

Royal Airways Ltd. Vs. Additional Director of Income Tax

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SooperKanoon Citation : sooperkanoon.com/74445

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Oct-31-2005

Reported in : (2006)98ITD259(Delhi)

Judge : S Tiwari, N Karhail

Appellant : Royal Airways Ltd.

Respondent : Additional Director of Income Tax

Judgement :

1. These 19 appeals have been filed by the assessee on 29th Nov., 2004 against the consolidated order of the learned CIT(A)-XXIX, New Delhi dt. 24th Sept., 2004 in relation to 19 appeals filed by the assessee under the provisions of s. 248 of the Act.

2. In these appeals, the assessee has taken 7 grounds of appeal. Some of the grounds of appeal have been further divided into several sub-divisions. During the course of hearing before us the learned Counsel for the assessee stated that mainly there were two issues in these appeals, viz., (i) condonation of delay in filing the appeals before the learned CIT(A), and (ii) the contention of the assessee that it was not liable to deduct any tax at source. The learned Counsel argued that the second issue already stood covered in favour of the assessee and against the Revenue by several earlier decisions of the Tribunal.

3. Facts of the case leading to these appeals briefly are that the assessee, a domestic company, started airline operations in India in May, 1993. For that purpose the assessee entered into three separate agreements with a foreign company named and styled as M/s Deutsche Lufthansa, Aktiengesellschaft (hereinafter called Lufthansa A.G) for providing aircrafts on lease, for servicing of the aircrafts and for providing crew to fly the aircrafts. These agreements were entered into on 18th March, 1993, 15th Feb., 1993 and 5th Aug., 1993. In pursuance to these agreements, the assessee-company took on lease three aircrafts from Lufthansa A.G. CBDT vide its orders dt. 8th Oct., 1993, 5th Sept., 1993 and 20th Aug., 1993 granted exemption under Section 10(15A) in relation to the assessee's agreements with Lufthansa A.G. dt. 18th March, 1993 for lease of three aircrafts. According to the assessee the terms of the lease of three aircrafts included provision of technical services to the assessee-company even though separate agreements also had been made between the assessee and Lufthansa A.G. in that behalf.

According to the assessee, since the lease was a composite lease of the aircrafts, services and operation, the exemption granted under Section 10(15A) of the Act fully covered the three agreements between the assessee and Lufthansa A.G. The assessee maintained that the payment for crew, lease, flat rate charges, training fee and ground handling charges being linked to the lease of the aircraft, exemption under Section 10(15A) applied to all the payments. Otherwise also no tax was payable in India in terms of Article III of DTAA between Federal Republic of Germany and India.

4. The assessee was required to make remittances to Lufthansa A.G. in respect of the aircrafts leased and various services received in accordance with each of the three agreements. As per the procedure prescribed by RBI and IT Department, the assessee was required to obtain a no objection certificate from the AO before making any remittance to Lufthansa A.G., being a foreign company. The assessee, therefore, applied to the AO for issue of NOC. The AO held that the CBDT vide its orders dt. 20th Aug., 1993, 15th Sept., 1993 and 8th Oct., 1993 had specifically approved only the agreement dt. 18th March, 1993 for the purpose of Section 10(15A). Hence, only the payments in respect of the three leased aircrafts

were exempted from tax under Section 10(15A). No exemption was granted by the CBDT for payment made on account of other services rendered by Lufthansa A.G. The learned AO also rejected the assessee's claim based on Article III of the DTAA. According to the learned AO, Article III of the DTAA was not applicable because the payments received by Lufthansa A.G. from the assessee-company were covered by the definition of fees for technical services as given in Article VIIIA of the DTAA. Hence, the amounts received by Lufthansa A.G. in relation to the other two agreements not approved by CBDT was chargeable to tax in India @ 20 per cent. The learned AO also rejected the alternative contention of the assessee based on Section 44BBA. The three aircrafts leased by the assessee-company were operated by the assessee-company for domestic traffic in India. They were not and could not be said to be operated by Lufthansa A.G. It was the assessee who was engaged in the operation of the aircrafts in India and not Lufthansa A.G. Hence the provisions of Section 44BBA were not applicable at all. The learned AO, therefore, directed the assessee to deduct tax at source @ 20 per cent. In the absence of the approval by the Government of India as required under Section 10(6A) of the Act, the tax of 20 per cent was to be grossed up under Section 195A.5. According to the assessee-company it made remittances to Lufthansa A.G. without deduction of tax at source. However, tax was paid @ 20 per cent by the assessee himself. The tax, thus, paid was shown in the books of account of the assessee-company as tax receivable.

