



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"I" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

ITA no.2130/Mum./2016  
(Assessment Year : 2014-15)

Dy. Commissioner of Income Tax (I.T)  
Circle-3(2)(2), Mumbai

..... Appellant

v/s

Abudhabi Ship Building PJSC  
C/o Approach Properties P. Ltd.  
Room no.53, Free Press Journal Road  
Nariman Point, Mumbai 400 021  
PAN – AAKCA9432F

..... Respondent

Revenue by : Shri O.P. Meena  
Assessee by : None

Date of Hearing – 03.10.2019

Date of Order – 25.10.2019

**ORDER**

**PER SAKTIJIT DEY. J.M.**

Captioned appeal has been filed by the Revenue challenging the order dated 30<sup>th</sup> November 2015, passed by the learned Commissioner of Income Tax (Appeals)-55, Mumbai, for the assessment year 2014-15.

2. The effective grounds raised are as under:-

1. *On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in adjudicating the appeal filed by M/s. Abu Dhabi Ship Building PJSC who is not Applicant of the*

*adjudicating the appeal filed by M/s. Abu Dhabi Ship Building PJSC who is not Applicant of the application u/s. 195(2). The application was filed by ONGC".*

*2. 2.. 'On the fact and in the circumstances of the case and in law, the Id. CIT(A) has erred in adjudicating the appeal filed by M/s. Abu Dhabi Ship Building PJSC. The section 246A(1) and 248 of the I.T. Act, 1961 do not enable M/s. Abu Dhabi Ship Building to file the appeal against the order of Section 195(2) of IT Act."*

*3. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in not appreciating the fact mentioned in para 4 of order u/s. 195(2) that the income is accruing or arising in India".*

*4. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in not appreciating the fact that DTAA (between India and UAE) benefit is not available to the consortium".*

*5. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in not appreciating the fact the consortium is working through 'dependent agent' namely M/s. Abu Dhabi Ship Building PJSC and the dependent agent is a form of Permanent Establishment of Abu Dhabi Ship Building PJSC in India".*

3. When the appeal was called for hearing, no one was present on behalf of the assessee to represent the case. From the order sheet entries it is notice that on earlier occasions also when the appeal was posted for hearing, no one was present on behalf of the assessee to represent the case. Keeping in view the aforesaid facts, we proceed to dispose off the appeal ex-parte qua the assessee after hearing the learned Departmental Representative and the basis of material available on record.

4. Brief facts emanating from records are, the respondent is a non-resident. Oil and Natural Gas Co. Pvt. Ltd. entered into an agreement with the respondent company on 25<sup>th</sup> May 2012 for construction of nine new Immediate Support Vessels (ISVs) at respondent's Abu Dhabi shipyard. For making payment to the respondent company without deducting tax at source or deducting at a lower rate, the ONGC made an application to the authority concerned under section 195(2) of the Act. However, the authority concerned directed ONGC to withhold tax as per the applicable rate on the payments to be made in financial year 2012-13 relevant to the assessment year 2013-14. Against the order passed directing withholding of tax, ONGC did not prefer any appeal but the respondent company preferred appeal before the first appellate authority, which was decided in its favour by holding that the income of the respondent company is not taxable in India. Based on the aforesaid decision of learned Commissioner (Appeals), ONGC again filed an application seeking an order to allow payment to be made to the respondent company without deducting tax or deducting tax at lower rate for the payments to be made in the financial year 2013-14 corresponding to assessment year 2014-15. However, the Assessing Officer rejected the application filed by the ONGC and directed it to withhold tax as per applicable rate. Against the said order, respondent company preferred appeal before the first appellate authority. The learned Commissioner (Appeals), following the

order passed by him in the assessment year 2013–14 in assessee's own case, allowed the claim of the respondent company holding that its income is not taxable in India, therefore, ONGC is not liable to withhold tax in respect of payments to be made for the financial year 2013–14.

