ito Vs. Board for Cricket Control in India

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-28-2007

Judge : P Kumar, S Chowla

Appellant : ito

Respondent : Board for Cricket Control in India

Judgement :
1. These five appeals in the matter of ascertainment of tax withholding liability from certain payments made by the assessee to overseas bodies relating to cricket sports, in the period relevant to the assessment years 1993-94, 1995-96, 1996-97, 1997-98 and 1999-2000. The orders passed by the Commissioner (Appeals) (Commissioner (Appeals), in short) which have been called into question in these appeals are-(a) consolidated order dated 28-2-2001 passed by the Commissioner (Appeals) for the assessment years 1993-94, 1995-96, 1996-97 and 1997-98; and (b) order dated 27-4-2002 passed by the Commissioner (Appeals) for the assessment year 1999-2000. As the issues raised in these appeals are common, the assessee in these appeals is the same and as all these appeals were together, we are disposing of all the appeals by way of this consolidated order.

2. The factual matrix giving rise to this litigation before us is as follows. So far as the assessment years 1993-94, 1995-96 and 1996-97 are concerned, a common order was passed by the assessing officer on 19-1-2001. We will, therefore, first take up facts relating to these three years. During the course of scrutiny of the relevant tax deduction at source returns filed by the assessee, the assessing

officer noticed that the assessee did not deduct tax at source from following payments: 3. The assessing officer was of the view that under the provisions of Section 194E read with Section 115BBA, tax is deductible from the above payments. He, therefore, required the assessee to show cause as to why an order under Section 201(l) and under 201(1A) of the IT Act, 1961 (the Act' in short) not be passed against the assessee calling upon to the assessee to pay such shortfall in tax deduction as also interest for the period of delay in such tax deduction. In the proceedings which followed, the assessee filed the requisitioned details, made necessary submissions on the legal and factual aspects, and contended that the assessee did not have any tax withholding liability so far as the above payments are concerned. It was submitted that an action for failure to deduct tax at source can only be taken in a reasonable time and since the action proposed to be taken by the assessing officer is well beyond four years from the end of the relevant previous year, the action so taken is vitiated in law as time-barred. The, assessee further contended that tax can be required to be deducted at source only when the recipient of the money has an income chargeable to tax in India. It was also pointed out that Section 115BBA, which provides for taxation of non-resident sportsmen and sports associations, etc. at a lower rate, can only come into play when the receipts by such sportsmen or sports associations are in the nature of income in the first place.

Merely because a tax rate was prescribed for an item of receipt cannot make such an item taxable if the same was not covered by the scope of charging provisions. The assessee then elaborated upon the nature of I guarantee money' and contended that this guarantee money paid to the cricket bodies in question was not of income nature at all. It was submitted that when an Indian team visits a foreign country, Indian team receives guarantee money and that cricket body in that country meets the expenses of the Indian team. It is in return of assuming such obligation that the assessee pays the guarantee money to the foreign cricket bodies and meets the expenditure on their team's visit to India. This is a reciprocal obligation and does not result in income in the hands of either of the cricket bodies-whether the host or the guest. There was thus no question of deduction of any taxes at source.

The assessee further submitted that so far as the cricketing bodies of the countries with which a double taxation avoidance agreements (tax treaty, in short) have been entered into by India, are concerned, the provisions of the Income Tax Act will not apply, as the tax treaty provisions are more favourable vis-a-vis the provisions of the Act. It was submitted that the taxability of these cricketing bodies is examined under art. 7 of the relevant tax treaties, dealing with business profits and since none of these cricketing bodies has a permanent establishment in India, which is sine qua non for taxability of business profits, the taxability in India cannot arise. The assessee also took note of assessing officer's reliance on the provisions of art. 22 of the tax treaties, as was indicated during the course of the scrutiny proceedings, but repudiated applicability of the said provision on the facts of these cases. The assessee then referred to clarification dated 17-5-1996 issued by the Central Board of Direct Taxes (CBDT, in short) to the effect so far as the payments to cricketing bodies of the countries, with which India has entered into tax treaties, are concerned, no tax withholding liability arises as no part of income of such bodies is taxable in India. It was submitted that on the basis of this clarification issued by the CBDT, the assessee acted and accordingly, deducted withholding taxes from payments made only to cricketing bodies of the countries with which no tax treaties were entered into, such as, West Indies and Zimbabwe. The assessee also made submissions on the scope ot application of art. 22 of India New Zealand tax treaty, with a view to demonstrate that even if art. 22 is found to be applicable on the facts of these cases, the conditions for chargeability of guarantee money to tax in India are not satisfied. In the light of thesesubmissions, which duly find mention in the impugned orders, the assessee urged the assessing officer to drop the proceedings and accept the assessee's stand to the effect that no tax was deductible from the payments in question.