6. These appeals pertain to 18 remittances made by the assessee to Lufthansa A.G. during the financial years 1993-94 and 1994-95. In addition, the assessee also made one remittance on 30th May, 1995 falling in financial year 1995-96. The details of amounts remitted are given at pp. 1 and 2 of the impugned order of the learned CIT(A).

Though the assessee had made remittances during the financial years 1993-94 to 1995-96, the assessee filed appeals under Section 248 before the learned CIT(A) on 27th July, 2004. The assessee requested the learned CIT(A) to condone the delay. During the course of hearing before the learned CIT(A) the assessee relied upon the facts stated in the application under Section 249(3) submitted along with Form No. 35 for filing the appeals. The assessee submitted that it was formerly

known as M.G. Express Ltd./Modiluft Ltd., a limited company. Though in view of the company no tax was payable in respect of remittances made to the foreign company, it had to deposit the tax and obtain NOC from the Department for making the remittances to Lufthansa A.G. at the instance of the Department. The company was advised that instead of raising claim in respect of each of the payments for non-taxability and filing appeals separately for each of the remittances, the company should file return of the foreign company and refund should be claimed for all the remittances made during a financial year in such returns of income. In view of the legal opinion received the assessee-company did not raise claim in respect of each of the remittances by filing appeals separately. Payments of taxes were shown as tax recoverable in the books of account with the understanding that refund will be claimed and allowed by the Department pursuant to return of income to be filed in the case of the foreign company. The return of income for the financial year 1993-94 was due for being filed by 30th Nov., 1994. The company requested the foreign company to either sign return of income to be filed in India or give power of attorney to the assessee-company to file return on their behalf and claim refund of tax paid in India.

Lufthansa A.G. was reluctant to either sign the return of income or authorize the assessee-company to file the same. The assessee-company tried to explain the position under IT Act to Lufthansa A.G. but the matter, however, remained pending. Towards the end of 1995 a dispute arose between the assessee-company and Lufthansa A.G. Finally, the relationship had broken down completely by middle of 1996. By the end of 1996 operations of the assessee-company were suspended and most of the employees of the company including the employees of the accounts and finance Department, who were aware of the income-tax matters left the company. The top management of the company became involved in difficulties relating to operations of the company and settlement of disputes with the foreign company as well as with Government Departments. Therefore, no attention could be paid to the matter relating to claim of refund for payment of taxes in respect of remittances already made. The management of the company throughout the intervening period from 1996 to 2000 continued to make efforts to relaunch operations by settling the disputes with Customs Department and other Government authorities. During that period the company was also looking for a

suitable collaborator. Towards the end of year 2000 the assessee received fresh FDI after necessary approval from FIPB and other Government agencies. Unfortunately at that juncture some disputes arose between the old management and the subsequent management. Since in the accounts of the company for the year ended 31st May, 2003 an amount of Rs. 3.24 crores was being stated to be recoverable in respect of TDS, at the time of finalisation/discussion of the accounts in the meeting of the board of directors questions were raised as regards the details of those payments. The general manager (finance) of the company was directed to take up the matter and find out the details of appeals pending from the concerned authorities and the reasons why the matter was not being sorted out. Such directions were given in the meeting of board of directors held on 17th Sept., 2003. The general manager (finance) pursuant to the above directions inspected the records of the IT Department relating to applications filed for obtaining NOC in respect of remittances and details of taxes paid. As per the opinion of the tax consultant dt. 16th June, 2004, the board of directors of the company in its meeting held on 17th June, 2004 authorised taking of necessary actions for obtaining the refunds of tax recoverable. The assessee pleaded that delay in filing the appeals had been on the facts and in the circumstances abovementioned. There was no intentional default or carelessness on the part of the company in not filing the appeals during the statutory time. The company had entertained bona fide belief that it could claim refund of tax by filing return of income of the foreign company. That it could not do for the reasons and circumstances beyond its control. The assessee, therefore, prayed that the delay in filing of the appeals may be condoned. The assessee placed reliance on the judgments reported in Collector, Land Acquisition v. Mst. Katiji and Ors. (1987) 167 ITR 471 (SC), CIT v. Khemraj Laxmichand (1978) 114 ITR 75 (MP) and Shrimant Govind Rao Narayanmo Ghorpade v. CIT 7. The learned CIT(A) noted that as per the provisions of Section 249(2) of the Act the appeal should be presented within 30 days from the date of payment of tax where the tax had been deducted under Section 195(1) of the Act. As per provisions of Section 249(3), the delay could be condoned only when the assessee had sufficient cause for not presenting it within the statutory period. According to the learned CIT(A) the sufficient cause for this purpose must be a cause beyond the control of the party which by due care and