5. The learned Departmental Representative submitted, the ONGC having not filed any appeal before learned Commissioner (Appeals) contesting the order passed under section 195(2) of the Act, learned Commissioner (Appeals) was not justified in entertaining the appeal filed by the respondent company against the order passed under section 195(2) of the Act. He submitted, while deciding identical issue in respondent's case in assessment year 2013–14, the Tribunal has reversed the decision of learned Commissioner (Appeals). Thus, he submitted, the order passed by the Tribunal in the earlier assessment year would be squarely applicable.

6. We have considered the submissions of learned Departmental Representative and perused the material on record. A preliminary issue has been raised by the Revenue with regard to the maintainability of the appeal filed by the respondent company before learned Commissioner (Appeals). As could be seen from the impugned order of learned Commissioner (Appeals), he has decided the issue in favour of the assessee following the order passed by him in the earlier

assessment year. Notably, while deciding Revenue's appeal against the order passed by learned Commissioner (Appeals) in assessee's own case in the assessment year 2013-14, the Tribunal in ITA no.5418/Mum./2013, dated 8<sup>th</sup> June 2016, has decided the issue in favour of the Revenue with the following observations:-

*"13. We have considered the submissions of the parties and perused the material available on record as well as the decisions relied upon by both the Counsels. At the outset, we propose to deal with the preliminary objection raised by the Department with regard to maintainability of appeal filed by the respondent assessee purportedly u/s 246A. It is the contention of the learned D.R. that the order passed u/s 195(2), is not an appealable order u/s 246A as there is no mention of such an order u/s 246A.*

*14. It is also the contention of the learned Departmental Representative that the only provision under which the order under section 195(2) can be challenged before the learned Commissioner (Appeals) is under section 248 of the Act. Before deciding the preliminary issue raised by the Department on the maintainability of the appeal filed by the assessee before the first appellate authority, it is necessary to look into some of the statutory provisions which has relevance to the issue at hand. Section 195 of the Act mandates that a person responsible for paying to a non-resident or a foreign company any interest or any other sum chargeable under the provisions of the Act except salary, at the time of credit of such income to the account of the payee or at the time of payment in cash, cheque or demand draft or by any other mode shall deduct income-tax at source at the prescribed rate. However, sub-section (2) of section 195 provides that if the payer / deductor paying any sum to the non-resident considers that the whole of such sum would not be income chargeable of the recipient he can make an application to the Assessing Officer to determine by an order the appropriate portion of such sum chargeable to tax so that tax shall be deducted on such proportion of the sum determined as chargeable to tax. Sub-section (3) of section 195 also provides an option to the recipient of income to make an application in the prescribed manner to the Assessing Officer for grant of a certificate authorising him to receive such interest or other sum without deduction of tax at source subject to fulfillment of conditions laid down as per rules made under sub-section (5) of*

section 195. Section 246A lays down the provision for filing of appeal before the first appellate authority by an assessee or deductor or collector of tax aggrieved by an order passed under certain provisions of the Act as enumerated under different clauses of section 246A. On a careful reading of section 246A, we find there is no mention of an order passed under section 195(2) as an appealable order. The only provision we could locate in the Act under which an appeal is provided before the learned Commissioner (Appeals) against an order passed under section 195 is section 248. However, an appeal under section 248 can only be filed by a deductor upon fulfillment of certain conditions laid down therein.

15. Keeping the aforesaid statutory provisions in view, if we examine the facts of the present case, it is evident that on 4<sup>th</sup> October 2012, Chief Manager (F&A), ONGC, Mumbai, made an application, purportedly under section 195(2) of the Act, before the Assessing Officer for an order of non-deduction of tax at source. The Assessing Officer, however, rejected the application filed by the ONGC under section 195(2) vide order dated 23<sup>rd</sup> November 2012. Undisputedly, neither the respondent assessee nor the consortium or the other constituent has approached the Assessing Officer for a no deduction of tax certificate in terms of sub-section (3) of section 195 or under section 197. Therefore, against the order passed under section 195(2) the payer / deductor i.e., ONGC could have filed an appeal under section 248 before the learned Commissioner (Appeals) provided the conditions laid down therein are fulfilled. However, no such appeal, as it appears, has been filed by the ONGC before the learned Commissioner (Appeals). On the contrary, one of the constituents i.e., Abu Dhabi Ship Building PJSC, the respondent before us, filed an appeal before the learned Commissioner (Appeals) challenging the order under section 195(2). The issue before us is whether the appeal filed by Abu Dhabi Ship Building PJSC, before the learned Commissioner (Appeals) is maintainable under section 246A. As already stated herein before on a careful reading of section 246A, we find that an order passed under section 195(2) is not mentioned as an appealable order. It is the contention of the learned Authorised Representative appearing for the assessee that the expression "an order against the assessee where the assessee denies his liability to be assessed under this Act used in clause (a) of section 246A(1)" enables the assessee to file appeal against the order under section 195(2) before the learned Commissioner (Appeals). However, we are not impressed with the aforesaid contention of the learned Authorised Representative. The expression, "an order against the assessee where the assessee denies his liability to be assessed under this Act" cannot be considered in isolation but has to be read not only in the context

