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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 285 OF 2011

Ingram Micro India Ltd.
(Formerly known as Tech Pacific India Ltd.),
Mumbai. ... Petitioner.

V/s.

Deputy Commissioner of Income-tax,
Central Range & Anr. ... Respondents.

Mr. Jahangir Mistry, Senior Advocate with Mr. N.J. Thakkar and
Mr. Atul Jasani for the Petitioner.
Mr. B.M. Chatterjee for the Respondents.

**CORAM : DR. D.Y. CHANDRACHUD &
A.A. SAYED, JJ.**

30 NOVEMBER 2011.

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. This Petition under Article 226 of the Constitution has been instituted in order to challenge an order passed by the

Deputy Commissioner of Income Tax (OSD-II), Mumbai under Section 163 (2) of the Income Tax Act, 1961. By the impugned order, the assessee has been treated as an agent of a Company based in Bermuda by the name of Techpac Holdings Ltd. Consequently, capital gains in the hands of the Foreign Company in the amount of Rs.575.39 crores are proposed to be assessed in the hands of the Petitioner as an agent under Section 163 of the Income Tax Act, 1961 for Assessment Year 2005-06.

3. The shares of Techpac Holdings Ltd. - a Bermudian Company, were held by non-resident shareholders being private equity funds and by a few resident shareholders. The Bermudian Company held under its fold several operating companies in Australia, New Zealand and Thailand and a holding company named Tech Pacific Asia Ltd. (a Company registered in the British Virgin Islands). Tech Pacific Asia Ltd. held holding and/or operating companies in Mauritius, Hong Kong, Malaysia and Singapore. A Mauritian subsidiary of Tech Pacific Asia Ltd. had a subsidiary in India by the name of Tech Pacific (India) Ltd. The Indian Company had a fully owned subsidiary based in Singapore. Thus, in this manner by a

pattern of interconnected holdings the Techpac Group consisted of over 20 companies in 13 different countries.

4. The Techpac group was a technology distributor in the Asia Pacific Region with an extensive presence inter-alia in India. Ingram Micro Inc., a company incorporated in the U.S. was a technology distributor with a presence in the worldwide information technology industry. Ingram Micro Asia Holdings (a U.S. based company) held a subsidiary in India by the name of "Ingram Micro India Private Limited". In 2004, Ingram Micro Asia Holdings Inc. acquired shares of the Bermudian Company under a Share Purchase Agreement, Those shares were transferred on 10 November 2004. Pursuant to the acquisition, the Indian entity of the Ingram Group merged into the Indian entity of the Tech Pacific Group. The name of the Indian subsidiary was changed to its present name, namely, the Petitioner to these proceedings.

5. Search and seizure proceedings were carried out at the premises of the Petitioner on 17 September 2007. During the course of the search, an Annual Report of Ingram Micro Inc. for 2005 was recovered. The report referred to the acquisition

of shares of Techpac Holdings Ltd. The First Respondent issued a notice dated 22 November 2010 to the Petitioner stating that the Petitioner was an agent of the Bermudian Company in respect of the capital gains arising to Techpac Holdings Ltd. on the transfer of its own shares in the previous year relevant to Assessment Year 2005-06. The notice recites that Ingram Micro Inc. had acquired shares of the Bermudian Company for a consideration of Australian Dollars 730 million on 10 November 2004. The take over of the Bermudian Company would, according to the notice, involve a take over of the Indian Company. This, according to the notice, resulted in capital gains arising in India on the transfer of assets of the Indian Company. In these circumstances, the Petitioner was treated as an agent under Section 163 of the Bermudian Company.

6. The Petitioner challenged the notice initially in Writ proceedings under Article 226 of the Constitution. By an order dated 7 December 2010, a Division Bench disposed of the Petition on a statement by Counsel for the Revenue that the proceedings in the notice would be disposed of after

furnishing a personal hearing to the Petitioner and that if an order adverse was passed it would not be given effect to for a period of four weeks. The First Respondent has passed an order dated 14 January 2011 which is impugned in these proceedings. By the impugned order the First Respondent has held that there is a business connection between the Petitioner and the Bermudian Company. The Overseas Company has been held to have a 23% business interest in the India operations. The accrual of capital gains in the hands of the Bermudian Company is proposed to be assessed in the hands of the Petitioner under Section 163 in the amount of Rs. 575.39 crores for Assessment Year 2005-06.

7. Counsel appearing on behalf of the Petitioner has assailed the order that was passed under Section 163 on two grounds; (1) Firstly, it has been urged that under Section 160(1)(i), a representative assessee is defined to mean, in respect of the income of a non-resident specified in sub-Section (1) of Section 9, the agent of the non-resident, including a person who is treated as an agent under Section 163. In other words, a person can be treated as a

representative assessee in respect of the income of a non-resident specified under Section 9(1). In the present case, what is sought to be brought to tax is a capital gain arising upon a transfer of shares of the Bermudian Company from the existing shareholders to the transferee shareholders. The submission is that no part of the consideration for the transfer of shares has flowed to the Bermudian Company and as a matter of first principle, income representing capital gains arising out of the transfer of shares can accrue or arise only to the transferor and not to the company whose shares are transferred. There was no accrual of income to the Bermudian Company nor did any consideration flow to it. Hence, the Petitioner cannot be treated as a representative assessee under Section 160(1)(i); (2) The notice which has been issued under Section 163 is ex-facie barred by limitation. Under Section 149(3) a notice for assessment was required to be served upon the Petitioner within two years of the expiry of the relevant Assessment Year. The relevant Assessment Year being 2005-06, such a notice ought to have been issued on or before 31 March 2008. The First Respondent has relied upon the provisions of Section 153(b). Reliance on those provisions of