attention could not have been avoided. The assessee was required to show sufficient cause for not filing the appeal from the last day of limitation till the actual date of filing of the appeal. In the instant case the assessee had submitted that initially on the basis of legal advice it was thought by the company that the foreign company should file the return and claim the refund. The statutory period for filing the return expired on 30th Nov., 1994 and as per the assessee's own version Lufthansa A.G. was reluctant in either signing the return of income or authorizing the assessee-company to file the same. Hence, even when the assessee came to know that the foreign company was not filing the return and the statutory period had expired, the assessee even thereafter did not file the appeal under Section 248 for the denial of tax liability. After the time to file the return by foreign company had expired, the assessee could have filed the appeal under Section 248 but he did not do without any reason. It was also admitted position that when the operations of the company were suspended by the end of 1996 no attention could be paid to the matter relating to claim of refund for payment of taxes made during the period 1993-94 to 1995-96. Even after take over of the company by the new management, no attention was paid for filing of the appeal. The new management also took several years to file the appeals.

The appeals in question were late by almost 9 to 11 years. From the submissions of the assessee, it was clear that no care or attention had been given in filing the appeals in statutory time-limit and the assessee had shown utter disregard to the statutory provisions of the Act.

8. The learned CIT(A) referred to the judgments reported in AIR 1917 PC 156, AIR 1979 Mad 115, AIR 1938 Nag. 156 and 11 STC 104 (Pat). The question was whether the assessee had acted with reasonable diligence in the prosecution of his appeals. The period for filing of appeal could not be extended because the assessee's case was hard and called for sympathy. There had to be diligence on the part of the assessee and he should not be guilty of negligence. The burden to prove existence of sufficient cause was upon the assessee and there was no presumption that delay had occurred by bona fide reasons. In the absence of sufficient cause being shown, the application for condonation of delay was liable to be rejected. The learned CIT(A) further held that the judgments being relied upon

by the assessee were distinguishable on facts. Those were the cases relating to condonation of delay for the registration of firm or the condonation of delay in filing of appeal by the State, etc. According to the learned CIT(A) on the facts of the case it appeared that the assessee had not taken due care and diligence and had not given sufficient attention to file the appeal in time, rather utter disregard had been shown to the statutory provisions in filing appeals in time. The assessee had failed to establish that there had been diligence on the part of the assessee and he was not guilty of negligence. The assessee had not acted with reasonable diligence and due care in filing the appeals. The reasons mentioned by the assessee were not such which could be called beyond his control. On this reasoning the learned CIT(A) held that the assessee did not have any sufficient cause for not presenting the appeals within the statutory period. He, therefore, declined to condone the delay and dismissed the appeals being time-barred by limitation in limine. Aggrieved, the assessee is in appeal before us.

9. During the course of hearing before us the learned Counsel for the assessee argued that in the instant case the delay in filing of appeals originated from entirely bona fide reasons and the circumstances beyond the control of the assessee. The assessee-company itself had a chequered history. Its venture of operating as a domestic airline was shortlived. At the material time the assessee received legal advice that the better course would be to file returns of income for the relevant assessment year on behalf of Lufthansa A.G. and obtain the refund of entire tax amount on the ground that no part of the income of Lufthansa A.G. in relation to the payments received from the assessee-company was chargeable to tax in India. The foreign company, however, had reservations in the matter and while discussions were going on, the business of the assessee itself came to a grinding halt.

The relationship with Lufthansa A.G. also deteriorated. Having regard to the fact that the assessee was no longer in active business its employees, including the staff in accounts Department, deserted the assessee. Thereafter there was a change of management and new management was keenly engaged in reviving the company. As a result of the efforts of the new management, sizeable amount of foreign investment was received after approval from various Government

agencies. By that time there were differences with the old management.