4. The assessing officer, however, was far from impressed with correctness of these arguments advanced by the assessee.

5. As regards the contention that an action for failure to deduct tax at source can only be taken in a reasonable time and since the action proposed to be taken by the assessing officer is well beyond four years from the end of the relevant previous year, the action so taken is vitiated in law as time-barred, the assessing

officer pointed out that while the assessee was all along deducting the tax at source, the return disclosing relevant information was filed only in year 1998-almost four years after the time-limit set out for filing of such TDS returns. The assessing officer observed that, in these circumstances, it cannot be open to the assessee to challenge the validity of proceedings on the ground that the proceedings are conducted after the lapse of reasonable time. The preliminary objection of the proceedings being barred by the limitation of time was, thus, rejected. Coming to the applicability of provisions of Section 194E to the guarantee monies paid to the nonresident sports bodies, the assessing officer stated that the provisions of sections 194E and 115BBA unambiguously show that 'guarantee money' payments to such associations are covered by the provisions of Section 194E. It was observed that "the intention of the legislature in singling out the item of 'guarantee money' payable to non-resident association is very clear" and that "this item of income appears to be a subject-matter of some special deliberations, and, therefore, assessee's repetitive argument that the guarantee money is not income, but only the bearing of expenses in reciprocal manner does not apply to reason". The assessing officer wont on to add that "receiving and paying the guarantee money may be on reciprocal basis but such payment cannot lose character of compensatory payment which is necessarily liable to tax" and that "the provisions of Section 11 51313A, in fact, take into its ambit the whole of the amount and do not even allow any deduction towards expenses". The assessing officer also noted that the assessee himself has accepted this position by deducting tax at source froff payments to cricketing bodies in the countries with which India has not entered into the tax treaties. The argument that payments are not in the income nature was also, therefore, rejected by the assessing officer. The next thing that the assessing officer discussed in this order was taxability of these payments in the hands of the relevant overseas cricket bodies in the light of the provisions of the applicable tax treaties. He pointed out in terms of the provisions of art. 22(3) of the India UK tax treaty and in terms of the provisions of art. 23 of the India New Zealand tax treaty, which are similar in effect, any income which is not expressly dealt with in the respective tax treaties, is to be taxed in the country in which it arises. The assessing officer also rejected assessee's plea that the taxability of the overseas cricket bodies is to be considered as for business profits under art. 7. The reasoning adopted for this rejection was that under art. 2(13) of the tax treaty, business means 'any trade, commerce or manufacture or any adventure or concern in the nature of trade, conu-nerce or manufacture', and since the overseas cricket bodies in question arb not involved in any of the activities of this nature, no business profits were involved. 'Even by common understanding~, according to the assessing officer, 'the tours of such teams for playing games in India cannot be said to be for business purposes'. The assessing officer thus concluded that art. 7 dealing with business profits has no application in the matter and that in terms of the residuary clause set out in art. 22(3) of the UK tax treaty and art. 23 of the New Zealand tax treaty, the income by way of guarantee money paid by the assessee is taxable in India, as per the domestic law as it arises in India. The clarification issued by the CBDT, on which the assessee claimed to have placed reliance, was also considered by the assessing officer. The assessing officer was of the view that it is an internal correspondence between CBDT and the Director of IT (Exemptions) and the assessee cannot claim any benefits or concessions from such an internal correspondence between income-tax functionaries.