Section 153(b) cannot be said to obviate the bar of limitation in this case because the search was of the Indian Company and not of the person who is sought to be assessed. The assessment of the Indian Company is a separate assessment altogether and in the present case, the assessment is of the income of the non-resident. The Petitioner being treated as an agent of the non-resident Bermudian Company, the limitation for initiating proceedings would expire on 31 March 2008 which was two years of the end of the relevant Assessment Year. The notice which was issued on 22 November 2010 was barred by limitation. Learned Counsel submitted that Section 149 of the Income Tax Act, 1961 provides for a period of limitation on the initiation of assessment proceedings following the order under Section 163. The assessment proceedings would ex-facie be barred upon the expiry of two years by virtue of Section 149(3).

8. Having heard Counsel appearing on behalf of the Petitioner, we were prima facie of the view that the objection on the ground of limitation would have to be sustained. Consequently, we have called upon Counsel appearing on

behalf of the Revenue to address submissions on that aspect of the matter. If the proceedings are barred by limitation, then, it would not be necessary for the Court to determine issues wider than those that are strictly necessary for disposal of the proceedings. Counsel appearing on behalf of the Revenue has relied upon the observations contained in paragraphs 15.1 and 15.2 of the impugned order in support of the submissions that the proceedings are not barred by limitation. No further submissions have been urged.

9. Clause (i) of sub-Section (1) of Section 160 provides that for the purposes of the Act, “representative assessee” means - in respect of the income of a non-resident specified in sub-Section (1) of Section 9, the agent of the non-resident including a person who is treated as an agent under Section 163. Section 163 of the Income Tax Act, 1961 stipulates that for the purposes of this Act, “agent”, in relation to a non-resident includes any person in India – (a) Who is employed by or on behalf of the non-resident; or (b) Who has any business connection with the non-resident; or (c) From or through whom the non-resident is in receipt of any income, whether

directly or indirectly; or (d) Who is the trustee of the non-resident and includes also any other person who, whether a resident or non-resident, has acquired by means of a transfer, a capital asset in India. Sub-section (2) of Section 163 provides that no person shall be treated as the agent of a non-resident unless he has had an opportunity of being heard by the Assessing Officer as to his liability to be treated as such. What needs emphasis is that under Clause (i) of Section 160(1) a person is treated as a representative assessee in respect of the income of a non-resident where he is either an agent or a person who is treated as an agent under Section 163. Therefore, it is in respect of the income of the non-resident that a person is treated as a representative assessee. The income which is sought to be brought to tax is the income of the non-resident, in the hands of the representative assessee. By the impugned order, the First Respondent has held the Petitioner to be an agent of the non-resident under Section 163. Following an order under Section 163(2), a notice is liable to be issued under the provisions of Section 148. Under sub-Section (3) of Section 149 if the person on whom a notice is issued under Section 148 is a person treated

as the agent of a non-resident under Section 163 and the assessment, re-assessment or re-computation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant Assessment Year. The relevant Assessment Year to which the proceedings relate is 2005-06. Clearly, the plain consequence of the provisions of Section 149(3) is that no assessment, re-assessment or re-computation can take place after 31 March 2008. The notice under Section 163 is in aid of the action of the Revenue in bringing to tax the capital gains arising out of the transfer of shares of the Bermudian Company because according to the Revenue, this involved the transfer of a capital asset in India. The First Respondent, in our view, was clearly in error in relying upon the provisions of Section 153(b). The search and seizure operation took place in respect of the Indian company but it is an admitted position that what is sought to be brought to tax as capital gains are capital gains alleging to accrue to the Bermudian company. The Petitioner is treated as a representative assessee on the finding that it is an agent within the meaning of Section 163.

In other words, what is brought to tax in the hands of the Petitioner is the capital gains which are stated to accrue to the Bermudian company. The provisions of Section 153(b) would therefore clearly not have any application. The judgment of the Supreme Court in **Claggett Brachi Co. Ltd., London V/s. Commissioner of Income-Tax**¹ dealt directly with Section 149(3). Chief Justice R.S. Pathak observed that “The issue of notice under Section 148 of the Act to the agent after the expiry of two years from the end of the relevant assessment year is prohibited by the statute.”² In that case, the Income Tax Officer had issued notice to the agents of the assessee whereupon the agent took the defence of Section 149(3). The Income Tax Officer upheld their objection and dropped the proceedings since it was time barred. The Supreme Court held that the Officer had acted correctly in quashing the reassessment of the agent, since the provisions of Section 149(3) must be strictly construed. Thereafter, the Court went on to hold that this would not preclude the revenue from reassessing the assessee – merely because the revenue had taken out assessment proceedings against the

1 (1989) 2 SCR 731 at 736.

2 Id., at 736.

agent of the assessee, which were dropped due to limitation restrictions, the revenue would not be precluded from taking out assessment proceedings against the assessee. Thus, the Supreme Court affirmed the duty of the Income Tax Officer to drop the proceedings against the agent of the assessee in that case, due to the strict wording of Section 149(3). In our view, the proceedings which were initiated by the First Respondent were clearly beyond limitation.

10. In the view which we have taken, it is not necessary for the Court for the purposes of these proceedings to express any opinion on the first submission which has been addressed before the Court on behalf of the Petitioner. We accordingly allow the Petition by quashing and setting aside the impugned order under Section 163. Rule is made absolute in these terms. No order as to costs.

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

(A.A. Sayed, J.)