The facts of the case came to the notice of the new management for the reasons that in the books of account of the assessee-company, the amounts of taxes paid over and above full payment to Lufthansa A.G. had been shown as tax recoverable. The new general manager was directed to look into the matter who had to inspect the old assessment records and gather the information relating to the amounts recoverable. These were weighty and material reasons which the learned CIT(A) failed to attach due importance to. After the assessee had deposited the amount of TDS directed by the AO so as to facilitate remittance of money to Lufthansa A.G., there were two courses available to the assessee, viz., to claim the refund on filing of the return of income by or on behalf of the foreign company, or to file direct appeals against each of remittances under the provisions of Section 248. The assessee at that time had the perception that the former course would be easier but that was not to be because Lufthansa A.G. had reservations in the matter and was not well conversant with the tax procedures in India. Thereafter everything came to a grinding halt because the assessee's business abruptly stopped. Once the business stopped everything came to a standstill. The learned CIT(A)'s view that even after the assessee's business having come to a grinding halt, the things would go in normal course as if nothing happened, was completely shorn of ground reality. Most of the employees deserted the assessee-company treating it as a sinking ship.

There was nobody to look after various pending matters. Halt of business itself threw up several pressing problems which took priority.

Apparently the delay occurred on account of turn of events and circumstances beyond the control of the assessee.

10. The learned Counsel argued that the finding of the learned CIT(A) that the assessee had acted in "utter disregard to the statutory provisions of the Act" was unrealistic and illogical. The learned CIT(A) did not appreciate that the relevant statutory provisions were provisions for obtaining refund of taxes paid by the assessee and not the provisions of payment of any further amounts by way of taxes. No assessee in his proper senses would show utter disregard to the

statutory provisions resulting into refund of substantial amounts to the assessee. If the assessee would show disregard to those provisions, it was perilous to the assessee alone and no one else. On the facts and circumstances of the case, any disregard to the statutory provisions of the Act or any contumacious conduct on behalf of the assessee was unthinkable. On the contrary the very fact that huge refunds due to the assessee were not claimed would go a long way to show that the assessee was prevented by sufficient cause from lodging its claim in time for recovery of the amounts that rightfully belonged to the assessee.

11. The learned Counsel argued that in the instant case the Tribunal has repeatedly held several times that no part of the payments made by the assessee to Lufthansa A.G. is chargeable to tax in India. The assessee had already made full payment to Lufthansa A.G. and deposited the amounts as directed by the AO because there was no other way to facilitate remittances to the foreign company. On these facts substantial justice required that the appeals filed by the assessee may be entertained. The assessee should be refunded the amounts not due to the credit of the Central Government. The money paid always belonged to the assessee and has remained with the Central Government in trust pending adjudication of the matter. It is not the case of any false claim or any manipulation of accounts or facts of the case. The bona fide of the assessee and sufficient cause was patent on the facts of the case. The learned Counsel referred to the judgment of Hon'ble Supreme Court in R.B. Shreeram Durga Prasad & Fatehchand Nursing Das v. Settlement Commission (IT & WT) and Anr. (1989) 176 ITR 169 (SC) and argued that provisions of Section 5 of Limitation Act are required to be interpreted so as to do substantial justice between the parties. He also placed reliance on the judgments in Addl. CIT v. Dalmia Magnesite Corporation (Mad), CIT v. Dalmia Magnesite Corporation (Vaijayanatabai Baburao Patil v. Shantaram Baburao Patil and Ors. (2002) 253 ITR 798 (SC) and the decision of the Tribunal, Mumbai in ITA No. 6689/M/1995 in the case of Datamatics Ltd. He argued that in a case where the delay is not voluntary and bona fide the provisions of condonation of delay should be liberally applied.

12. The learned Departmental Representative argued that the delay in filing of these appeals was inordinate. It had to be borne in mind that the delay ranged

between 9 to 11 years. Such exceptional delay could not be explained away by pleading various difficulties of the assessee.

The Act provided a period of 30 days only. A line was, therefore, required to be drawn upto which the assessee could plead financial difficulties, change of management, nonavailability of staff and all that. The learned Departmental Representative emphasized that the expression used in Section 249(3) was not merely reasonable cause but "sufficient cause". The expression "sufficient cause" was more strict and restrictive than "reasonable cause". The assessee was required to explain each day of delay.