In any event, according to the assessing officer, on presentation of full facts to the authority which had issued this clarification, the clarification was revoked and withdrawn. It was also pointed out that while the date of the clarification is 17-5-1996, the alleged tax deduction lapses took place in period prior to the issuance of this clarification. The assessee, therefore, cannot derive any advantage from this clarification which was an event subsequent to assessee's failure to discharge tax withholding obligations. Finally, the assessing officer also rejected assessee's contention that income did not arise in India. The reasoning adopted for this stand was that, according to the assessing officer, the guarantee fees payments were made in consideration of the their 'playing cricket in India'.

6. As regards the assessment year 1997-98, the assessing officer, in the course of scrutiny of TDS returns filed by the assessee, noted that the assessee has not deducted tax at source from payment of Rs. 43,58,878 to the Australian Cricket Board. It was a case in which the assessee had approached the assessing officer to make the aforesaid payment without any deduction of tax at source. This

request was granted by the assessing officer by issuing the necessary certificate, but the said certificate authorising the assessee to make the remittance without deduction of tax source was later subjected to being rescinded by the CIT in exercise of his revision powers under Section 263. The impugned order was passed by the assessing officer admittedly as a 'natural sequel' to this development and by holding that 'therefore, the assessee cannot escape the liability under Section 201(l) and under Section 201(lA)'. The assessing officer took the stand that the provisions of the India Australia tax treaty were pari materia with the provisions of the India UK tax treaty analyzed by him in his order for the earlier years and that the assessee did not, therefore, derive any advantage from India Australia tax treaty. The assessing officer also declined to stay the proceedings under Section 201 till the time the Tribunal disposes of assessee's appeal against the revision order so passed by the CIT. Barring these facts, the stand of the rival parties was the same as is set out above, no fresh arguments were advanced and the conclusions drawn by the assessing officer in the earlier years were also adopted in this year.

So far as assessment year 1999-2000 is concerned, the payments in question made by the assessee were to Australian Cricket Board (Rs. 44,32,548), Kenya Cricket Association (Rs. 17,18,000) and Board of Cricket Control in Sri Lanka (Rs. 42,66,000). The assessee's contention was that in view of the no objection certificates issued by the assessing officer himself for similar remittances made to Board for Cricket Control in Sri Lanka and New Zealand Cricket Inc, for the assessment year 199798, the assessee had a bona fide belief that no taxes are required to be deducted from the payments made in this year to Board for Cricket Control in Sri Lanka Board and Kenya Cricket Association as well. The assessing officer pointed out that those no objection certificatcs issued by the assessing officer were since rescinded by the CIT under Section 263 of the Act and the assessee thus cannot derive any advantage from the same. The provisions of the applicable tax treaties, according to the assessing officer, were similar in nature and effect, and the assessee does not derive any advantage from the provisions of these treaties either. Barring these facts, the stand of the rival parties was the same as is set out above, no fresh arguments were advanced and the conclusions drawn by the assessing officer in the earlier years were also adopted in this year.

Accordingly, a demand under Section 201 r/w. Section 194E was raised for the assessment year 1999-2000 also.

It was in this backdrop that the assessee was saddled with the liability to pay taxes which, according to the assessing officer, the assessee should have deducted at source under Section 194E from ~ayment of guarantee fees to certain overseas cricket bodies and to pay interest for delay in payment of these taxes. Aggrieved by the order so passed by the assessing officer, assessee successfully carried the matter in appeals before the Commissioner (Appeals).

