Reserve Bank of India in regard to the establishment of business in India was required to be obtained subsequently within a period of six months from the date of establishment of business in India and in these facts and circumstances, it was held by the Hon'ble Supreme Court that the permission obtained subsequently from the Reserve Bank of India should be

treated as having retrospective effect. The decision of the Hon'ble Supreme Court in the case of LIC vs. Escorts Ltd. (supra) thus was rendered in a different context and in a different set of facts and the same in our opinion, cannot support the stand of the Revenue in the present case.

13. Before us, the learned DR has made an attempt to distinguish the decision of the Hon'ble Bombay High Court in the case of CIT vs. Kirloskar Tractors Ltd. (supra) and in the case of CIT vs. John Fowler (India) Ltd. (supra) stating that permission in the said cases applied by the assessee from the RBI whereas no such permission has been sought by the assessee in the present case. However, as explained by the learned counsel for the assessee, permission has not been sought from RBI since BAH India having substantial losses is not in a position to remit the amounts in question to the overseas group entities. In any case, this aspect, in our opinion, is not relevant for deciding the issue of accrual of income which as held by the Hon'ble Bombay High Court in the case of Kirloskar Tractors Ltd. (supra) and in the case of Dorr-Oliver (India) Ltd. takes place only on the obtaining of the necessary approval required from RBI. Keeping in view the said decision of Hon'ble Bombay High Court, we accept the contention raised on behalf of the assessee that the amounts payable by BAH India to three group entities in Germany, Indian and Panama (SE Asia) did not constitute their income chargeable to tax in

the year under consideration as there was no accrual of income in the absence of permission obtained from RBI as required by FERA. We, therefore, delete the additions made on this count by the AO and confirmed by the learned CIT (Appeals) in the case of the said three entities and allow ground No.5 of ITA Nos.4502, 4503 & 4504/Mum/2003."

9. Our view as above, is reinforced by the fact that nothing contrary to the decision of this Court relied upon by the Tribunal has been brought to our notice. Further, in the case of M/s.Kirloskar Tractors Ltd. (supra), this Court has referred to the judgment of the Hon'ble Supreme Court in the case of **LIC of India Vs. Escorts Ltd.** reported in **AIR 1986 SC 1370.** This Court has held that the judgment of the Hon'ble Supreme Court in the case of LIC of India V/s. Escorts Ltd. would not be applicable and is distinguishable, because, it deals with the provision in the Foreign Exchange Regulation Act, 1973. For all these reasons, we do not find that the appeals raise any substantial questions of law. The appeals are dismissed. No order as to costs.

(A.K.MENON, J.) **(S.C.DHARMADHIKARI, J.)**