13. The learned Departmental Representative argued that the explanations given by the assessee were not easy to believe. According to the assessee's own version, the payments were made to the foreign company at regular intervals. At the same time the assessee argued that the foreign company was not coming forward to file the return of income. The return of income for the financial year 1993-94 had fallen due on 30th Nov., 1994. It was difficult to understand that if the foreign company was reluctant to file return of income, the assessee would neither file its own appeals nor compel the foreign company to file the return of income and instead continue to make remittances for more than one year thereafter. According to the assessee by the end of 1996 operations of the company were suspended. However, the appeals were filed only in the middle of the year 2004. It was difficult to believe that for such a long duration the assessee could not have detected the basis on which huge amounts were shown in its books of account as tax recoverable. The learned Departmental Representative argued that the various case laws relied upon by the assessee were distinguishable on facts. He relied upon the judgment of Hon'ble Supreme Court reported in AIR 1998 SC 2276. He also relied upon the judgments reported in (2002) 253 ITR 798 (SC) (supra) and CIT v. Ram Mohan Kabra (2002) 257 ITR 773 (P&H). The learned Departmental Representative strongly relied upon CBDT Circular No. 790, dt. 20th April, 2000. He argued that under this circular two years time-limit had been laid down. In the case of the assessee condonation was sought for about 10 years and, therefore, the assessee's claim was clearly unacceptable.

14. The learned Departmental Representative thus, argued that the assessee's request for condonation of delay was correctly turned down by the learned CIT(A) and the assessee (order) did not deserve any interference on the part of the Tribunal. Alternatively, the learned Departmental Representative argued that should the Tribunal come to the conclusion that the delay in filing of appeals by the assessee before the learned CIT(A) be condoned, in that event the matter should be sent back to the learned CIT(A) for decision on merits. He argued that in the instant case the learned CIT(A) had dismissed the assessee's appeals in limine. There was no finding of the learned CIT(A) that the payments made by the assessee to Lufthansa A.G. were not chargeable to tax in India. Unless that issue was decided by the learned CIT(A), no decision on merits could be given by the Tribunal.

15. At this point, the learned Counsel for the assessee pointed out that as far as the issue on merits was concerned, there were as many as six orders of different Benches of the Tribunal in favour of the assessee and none in favour of the Revenue. That aspect had been argued and reargued several times before the Tribunal and had been completely threshed out. There was no justification in the request of the learned Departmental Representative that for decision on merit the matter should be restored to the file of the learned CIT(A). Having regard to this plea we directed the learned Departmental Representative to spell out his reasons as to why in spite of there being half a dozen Tribunal orders already in existence, in the event of the delay being condoned, the matter should be sent back to the learned CIT(A) for decision again. The hearing was adjourned to next session for that purpose. In the afternoon session the learned Departmental Representative was heard by us in extenso. He mainly argued on the basis of Circular No. 790 of CBDT. He pointed out that in none of the Tribunal orders CBDT Circular No. 790 had been taken into consideration. The essence of CBDT Circular No. 790 was that the refund of tax deducted at source while obtaining NOC could be claimed only by the non-resident. The assessee had no locus standi in the matter. The learned Departmental Representative relied upon the judgments reported in 190 ITR 517 (Cal) (sic) and CIT v. Karnataka State Warehousing Corporation Ltd. (1990) 185 ITR 25 (Kar) in this respect.

16. Secondly, the learned Departmental Representative argued that in the orders of the Tribunal it was assumed that Lufthansa A.G. did not have a permanent establishment in India. The assessee had not conclusively established that the payee did not have permanent establishment in India. The Tribunal also did not take into account that out of the three agreements exemption under Section 10(15A) was given by CBDT only in respect of one agreement. As a logical corollary, the payments made by the assessee to the foreign company in pursuance to other two agreements were chargeable to tax.