7. In his brief operative portion of the consolidated order dated 28-2-2001, for the assessment years 1993-94, 1995-96, 1996-97 and 1997-98, the Commissioner (Appeals) held that "it cannot be said that the letter dated 17-5-1996 by the CBDT is only an internal correspondence" and that "it (the said CBDT letter) is an instruction of the CBDT issued in response to a detailed representation made by the (assessee) appellant." The Commissioner (Appeals) also referred to the Hon'ble Supreme Court's judgment in the case of UCO Bank v. CIT and held these instructions to be binding on the assessing officer. The order dated 22-4-2002, for the assessment year 1999-2000, simply followed the earlier consolidated order dated 28-2-2001, without assigning any additional or further reasons. In this view of the matter, the Commissioner (Appeals) cancelled all the demands raised by the assessing officer, under Section 201(l). read with Section 194E and under Section 201(1A) read with Section 194E for non-deduction of tax at source from payments of guarantee money paid by the assessee to cricket bodies in UK, New Zealand, Australia, Sri Lanka arid Kenya.

8. The assessing officer is not satisfied with the stand so taken by the Commissioner (Appeals) and he is in appeal before us on the following grounds: 1. On the facts and in the circumstances of the case and in law, the Commissioner (Appeals) erred in holding that guarantee money paid to cricket boards of the countries with which India has entered into a DTAA is not taxable in India, and in holding that the assessee is not required to deduct tax at source on the payments of the guarantee money to those cricket boards by relying upon the CBDT letter No. 484/l/96-FTD, dated 17-5-1996 on the subject of 'taxability of BCCI and PIL

COM' and other tax related matters.

2. On the facts and in the circumstances of the case and in law, the Commissioner (Appeals) erred in not appreciating the fact that the abovementioned clarification/ instruction contained in the CBDT letter dated 17-5-1996 was subsequently withdrawn by letter No. F. No. 484/l/96-FTD, dated 21-11-1996.

3. On the facts and in the circumstances of the case and in law, the Commissioner (Appeals) also erred in directing the assessing officer not to compute TDS liability in respect of the said payees and in deleting the interest levied on the same as against the assessing officer's action of treating the assessee in default in respect of above payments and charging interest under Section 201(lA) of the Income Tax Act, 1961.

9. Shri Durgesh Summrott, distinguished departmental Representative, submits that the Commissioner (Appeals) was clearly in error in holding that the clarification dated 17-5-1996 had a binding force of law under Section 119 of the Act. Our attention is invited to the order passed by a co-ordinate Bench in the case of PILCOM v. Income Tax Officer (2001) 71 TTJ (Cal) 729 : (2001) 77 ITD 218 (Cal) wherein a view is taken to the effect that the said letter "is not in the nature of a circular issued by the CBDT in general manner and this circular does not have any sanctity, and secondly, that the said letter was actually withdrawn by the CBDT later on .... It is thus submitted that the order of the Commissioner (Appeals) is based on fundamentally erroneous approach and should be vacated forthwith. It is submitted that the issue in appeal is no longer res integra inasmuch as it is concluded against the assessee by a co-wordinate Bench of this Tribunal, and, therefore, the order of the assessing officer should be restored. In response to Bench's query about merits of the case, apart from reliance of the assessee on the CBDT clarification dated 17-5-1996, Shri Summrott took us through the order of the assessing officer, reiterated and justified the same and submitted that the guarantee money paid by the assessee to the cricket bodies of Australia, New Zealand, United Kingdom, Sri Lanka and Kenya is clearly taxable in India as it is paid in consideration of cricket played by their teams in India, and, therefore, the same accrues and arises in India. Learned departmental Representative

