

Date of Decision: 19<sup>th</sup> November, 2009

THE COMMISSIONER OF INCOME TAX-XVII

..... Petitioner

Through: Ms. Rashmi Chopra, Adv.

versus

BRITISH AIRWAYS PLC.

..... Respondent

Through: Mr. M.S. Syali, Sr. Adv.  
with Ms. Mahua Kalra,  
Adv.**CORAM:****HON'BLE MR. JUSTICE A.K. SIKRI****HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**

1. Whether reporters of local papers may be Allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

**J U D G M E N T*****A.K. SIKRI, J (ORAL):***

**1.** In identical circumstances where the penalty order was passed by the Assessing Officer in respect of the assessment year 1990-91, ITA 425/2008 was preferred by the Revenue, which was disposed of in the following manner vide order dated 10<sup>th</sup> July, 2009 passed by this Court:

“The assessee herein had not deducted tax at source from its employees qua meal and conveyance allowances. This was treated as short deduction of tax by the assessing officer and on that basis assessment a search was carried out. At the same time penalty proceedings were also

initiated against the assessee under section 271 C of the Income Tax Act for short deduction of tax and penalty order dated 30.6.1998 was passed. In appeal preferred by the assessee CIT (A) allowed the appeal partly. The matter was taken up by the Income Tax Department before the ITAT by filing appeal against the order of CIT (A).

It so happened that against the assessment orders the assessee had gone in appeal and ITAT allowed the appeal on the ground that assessment was made after four years and was thus barred by limitation. Appeal of the revenue preferred under section 260A of the Income Tax Act before this Court also failed and this Court affirmed the order of the ITAT. Since the very assessment, in this manner, was set aside, the ITAT has dismissed the appeal of the revenue against the orders passed under Section 271C as well by the impugned order.

Learned counsel for the appellant submits that against the orders passed by this Court affirming the order of the ITAT setting aside the assessment as time barred revenue has filed the Special Leave Petition in which notice has been issued and the said SLP coming up for disposal sometime in December, 2009. In these circumstances, the present appeal is disposed of with the observations that in case the SLP/civil appeal is allowed by the Supreme Court and the assessment restored, the appellant shall be entitled to move application before the ITAT for revival of Appeal No.3847/Del/2003 on the issue of penalty for decision of the said appeal on merits.

The appeal stands disposed of in the aforesaid terms.”

2. The present case relate to assessment year 1991-92. It is not in dispute that the Special Leave Petition is still pending before the Supreme Court and is fixed for final hearing in lieu thereof counsel for the parties agreed that this appeal be also decided in terms of the aforesaid order dated 10<sup>th</sup> July, 2009.

3. Mr. Syali, however, points out that in respect of this very assessment year, this Court in its judgment dated 6<sup>th</sup> December, 2006 in ***Commissioner of Income Tax vs. British Airways-[2007] 165 TAXMAN 230 (DELHI)*** has categorically held that the Income Tax Appellate Tribunal (ITAT) was justified in rejecting the Revenue’s appeal, insofar as penalty of short deduction of tax of leave allowance is concerned. Thus, we make it clear that in case the SLP and Civil Appeal is allowed by the Supreme Court and the assessment restored, the Tribunal shall decide the question of penalty only relating to conveyance allowance and not leave allowance.

4. The writ petition is disposed of in the aforesaid terms.

**A.K. SIKRI, J.**

**SIDDHARTH MRIDUL, J.**

**NOVEMBER 19, 2009**

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