17. The learned Departmental Representative argued that under the Act there was no provision for grant of refund of TDS to the payer. CBDT Circular No. 790 made it very clear that refund could be granted only to the payee. That circular also laid down limit of two years. In that respect the learned Departmental Representative placed reliance on *Samcor Glass Ltd. v. Asstt. CIT* (2004) 82 TTJ (Del) 325 : (2005) 94 ITD 202 (Del). He also made an alternative contention that if the refund of TDS was to be granted to the assessee, in that event the assessee should not be allowed to claim the amount of TDS as expenditure incurred, 18. In his rejoinder, the learned Counsel for the assessee argued that in the order of the learned CIT(A) there was only one reason given, i.e., according to him there was no sufficient cause. He argued that the Tribunal had already decided half a dozen times that the payments made by the assessee to Lufthansa A.G. are not chargeable to tax in India. Some of these decisions had been delivered years ago. The Department had not brought on record at any stage an iota of material to suggest that Lufthansa A.G. had any PE in India. It had, therefore, become a settled position that the payee had no PE in India. There was no burden to prove negative on the assessee that the payee did not have PE in India. He pointed out that in the orders under Section 195 the learned AO nowhere mentioned that there was a PE maintained by Lufthansa A.G. The only reason given was that CBDT had approved only one agreement relating to aircrafts leasing and the other agreements had not been approved for the purpose of exemption under Section 10(15A) of the Act. The case of the AO was that what the assessee paid was fees for technical services and, therefore, it was chargeable to tax. The Tribunal have held years ago that even fees for technical services cannot be charged in India in the case of a non-resident who does not have a PE in India. Thereafter five more

decisions had been delivered by the Tribunal. That aspect was not in dispute. The learned Counsel argued that it was totally incorrect to say that the refund of TDS could be granted to the payee only. In none of the 19 remittances the assessee had deducted any tax at source while making payment to Lufthansa A.G. Lufthansa A.G. had been paid in full without deduction of a rupee and, therefore, no part of the amounts ever belonged to them. That was the reason that they were not concerned in the matter and did not go along with the assessee for the purpose of filing of tax returns in India. As the amounts had been paid by the assessee over and above its liability of payment to Lufthansa A.G., the amounts in question belonged to the assessee. Provisions of Section 248 clearly authorized the assessee to file a direct appeal against the order of the AO requiring deduction of tax at source. In that event the assessee could claim refund in its own right.

19. We have carefully considered the rival submissions. The first issue before us is whether the learned CIT(A) is justified in refusing to condone delay, as prayed for by the assessee, in filing the appeals. It is settled legal position that the provisions relating to condonation of delay are procedural provisions. The Courts have, therefore, held that the statutes conferring a right of appeal are in furtherance of justice and the provision limiting the time for bringing an appeal must be liberally interpreted so that the party pursuing remedy allowed to him is not deprived of the same on mere technicalities. It has been held in a number of cases that the words "sufficient cause" should receive liberal construction so as to advance substantial justice. (AIR 1978 SC 537, AIR 1982 All 240, AIR 1969 SC 575, AIR 1954 SC 411 and AIR 1964 Punj. 235). It is true that the period for filing an appeal cannot be extended simply because the appellant's case is hard and calls for sympathy. In granting the condonation of delay, the appellate authority must be satisfied that there had been diligence on the part of the appellant. However, for deciding the question of diligence, a reasonable view is required to be taken keeping in view the facts and circumstances of each case. When no negligence nor inaction nor want of bona fide can be imputed, a liberal construction of provision has to be made in order to advance substantial justice. Similarly, while it is true that the appellant has to show sufficient cause for not filing the appeal on the last day of limitation and must explain the delay made thereafter, day by day, and in other words the whole of the delay must be explained. At the same time, while applying

this principle, a broad view is required to be taken because the principle of advancing substantial justice is of prime importance. [(2002) 253 ITR 798 (SC) (supra)].

20. In the case before us the major part of the delay relates to the period when the assessee's business operation came to a grinding halt.