vehemently disputes factual contentions embedded in assessee's submissions about the true nature of 'guarantee fees' and submitted that all these innovative descriptions about the nature of 'guarantee fees' are basically manoeuvres to avoid taxability of these payments in India by giving misleading description of the nature of payment. The payment was, according to the learned departmental Representative, simply a payment for playing cricket in India. There is no other consideration involved. Our attention was also invited to a recent decision of another co-ordinate Bench of the Tribunal in the case of Board for Cricket Control in India v. Director of IT (ExemplJon) (2005) 97 TTJ (Mumbai) 751 : (2005) 96 ITD 263 (Mumbai). It was pointed out that in the said decision, the Tribunal has held that the no objection certificates issued by the assessing officer for making payments of guarantee money to the Australian Cricket Board were issued in a stereotyped manner, within one day of receiving the application and without properly examining the factual and legal aspects of the case and without application of mind. It was also emphasized that the Tribunal has upheld cancellation of these no objection certificates and remitted the matter to,the assessing officer for fresh determination of withholding tax liability. It was thus argued that assessee's reliance on these no objection certificates, for non-deduction of tax at source from these payments and also for holding the bona fide belief that taxes are not deductible from other similar payments, is unsustainable in law. These certificates no longer exist in the eyes of the law and the assessee - cannot derive any advantage from the same. Learned departmental Representative then invited our attention to the PILCOM decision (supra) with a view to demonstrate that it is now a settled position that income from guarantee money by the foreign boards is in the nature of income in terms of the provisions of the Income Tax Act.

Our attention is then invited to para 22 of the said order and it is argued that the Tribunal has also concluded that even on the touchstone of the principles set out in the relevant tax treaties, income from guarantee money is taxable in the source country, i.e. in the country by the cricketing body of which the guarantee fees is paid. The arguments adopted by the assessing officer were reiterated, fortified and elaborated upon. We were thus urged to vacate the order of the Commissioner (Appeals) and restore that of the assessing officer.

10. Shri Pardiwala, learned Counsel for the assessee, supported the conclusions arrived at by the Commissioner (Appeals). He began by pointing out that he supports the order of the Commissioner (Appeals) not only on the ground which he has decided in favour of the assessee, but also on the grounds which he has not decided. It was contended that under r. 27, it is open to him to support the order of the Commissioner (Appeals) on any of the grounds, including grounds decided against him.

It was pointed out that, in any event, learned departmental Representative has addressed us on all the aspects of the matter and we should, therefore, decide all the related aspects, including the one decided in assessee's favour by the Commissioner (Appeals). Learned departmental ' Representative did not object to this prayer. Learned counsel then submitted that the decision in PILCOM (supra) has no bearing on the issue in appeal before us because PILCOM was a different assessee and the nature of its payments, though with same nomenclature, has different purposes and considerations. It was also pointed out that the decision so rendered by the Tribunal was vitiated by several fundamental errors and it does not, therefore, have any precedence value. Learned counsel invited our attention to several decisions of the Hon'ble High Courts and Hon'ble Supreme Court in which the intra department correspondence and instructions are held to have binding force under Section 119 of the Act. It is pointed out that in PILCOM's case (supra) only one of the treaty clauses is discussed and this discussion proceeds on the erroneous generalisation that the provisions of all the tax treaties that India has entered into with various cricket playing countries are materially identical. Learned counsel took us through tax treaties with UK, Australia, New Zealand, Sri Lanka and Kenya, and highlighted the material differences in these treaties.