of the provisions contained under section 246A of the Act but other provisions of the Act also. If we read the provisions of section 246A as a whole, it would emerge that the order appealed against must be an order against the assessee determining its liability to be assessed under the Act. In the present case, the order passed u/s 195(2) admittedly is not against the assessee but against ONGC. Moreover, the liability of the assessee to be assessed under the Act can only be determined in an assessment proceeding and not under section 195(2). Therefore, the party which could have challenged the order passed under section 195(2) before the learned CIT(A) u/s 248 is ONGC subject to fulfillment of conditions mentioned therein. Right to appeal under the Income-tax Act is a statutory right. Therefore, right to appeal does not exist unless it is specifically conferred by the statute. On a careful reading of the provisions of the Act, it is found, a specific provision has been engrafted into the Act by way of section 248 under which an appeal against an order under section 195 can be filed that too, by the payer / deductor of tax. Therefore, when there is a specific provision for filing appeal against an order u/s 195(2) by a specified person, the appeal before the first appellate authority can be maintainable only if it is filed in terms of the said provision and in no other manner. In the present case, facts on record indicate that after the order was passed under section 195(2) the payer / deductor i.e., ONGC has deducted tax at source on the payments made to the respondent and has remitted tax to the Government account. This is also evident from the letter dated 29<sup>th</sup> November 2012 of ONGC a copy of which is at Page-125 of the paper book. Further, at the time of hearing, we were informed by the Counsels appearing for the parties that assessment in case of the respondent has also been made in the meanwhile and the proceedings are pending before the appellate authority. Therefore, in our view, the course open to the assessee is to deny its liability to be assessed under the Act in such proceedings and claim refund of the amount deducted at source from its receipts / income. As far as the decisions relied upon by the learned Authorised Representative regarding the maintainability of appeal under section 246A, on a careful analysis of the decisions, it is noticed that in all these cases, the orders demanding tax or determining liability were directly against the assessee, hence, in that context, the Courts held that appeal before the learned Commissioner (Appeals) is maintainable. However, in the present case, as already stated, the order appealed against before the learned Commissioner (Appeals) was not against the assessee but against ONGC under section 195(2) of the Act. For the sake of completeness, we think it appropriate to deal in nutshell with few of the decisions relied upon by the learned Authorised Representative.

16. In the case of *M. Pyngrope (supra)*, the assessee had filed return of income under section 139 declaring certain income. The Assessing Officer processed the return of income under section 143(1) of the Act and determined the tax payable. Against the order under section 143(1), assessee filed an appeal before the first appellate authority claiming that his income is exempt under section 10(26). The learned Commissioner (Appeals) entertaining the appeal of the assessee, allowed his claim. The Department challenged the decision of the learned Commissioner (Appeals) before the Tribunal raising the issue of maintainability of the appeal. However, the Tribunal upheld the order of the learned Commissioner (Appeals) by holding that the appeal is in respect of an order against the assessee where the assessee denies his liability to assessee under the Act. In the present case, the order passed under section 195(2) is not against the assessee. Therefore, this decision is not applicable to the facts of the present case.