Cessation of business activity is commercially the worst calamity that could happen and brings in its wake deterioration of all other collateral activities, such as upkeep and maintenance of fixed assets, regular maintenances of books of account; collection and recovery of outstanding dues and so on. It is proverbial that nothing succeeds like success and nothing fails like failure. When going gets tough it cannot be expected that things would remain the same when going was good. In the instant case the assessee made full payments to Lufthansa A.G. and decided to make payment of TDS demanded by the AO on its own. The assessee had, therefore, nothing to gain by delaying the matters thereafter. It is not a case where the assessee could expect to have derived any mileage on account of the matter getting delayed. The delay in filing of appeals has caused prejudice to no one else except the assessee himself. When we keep these facts in mind, the bona fide of the assessee is not in doubt. Sufficient cause and bona fide go hand in hand. If the assessee has acted bona fide, the reasons for delay, in the absence of any material to the contrary, should be construed to be reasonable. After having made full payment to Lufthansa A.G. and at the same time met the requirements of the AO, the assessee obviously put itself in an unenviable position. The argument of the assessee is that it received legal advice that the matter should be approached by seeking to have completion of the assessment of the non-resident on the basis that no part of the income of the non-resident was chargeable to tax in India. It is settled legal position that any delay caused on account of legal advice received or while pursuing an abortive remedy should be treated as sufficient cause. [AIR 1937 PC 278, AIR 1923 Pat 40, AIR 1972 SC 1973 and 116 STC 324 (Punj), etc.]. In the instant case the assessee has pleaded that after cessation of business operations the assessee was deserted by the regular staff. There was change in management, there were financial difficulties and so on. On a pragmatic appreciation of the matter we are of the view that the assessee can be said to

have been prevented by a sufficient cause from filing the appeals on a date earlier than the same were filed before the learned CIT(A). At the same time we direct that the assessee would not be entitled to payment of any interest, etc. for the period of this delay and while calculating interest payable to the assessee, if any, the period of delay in filing the appeal before the CIT(A) shall be excluded.

21. We now address ourselves to the second issue, as to whether on merits these appeals filed by the assessee under the provisions of Section 248 should succeed. During the course of hearing before us the learned Departmental Representative argued that as the CIT(A) had dismissed the assessee's appeals in limine and not considered the appeals on merits, the matter should be restored to him for decision on merits. He referred to the Tribunal decision in *United Builders v. Asstt. CIT* (2000) 66 TTJ (Del) 13 in that respect. We would have gladly accepted this contention of the learned Departmental Representative but we find greater merit in the submission of the learned Counsel of the assessee that an issue, which has come up before the Tribunal about half a dozen times in past, should not be considered to be requiring further adjudication at the hands of the lower authority. We, therefore, asked the learned Departmental Representative to give reasons as to why the matter should be sent back to the lower authority for decision afresh when the same stands already concluded by more than one orders of the Tribunal. The learned Departmental Representative argued that the assessee had not conclusively established that Lufthansa A.G. did not have any PE in India. It is seen that in the order under Section 195 the learned AO rejected the assessee's numerous contentions that the payments made by it to Lufthansa A.G. were not chargeable to tax in India. He did so mainly on the ground that Article III of DTAA did not apply because the general provisions of Article III were superseded by Article VIIIA. The learned AO held that the payments made by the assessee to Lufthansa A.G. were chargeable to tax in India being "fees for technical services". The learned AO's orders are silent on the question of PE. It is on this ground that the first order of Tribunal, Delhi Bench 'E', dt. 18th Sept., 1998 in ITA No.2648/Del/1998 has been made in favour of the assessee. The matter has come up for consideration before the Tribunal in a number of appeals thereafter. Even after the lapse of 7 years, the learned Departmental Representative is in no position to assert that the payee had PE in India. He only wants the assessee to

prove the negative that the payee did not have PE in India. In our opinion, such negative burden cannot be cast upon the assessee before us. Second reason given by the learned Departmental Representative is that the CBDT Circular No. 790 has not been taken into consideration in the earlier orders of the Tribunal. We have carefully gone into the aforesaid CBDT Circular No. 790. The said circular issued by CBDT on 20th April, 2000, concerns itself with the situation where after deduction of tax at source and deposit into Government account, (a) the contract is cancelled and no remittance is made to the non-resident; (b) the remittance is duly made to the non-resident, but the contract is cancelled.

In both the cases income does not accrue to the non-resident. CBDT has dealt with such a situation and they have come out with certain solutions by way of general instructions to IT authorities. The case before us is altogether different. It is not a case where income did not accrue to the non-resident payee. It is very much the case of the assessee that the income did accrue to Lufthansa A.G. and, therefore, was duly paid for. The issue in appeals before us is not whether or not income accrued. It is whether or not the income accrued to the non-resident is chargeable to tax in India. We, therefore, do not find CBDT Circular No. 790 having any bearing on the issue before us. 22.