It was then submitted that a judicial precedent, which has its foundation as such erroneous assumptions, cannot have any binding force of precedent. Learned counsel thus submitted that neither PILCOM decision (supra) is legally correct, nor factually correct, nor it has much to do with the issue in appeal before us. Its relevance, if at all, is with regard to the legal status of the CBDT letter dated 17-5-1996, but then the assessee's defence consists of many other aspects as well. Assuming that this issue is to be decided against the assessee, though that will be in contravention of the settled legal position, other issues will have to be decided by the'Tribunal. The PILCOM (supra) decision, therefore, cannot be wholly decisive of all the issues in this appeal. Our attention was then invited to the decision of another co-ordinate Bench in assessee's own case (i.e. BCC1 v. Director of TT (supra)) which, while upholding the cancellation of no objection certificates issued by the assessing officer permitting assessee to remit the guarantee fees without deduction of tax at source, also holds that once the guarantee fees stood paid to a non-resident on the basis of a subsisting order tinder Section 195(2), it is not possible for the assessee to deduct tax at source and that it is a well-settled principle that a person cannot be asked to do impossible things and this principle also circumscribes revision powers of the CIT under Section 263. It is thus pointed out that while the co-ordinate Bench may have upheld the order of the CIT in principle, the actual effect of the Tribunal's order is that even today the assessee cannot be saddled with tax deduction at source liability in respect of the remittances for which no objection certificate was granted. The reliance of the departmental Representative, on the Tribunal's order upholding CIT's revision of the no objection certificates, is thus devoid of any legally sustainable basis. 'Phis decision, according to the learned Counsel, is in favour of the assessee. Learned counsel then took us through assessee's submissions on the nature of guarantee fees with a view to demonstrate that the guarantee fees is not in consideration for the foreign team playing in India, but to guarantee that the cricket bodies of those countries will meet expenses on tours of Indian teams to the respective countries. It cannot be equated with consideration for playing cricket in India and cannot therefore be said to accrue or arise in India. Learned counsel,then took us through the provisions of Section 115BBA and submitted that these provisions are applicable only for determination of tax in special cases and, therefore, they cannot have any application in the matter of deciding what is income in the.first place. Learned counsel submits that unless a receipt is in the nature of income, Section 115BBA cannot have any application in the matter. He further contends that there is no finding in the impugned order passed by the assessing officer to the effect that guarantee money is in ihe nature of income, save and except for, directly or indirectly, relying upon Section 115BBA itself in support of the contention that 'guarantee fee' is of income nature. Learned counsel suggests that the provisions of Section 115BBA cannot expand the scope of expression 'income'. It is thus submitted that unless there are specific independent and legally sustainable findings to the effect that 'guarantee money' is includible in the respective cricket board's income in India, Section 115BBA cannot be pressed into service. However, the assessing officer has proceeded on the basis that since Section 115BBA covers guarantee money paid to the sports association, such a receipt can only be of income nature. The very approach of the assessing officer is thus fallacious and legally incorrect. It is also contended that all payments made with the nomenclature of ,guarantee money' cannot necessarily be similar.in nature and, therefore, no straightjacket formula can be applied to all the payments described as I guarantee fees'. The scope of Section 115BBA must necessarily be viewed as confined to such guarantee fees as may be of income nature, reiterates the learned Counsel. It is thus contended that the payments in question were not taxable under the Act.

As regards the stand of the assessing officer that the assessee cannot take the stand that the payments are not taxable under the Act, since the assessee, on his own, has deducted payments of this nature to the cricket bodies of non-treaty countries, learned Counsel submits that the tax deduction from a foreign remittance, by itself, cannot make that remittance taxable in India. The taxability is to be examined on the touchstone of the legal principles and not on the basis of the conduct of the parties. We are then taken to the relevant provisions of the various tax treaties one by one. Learned counsel submits that even -the tax treaty provisions regarding taxability of an income, taxability of which is not provided under specific clauses, does not contain any deeming provisions and are confined only to the incomes 'arising' in the Contracting State. Unless, therefore, an income arises in the Contracting State, it is not possible to hold it taxable only on the basis that it is paid by the tax resident of that Contracting State. In the present case, according to the learned Counsel, the guarantee money is only paid by the Indian based assessee and the income has not arisen in India. The income has not arisen because it is not consideration of the cricket played in India. Learned counsel then took us through the provisions of art. 7 and submitted that definition of business profits is only inclusive in nature. Therefore, just because a particular activity is not specifically included in the inclusive definition of business in a tax treaty, it cannot be said that such an activity is outside the scope of business. The definition of business in the tax treaties is only inclusive and not exhaustive.

We are thus urged to consider the activities of the overseas cricket bodies as covered by art. 7. It is then argued that since these overseas cricket bodies had no PE in India, the business profits of these overseas cricket bodies cannot be taxed in India at all.