17. In the case of *M. Anandan (supra)*, the facts are almost similar. In this case, assessee challenged the order passed under section 143(1), claiming that the pension earned by him was not taxable in India in terms of DTAA. The appeal filed by the assessee under section 246(1) was held maintainable before the learned Commissioner (Appeals). Thus, as could be seen, the order challenged before the first appellate authority was passed against the assessee.

18. In the case of *Shri Bhogavati Sah. Sakhar Karkhana Ltd. (supra)*, the issue was an order raising demand under section 206C of the Act was passed against the assessee on his failure to collect tax at source. Though, order passed under section 206C was not specifically mentioned under section 246, however, the Tribunal took a view that the expression "assessee denies his liability under the Act" would make the order appealable under section 246(1).

19. Thus, from the aforesaid facts, it is clear that an order was passed against the assessee raising a demand, despite the assessee denying its liability to be assessed under the Act. However, in case of the assessee before us there is no such situation of demand being raised against the assessee. As reiterated earlier, the order challenged before the first appellate authority by the respondent is an order passed under section 195(2) of the Act directing the ONGC to deduct tax at source. Thus, there is neither any order against the assessee nor there is determination of chargeability to tax under the Act.

20. In case of *Kanpur Coal Syndicate (supra)*, the issue is completely different as it dealt with power of the learned

*Commissioner (Appeals) or the Tribunal in disposing of the appeal. Facts of the case are, the Assessing Officer made an assessment in the name of an Association Of Persons (AOP). The said AOP filed an appeal before the learned Commissioner (Appeals) claiming that instead of assessing the income at its hand, the Assessing Officer should have assessed the income in the hands of the individual members. Though, the learned Commissioner (Appeals) dismissed the appeal of the assessee. On further appeal before the Tribunal it held that, though, the Income Tax Officer had the power to assess the income of the AOP as such or in the alternative on the individual members thereof in respect of their proportionate shares in the income but the Tribunal had no power under the Act to direct the ITO to exercise his power in one way or other. When the matter went in reference to the High Court, the High Court held that the Appellate Tribunal has jurisdiction to give directions to appropriate authority to cancel the assessment made on the AOP and make a fresh assessment on the members of that association independently. Thus, as could be seen, the issue in the aforesaid decision was in relation to powers of the Appellate Authority. Moreover, the order appealed against before the first appellate authority and the Tribunal was passed against the assessee and not against a third person. Therefore, in these circumstances, we are of the view that these decisions are of no help to the assessee not only because of the fact that in all these cases, orders were passed directly against the assessee determining a liability under the Act but the assessee have denied their liability. Whereas, in the appeal before us, the order appealed against is an order passed under section 195(2) against ONGC requiring it to deduct tax at source on payments made to the assessee. Further, there is no final determination of liability under the Act as far as the assessee is concerned which can only be determined when assessment is framed against the assessee. That besides, there being a specific provision under section 248 of the Act for filing appeal against order passed under section 195(2) of the Act, that too by payer / deductor of tax at source the said order cannot be challenged under section 246A of the Act by the respondent. In the aforesaid view of the matter, we are of the considered opinion that the appeal filed by the respondent assessee before the learned Commissioner (Appeals) against the order passed under section 195(2) in the case of ONGC is not maintainable. The learned Commissioner (Appeals), in our view, was not competent under the provisions of section 246A of the Act to entertain such an appeal. We, therefore, set aside the impugned order passed by the learned Commissioner (Appeals) and restore the order of the Assessing Officer under section 195(2).*

21. *As we have decided the Department's appeal in its favour on the issue of maintainability of the appeal, there is no necessity to deal with the other grounds raised on merit in this appeal."*

7. There being no material difference in facts, the aforesaid decision of the Tribunal would squarely apply to the present appeal as well. Therefore, respectfully following the decision of the Co-ordinate Bench referred to above, we hold that the appeal filed by the respondent assessee before learned Commissioner (Appeals) was not maintainable, hence, should have been dismissed at the threshold. In view of the aforesaid, we set aside the impugned order of learned Commissioner (Appeals).

8. In the result, Revenue's appeal is allowed as indicated above.  
Order pronounced in the open Court on 25.10.2019

**Sd/-**  
**MANOJ KUMAR AGGARWAL**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 25.10.2019**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai