IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION (L) NO.694 OF 2010

Larsen & Toubro Ltd. & Anr. ...Petitioners.
Vs.
The Assistant Commissioner of Income Tax
(TDS) 2(1) & Ors. ...Respondents.

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Mr.Percy Pardiwala, Sr.Advocate with Mr.Nishant Thakkar and Mr.Rajesh Poojari i/b.Mint & Confreres for the Petitioners.
Mr.B.M.Chatterji with Mr. Suresh Kumar for the Respondents.

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CORAM : DR.D.Y.CHANDRACHUD AND
J.P.DEVADHAR, JJ.

April 28, 2010.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :

Rule; by consent returnable forthwith. With the consent of Counsel and at their request the Petition is taken up for hearing and final disposal.

2. The Petitioner is a consortium consisting of Larsen and Toubro Ltd., a company incorporated in India and Scomi

Engineering Berhad, a company incorporated in Malaysia. The Petitioner has been awarded a contract for the design, development, construction, commissioning, operation and maintenance of the Mumbai Monorail Project by MMRDA. The consideration to be received for executing the Project is Rs.2,460 crores. The Petitioner is an Indian resident and is assessable as an Association of Persons (AOP).

3. On 29 October 2009, the Petitioner filed an application under Section 197 of the Income Tax Act, 1961, requesting the First Respondent to issue a certificate authorising MMRDA to deduct tax at the rate of 0.11% from the payments made by it to the Petitioner under the contract. The case of the Petitioner is that the shares of Larsen and Toubro and of its Malaysian partner in the taxable income are determinate; the profit sharing ratio between the members of the consortium being 60 (L&T): 40 (Scomi). The case of the Petitioner is that the AOP would be charged to tax, to the extent of the share of L&T in the taxable income, at 33.99% and to the extent of Scomi's share in the taxable income, at 42.23%. Based on the tax computation, the percentage of total tax

liability to revenue was estimated at 0.11%. It was on this basis that the First Respondent was requested to issue a certificate granting a rate of 0.11% for withholding tax in respect of payments received by the AOP from MMRDA. Form 13 appended to the application inter alia contained an entry requiring a disclosure of the total income assessed in the last three assessment years and the total tax paid for each such year. The Petitioner answered the entry by stating that this would not be applicable, since the AOP had not been so assessed. The profit and loss statement for the AOP has also been placed on the record of the First Respondent in which the estimated profits of the AOP are quantified at Rs.7.48 crores. By a letter dated 16 December 2009, addressed to the Deputy Commissioner of Income Tax - TDS Range 2, details were submitted of payments received by the assessee from MMRDA together with tax deducted at source. The details submitted would indicate that MMRDA had deducted tax at source at 11.33%. The Assessing Officer, in the course of the enquiry held, upon the application filed by the assessee under Section 197 called for further details by a communication dated 29 December 2009 which were submitted by the assessee on 31 December 2009. The

assessee clarified that during the Financial Year 2008-09, it had not earned any revenues for executing the project. The assessee stated that when payments are required to be made by it, appropriate taxes are withheld and deposited with the authorities together with the interest, if any, for delay in deducting or depositing taxes.

4. On 5 January 2010, the First Respondent rejected the application filed by the assessee under Section 197 for two reasons: (i) The calculation mechanism provided in Rule 28AA of the Income Tax Rules, 1962 fails as figures for three previous years are unavailable; and (ii) No e-TDS returns were filed by the assessee. The assessee sought reconsideration of the rejection by a letter dated 6 January 2010. Once again by an order dated 13 January 2010, the application was rejected. The First Respondent stated that the Rules prescribe a comparison of the current year's projections with figures for previous three years. This mechanism, according to the Assessing Officer, is to ensure that the projection of the current year is compared with figures which have been crystallized after filing of returns for the previous three years. In

the absence of figures of earlier years, the First Respondent stated that he was not in a position to act upon the application. The second reason adduced was that TDS was not paid as on the date of the application and was eventually paid upon a query made by the First Respondent together with interest. On these two grounds, the rejection was maintained.

-5. The Petitioner moved the Commissioner of Income Tax (TDS), in revision under Section 264. By an order dated 29 January 2010, the Commissioner rejected the Revision Application holding inter alia that where the Assessing Officer rejects an application under Section 197, no approval of the Commissioner is necessary. In terms of Circular 7 of 2009, issued by the CBDT, the alternative plea of the assessee for directing a deduction at 2 per cent under Section 194-C was also rejected. The assessee once again sought a reconsideration of the rejection by the Commissioner. The application for reconsideration has also been dismissed by an order dated 9 February 2010. The Commissioner has furnished two reasons for the rejection. Firstly, the Commissioner has formed the view that if the benefit of a lower

rate for withholding tax is not granted under Section 197 to the assessee, no hardship or prejudice would be caused to the assessee as a result of the rejection of the application because, the assessee would be entitled to get a refund of excess tax paid, if any, together with interest. The second reason which weighed with the Commissioner is that when the Assessing Officer rejects an application under Section 197, he does not pass an 'order' as envisaged in Section 264 and consequently, a revision under Section 264 is not maintainable.

-6. The Commissioner is manifestly in error when he holds that the rejection of an application under Section 197 by the Assessing Officer does not result in an order and that the revisional power which is vested in the Commissioner under Section 264 would not be attracted. Sub-section (1) of Section 197 permits an assessee to submit an application to the Assessing Officer to issue a certificate for the deduction of income tax at a lower rate or for no deduction of income tax, as the case may be, where in the case of any income of any person or sum payable to any person, income tax is required to be deducted at the time of

credit or, at the time of payment at the rates in force under the provisions inter alia of Section 195. Sub-section (1) of Section 195 requires deduction of tax at source in respect of payments made to a non-resident, not being a Company, or to a foreign Company. Sub-section (2) of Section 197 provides that where a certificate is granted, the person responsible for paying the income shall deduct income tax at the rates specified in the certificate or deduct no tax, as the case may be, until the certificate is cancelled. Sub-section 2A empowers the Board, having regard to the convenience of assessees and the interests of the Revenue to make Rules specifying (i) The cases in which and the circumstances under which, an application may be made for the grant of a certificate under sub-section (1); and (ii) The conditions subject to which such certificate may be granted and providing for all other matters connected therewith. In exercise of the powers conferred upon the Board by Sub-section (2A) of Section 197, Rule 28AA has been made in the Income Tax Rules, 1962. Sub-rule (1) of Rule 28AA is to the following effect :

> "28AA.(1) The Assessing Officer, on an application made by a person under sub-rule (1) of rule 28, may issue a certificate in accordance with the provisions of Sub-section (1) of Section 197 for deduction of tax at source at the rate or rates calculated in the manner specified below:
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> (i) at such average rate of tax as determined by the total tax payable on estimated income, as reduced by the sum of advance tax already paid and tax already deducted at source, as a percentage of the payment referred to in section 197 for which the application under sub-rule (1) of Rule 28 has been made; or
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> (ii) at the average of the average rates of tax paid by the assessee in the last three years;
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> whichever is higher."

Rule 29B governs applications for certificates authorising receipt of interest and other sums without deduction of tax. The Assessing Officer, when he decides an application under Section 197(1) must of necessity pass an order on the application. Where the application is allowed, that application culminates in the grant of a certificate in accordance with the provisions of Sub-section (1) of Section 197. But it would be far fetched to accept the view that the rejection of an application must lie in the absolute discretion of the Assessing Officer or that the Assessing Officer is not bound to

indicate reasons or a basis for the rejection of the application. The fact that Parliament has empowered the Board to frame Rules under sub-section 2A, having due regard to the convenience of assessees and the interests of the Revenue specifying the cases and circumstances under which an application can be made and the conditions subject to which such a certificate may be granted is sufficient to indicate that the exercise of powers by the Assessing Officer is intended to be structured in accordance with the provisions of Section 197 and the Rules framed by the Board under sub-section 2A. The Assessing Officer cannot be heard to urge that though an assessee fulfills all the requirements which are stipulated in Rule 28AA or, as the case may be, in Rule 29B, he possesses an unguided discretion to reject the application. Consequently, the Assessing Officer when he rejects an application is bound to furnish reasons which would demonstrate an application of mind by him to the circumstances which are mandated both by the Statute and by the Rules to be taken into consideration. Hence, it would be impossible to accept the view that the rejection of an application under Section 197 does not result in an order. The expression “order” for the purposes of

Section 264 has a wide connotation. Sub-section (1) of Section 264 provides that in the case of any order other than an order to which Section 263 applies, passed by an authority subordinate to him, the Commissioner may either of his own motion or on application by the assessee for revision, call for the record of any proceeding under the Act in which any such order has been passed and after making an enquiry, pass such order thereon not being an order prejudicial to the assessee as he thinks fit. Parliament has used the expression "any order". Hence, any order passed by an authority subordinate to the Commissioner, other than an order to which Section 263 applies, is subject to the revisional jurisdiction under Section 264. A determination on an application under Section 197 requires an order to be passed by the Assessing Officer after application of mind to the circumstances which are germane under Section 197 and the Rules framed under sub-section 2A. The Commissioner was, therefore, manifestly in error when he held that there was no order which would be subject to his revisional jurisdiction under Section 264.

7. The manner in which the application filed by the assessee has been dealt with by the Assessing Officer and the Commissioner leaves much to be desired. The Assessing Officer dismissed the application for the grant of a certificate under Section 197 for two reasons. The first reason was that the mechanism under Rule 28AA would fail in the case of the assessee for the reason that the financial statements of the assessee for the three previous years were unavailable. The assessee had brought to the notice of the Assessing Officer, the circumstance that during the Financial Year 2008-09, it had not earned any revenue for executing the project. That is necessarily as a result of the fact that the project was awarded by MMRDA on 9 January 2009. Sub-rule (1) of Rule 28AA to which a reference has been made earlier would indicate that the Assessing Officer, on an application made in Form 13 under Section 197 may issue a certificate in accordance with the provisions of Sub-section (1) of Section 197 for deduction of tax at source at the rate or rates calculated in the manner specified thereafter. Sub clauses (i) and (ii) which follow thereafter, provide the mode for computing the rate at which the

tax is to be deducted at source. Sub-clause (i) refers to the average rate of tax as determined by the total tax payable on estimated income as reduced by the sum of advance tax already paid and tax deducted at source as a percentage of the payment referred to in Section 197 for which the application has been made, while sub-clause (ii) refers to the average of the average rates of tax paid by the assessee in the last three years. Whichever of these is higher has to be adopted. Clause (1) of Rule 28AA provides a mode of computing the rate at which tax is to be deduced at source. This is not a condition of eligibility. The Assessing Officer in the present case, was in error in coming to the conclusion that the mechanism that is contemplated under Rule 28AA would break down in the case of the assessee on the ground that the financial statements of the assessee in the previous three years were not available. In this case, sub clause (ii) would not apply and the rate would be computed under sub-clause (i). The second ground on which the application was rejected, was that the assessee had not filed e-TDS returns. The failure of the assessee, if any, to file e-TDS returns may result in independent consequences which are provided in law. That however, cannot

justify the rejection of the application made by the assessee for the determination of withholding of tax at a lower rate on payments which are to be received by the assessee. In the subsequent application dated 29 January 2010, the Assessing Officer accepted the position that the assessee had paid interest on the delayed payment of tax which was deduced at source. Here again, the submission of the assessee is that the delay, if any, may result in other consequences which are provided for by the Act, including penal consequences under Section 271(1). However, that cannot justify the rejection of an application under Section 197.

8. The Commissioner has rejected the application of the assessee on the ground that a revision was not maintainable under Section 264. That ground has been held earlier in this judgment to be erroneous. The Commissioner also observed that in the event that the assessee has paid excess tax, it would be entitled to a refund of the tax paid together with interest and hence, no prejudice would be caused to the assessee. The entire approach of the Commissioner is, with respect, specious. The Assessing Officer was required, in the first instance, to apply his mind to the fact that

the conditions for the grant of a certificate under Section 197 are duly fulfilled. If those conditions are duly fulfilled, it would be impermissible for the Assessing Officer to reject the application merely on a whim and on caprice and for the Commissioner to hold that no prejudice would be caused to the assessee since tax would be refunded later together with interest. We are constrained to observe that the application filed by the assessee has been rejected in a rather cavalier manner and without application of mind to circumstances which are germane to the statute.

9. For these reasons, we set aside the impugned orders passed by the Commissioner of Income Tax (TDS) on 29 January 2010 and 9 February 2010 both on the issue of maintainability and on the grounds which weighed with the Commissioner on merits in rejecting the application. We restore the Revision Application that was filed by the assessee under Section 264 to the Commissioner for a fresh determination which shall be carried out, in accordance with law, after furnishing to the assessee an opportunity of being heard. The Commissioner shall complete the exercise and pass a reasoned order on the Revision Application within a period of four

weeks from today. Rule is made absolute in these terms. No order as to costs.

(Dr.D.Y.Chandrachud, J.)

(J.P.Devadhar, J.)