Therefore, according to the learned Counsel, the recipients of the guarantee fees did not have any tax liability in India. Since there was no tax liability at all, there cannot be any reasons for deducting tax at source under Section 195. Learned counsel submits that in view of the no objection certificates issued by the assessing officer from time to time, the assessee had reasonable belief that no tax is deductible from the remittances in question. For this reason also, according to the learned Counsel, the assessee cannot now be saddled with the demands under Section 2010) and 201(1A) read with Section 194E. Learned counsel submits that, in any event, the Commissioner (Appeals) was justified in holding that the as a benevolent concession of the CBDT, the instructions issued by the CBDT, by way of letter dated 17-5-1996, are binding in nature. On the strength of all these arguments, learned Counsel urges us to confirm and approve conclusions arrived at by the Commissioner (Appeals) and decline to interfere in the matter. I 11. We have carefully considered the rival contentions, having perused the material on record and having duly analyzed factual matrix of the case as also the applicable legal position. We find that as far as assessee's reliance on the CBDT's letter dated 19th May 1996 is concerned, we find that a co-ordinate Bench of this Tribunal in PILCOM's case (supra) has already held that the said letter does not have any sanctity under s, 119 of the Act, and that therefore, it does not have any binding force on the assessing officer. To this extent, therefore, we uphold the stand of the assessing officer. The reasoning adopted by the Commissioner (Appeals) in giving the impugned relief is, therefore, rejected. Coming to the assessee's objection that the impugned orders are time-barred since these orders are passed after the expiry of four years from the end of relevant financial year, we see no substance in this either, since the filing of tax deduction returns itself was inordinately delayed. The assessing officer could not have examined proper discharge of withholding obligations unless he had an opportunity to examine the tax deduction at source returns. The delay was on the part of the assessee. A lapse by the assessee cannot be used for assessee's advantage. The question of 'reasonable time' is to be examined in the light of the facts of each case. On the facts of this case, we are satisfied that the orders under Section 201 were passed within reasonable time. As we hold so, we may make it clear that there is a divergence of views by the various Benches of this Tribunal, on the fundamental issue, i.e. whether or not an order under Section 201 can be passed, but that aspect of the matter is not really relevant so far as the present dispute before us is concerned. There is no dispute that orders under Section 201 passed within reasonable time cannot be said to be time-barred and that what is I reasonable time' for passing such orders shall be governed by the facts of the case. On the facts of the case before us, we are of the view that the impugned orders under Section 201 are passed within reasonable time.

12. None of the technical objections raised by the assessee, therefore, can be said to be of any legally sustainable merits on the peculiar facts of this case. To that extent, we agree with the learned departmental Representative.

13. That takes us to the question whether, on the merits of the case, the guarantee fees received by the overseas cricket boards was taxable in India. This is relevant because the tax withholding liability is essentially a vicarious liability and unless the principal liability to pay tax in India exists, vicarious liability under Section 195 cannot be invoked at all.

14. The guarantee fees paid by the assessee, so far as the issues in the present appeals before us are concerned, is to be cricket bodies of the countries with which India has entered into tax treaties. It is settled legal position that in viewof the provisions of Section 90(2) of the Indian Income Tax Act, 1961, the provisions of the tax treaty prevail over that of the domestic law unless the domestic law is more beneficial to the assessee. Therefore, in case we come to the conclusion that the payment in question is not taxable in terms of the provisions of the applicable tax treaty, there is no need to address ourselves to the scope of provisions of the domestic law. These tax treaties primarily provide for allocation of

rights over the tax subjects when an activity is spread over more than one tax jurisdiction and when the source of an income is situated in a country other than the country of residence. Therefore, a tax treaty essentially decides whether a particular Contracting State has the right to tax a particular nature of receipt in the hands of persons covered by the scope of such a treaty. It is for this reason that there is a school of thought that before we consider taxability of an income in terms of the Indian domestic tax law, we have to first examine whether India has a right to tax the receipt in question. Once a conclusion is reached that India has the right to tax the receipt of 'guarantee money' in the hands of the respective overseas cricket board, the next question is whether, even under domestic law, such receipts by an overseas cricket body can be taxed at all under the provisions of the Indian Income Tax Act, 1961, and if so, in what manner. Of course, the other way of looking at the issue is whether the 'guarantee money' is of the income nature at all, because unless it is of the income nature, there is no question of taxability thereof.