The third reason given by the learned Departmental Representative is that where tax is paid in pursuance to an order under Section 195, it is only the nonresident payee that can pursue the matter thereafter. We find these arguments of the learned Departmental Representative are completely contrary to the provisions of Section 248, which expressly give right to appeal to the resident payer. Apart from the provisions of Section 248 on the statute, we may also refer to the following pronouncements by the Hon'ble Supreme Court in the case of CIT v. Wesman Engineering Co. (P) Ltd. "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-sections either (1) or (2) of Section 195. When once an appeal has been

preferred to the AAC on the matter of liability of the company to deduct taxes, the AAC is well within his competence to pass an order on the quantum also. In our opinion, the AAC 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 AAC denying his liability to make such deduction and for a declaration that he is not liable to make such a deduction. It is thus difficult for us to accept the argument that a 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 that the AAC 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 ITO. Section 251 of the Act provides for the powers of the Dy. CIT(A) or, as the case may be, the CIT(A). Clause (c) of Sub-section (1) of Section 251 reads as under : '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 an appeal would lie before the AAC under Section 248 of the Act. We are thus in agreement with the view taken by the High Court and the Tribunal. The appeal thus fails and is dismissed with no order as to costs as nobody has appeared on behalf of the respondent." 23. Coming now to the merits of the case, we find that the issue first came to be considered by Tribunal, Delhi Bench "E" in ITA No.2648/Del/1998. In that appeal the AO on assessee's application dt. 4th Sept., 1995, rejected all the claims of the assessee-company and held that the assessee-company was liable to make payment of US Dollars, 2,40,174 (net of taxes) only after deducting income-tax at source @ 25 per cent thereon. Aggrieved by that order the assessee took up the matter in appeal before the CIT(A) and not being successful there, the assessee-company came in further appeal before the Tribunal. The Tribunal rejected the assessee's claim based on exemption under Section 10(15A), Article III of DTAA between India and Federal Republic of Germany and Section 44BBA. After detailed consideration of the matter the Tribunal held that the payments made by the assessee to Lufthansa A.G. were governed by Article VIII of DTAA and the payments could not be

charged to tax in India because Lufthansa A.G. did not have any PE in India. For that purpose the Tribunal followed the decision of the Authority for Advance Ruling in Tekniskil (Sendirian), Berhard v. CIT (1996) 222 ITR 551 (AAR). Thereafter the same issue arose before the Tribunal in the following matters : 1. RA No. 598/Del/1998 decided by order of Tribunal, Delhi Bench "B" on 13th Aug., 1999.

2. ITA Nos. 3949 and 3950/Del/1998 decided by Tribunal "D" Bench on 30th June, 1999.

In this appeal of the assessee, the learned Departmental Representative requested that the matter may be heard afresh in view of certain judgments of the Tribunal as well as Advance Ruling of the prescribed authority. After rehearing of the entire matter at length, the assessee's appeal was allowed once again by the Tribunal order dt. 30th June, 1999.

3. Tribunal Delhi Bench "F" order dt. 8th Jan., 2004 dismissing Revenue's appeal in ITA No. 2862/Del/2000.

4. Tribunal, Delhi Bench "C" order dt. 30th April, 2004 dismissing Revenue's appeal in ITA No. 4512/Del/2000.

5. Tribunal, Delhi Bench "C" order of August, 2004 dismissing Revenue's appeal in ITA No. 3831/Del/2000.

We find that in the appeals abovementioned decided by the earlier Benches of the Tribunal, facts of the case and issues for consideration are identical. The only new issue in the appeals before us is condonation of delay. We, therefore, hold that, as the assessee was prevented by sufficient cause from filing the appeals in time before the learned CIT(A), the learned CIT(A) erred in rejecting the assessee's appeals in limine. We further direct that the assessee shall not be entitled to payment of interest for the period of delay and while calculating interest payable to the assessee, if any, the period of this delay shall be excluded. Since on merits of the case the issue has been decided by the Tribunal after consideration of the matter at length on more than one occasion and since no distinguishing features have been brought to our notice, we hold that no useful purpose would be served

to restore the matter for adjudication afresh by the learned CIT(A). We, therefore, respectfully following the orders of the Tribunal in the assessee's own cases (supra) hold that the payments made by the assessee in relation to the appeals in question before us to Lufthansa A.G. are not chargeable to tax in India and accordingly the learned AO was not justified in insisting upon the payment of TDS by the assessee before issue of NOC

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