15. Whichever way one looks at it, the fundamental thing to be examined is the nature of 'guarantee fees' and it is on this crucial aspect that we do not find sufficient guidance from the parties.

16. On one extreme is the assessing officer who contends that since Section 1151313A, dealing with tax rate of income in the hands of non-resident sportsmen and sports bodies, covers the 'amount guaranteed to be paid or payable' in relation to any game or sport played in India, "the intention of legislature in singling out the item of I guarantee fees' payable to non-resident associations is very clear" and "this item of income appears to be a subject-matter of some special deliberations and, therefore, assessee's repetitive argument that guarantee money is not income but only bearing of expenses in reciprocal mamier does not apply to reason". There is no categorical finding about the basis on which the assessing officer comes to the conclusion that the 'guarantee fees' is of income nature and the assessing officer's perceptions about the intent of legislature certainly cannot constitute a legally sustainable foundation for holding that 'guarantee fee' is of income nature. It is correct that Section 115BBA does refer to guarantee fee but let us not forget that Section 115BBA is a provision laying down special rate of

taxes for certain types of income. Merely because a rate is prescribed for 'guarantee fee' cannot be viewed as an authority to conclude that it is taxable in the first place. That would be putting cart before the horse. There may be categories of guarantee fees which are of income nature and it is only for such categories of guarantee fees that the special rate under Section 115BBA would come into play. The intent of legislature cannot be pressed into service to hold taxability of an item. The taxability of an income has to be supported by plain words of the statute; there is no scope of reading the intent or drawing the inferences. for this purpose.

17. On the other extreme, we have the assessee who is not parting with any material or evidence to establish the facts embedded in his contention to the effect that 'guarantee fees' is not of income nature.

Mere bland statements to the effect that these payments are not in consideration of playing cricket in India, but in consideration of performing reciprocal obligations when Indian teams visit those countries, cannot suffice. The assessee has to give complete details about the nature of these payments and produce the minutes, correspondence, documents or any other form of evidence to support the stand that these payments are not in consideration for playing cricket in India. During the course of hearing before us, we did request the learned Counsel for the assessee to give us any documentary evidence in support of the contentions of the assessee, but these details were not furnished. In the absence of these details, it is not possible for us to draw any conclusions about the nature of payments. Unless we appreciate the nature of payments, it is not possible for us to examine whether or not these payments are taxable in India and whether or not, in terms of the applicable tax treaties, India has a right to tax such payments.

18. This elementary exercise about the nature of payments has not been conducted by any of the authorities below also. The assessing officer has simply proceeded on the basis of his understanding of intention of legislature, and the Commissioner (Appeals) has simply proceeded to treat a Board clarification as having binding force of Section 119A taxability simply on the basis of intendment of legislature, for the reasons set out above, has been disapproved by us, and

Board clarification having the binding force of Section 119 of the Act has been specifically disapproved by a coordinate Bench of this Tribunal in PILCOM's case (supra). The exercise conducted by the authorities below is thus not sufficient to decide the matter one way or the other.

19. It is in these circumstances, we deem it fit and proper to remit the matter to the file of the assessing officer for examining the nature of payments and after ascertaining the true character of payments, decide whether or not (a) these payments are of income nature under the provisions of the Indian Income Tax Act; and, if it is found to be of income nature, (b) whether or not, under the respective tax treaties, India has a right to tax the same. While doing so, the assessing officer shall give due and fair opportunity of hearing to the assessee and shall deal with the contentions of the assessee by way of a speaking order in accordance with the law. The assessing officer shall deal with each of the tax treaty situation separately, while deling with the right of taxability and taxability for payment to cricketing bodies in those countries. We also consider it appropriate to direct the assessee to furnish complete details and whatever evidences and whatever supporting documents in support of such details are available with him, to the assessing officer in order to enable him to carry out the exercise suggested above. The assessing officer is also directed to collect the necessary details and exercise his powers for that purpose in accordance with the law.

20. For the reasons set out above and in the terms indicated above, the matter is remitted for re-adjudication by the assessing officer.