REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 4435-37 of 2016
(ARISING OUT OF SLP (CIVIL) NOS.20822-20824 OF 2011)

ITC LIMITED GURGAON …APPELLANT

VERSUS

COMMISSIONER OF I.T. (TDS) DELHI …RESPONDENT

WITH

CIVIL APPEAL NOS. 4438-40 of 2016
(ARISING OUT OF SLP (CIVIL) NOS.9587-9589 OF 2012)
CIVIL APPEAL NO. 4441 of 2016
(ARISING OUT OF SLP (CIVIL) NO.10653 OF 2012)
CIVIL APPEAL NO. 4442 of 2016
(ARISING OUT OF SLP (CIVIL) NO.17964 OF 2012)
CIVIL APPEAL NOS. 4443-44 of 2016
(ARISING OUT OF SLP (CIVIL) NOS.18128-18129 OF 2012)

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. These appeals arise out of a common judgment of the Delhi High Court dated 11.5.2011.

3. The assessees are engaged in the business of owning, operating, and managing hotels. Surveys conducted at the business premises of the assessees allegedly revealed that the assessees had been paying tips to its employees but not deducting taxes thereon.

4. The Assessing Officer treated the receipt of the tips as income under the head "salary" in the hands of the various employees and held that the assessees were liable to deduct tax at source from such payments under Section 192 of the Income Tax Act, 1961. The assessees were treated by the Assessing Officers as assessees-in-default under Section 201(1) of the Act. The Assessing Officers in various assessment orders worked out the different amounts of tax to be paid by all the aforesaid assessees under Section 201(1), as also interest under Section 201 (1A) of the said Act for assessment years 2003-2004, 2004-2005 and 2005-2006.

5. The CIT (Appeals) *vide* his common order dated 28.11.2008 allowed the various appeals of the assessees holding that the assessees could not be treated as assessees-in-default under Section 201(1) of the Act for non-deduction of

tax on tips collected by them and distributed to their employees. Appeals filed by the Revenue to the Income Tax Appellate Tribunal (ITAT) came to be dismissed by the Tribunal by relying upon its own order for assessment year 1986-1987 in the case of ITC and the case of Nehru Palace Hotels Limited. Against the said orders of the Tribunal, appeals were preferred by the Revenue to the High Court.

6. The High Court *vide* the impugned judgment dated 11.5.2011 framed the questions of law as follows:-

> "(a) Whether on the facts and in the circumstances of the case, the Ld. ITAT erred in law and on merits holding that the assessee was not an "assessee in default" for short/non deduction of tax at source on account of banquet and restaurant tips collected and paid by it to its employees?
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> (b) Whether on the facts and in the circumstances of the case, the Ld. ITAT erred in law and on merits in holding that the payment of banquet and restaurant tips to the employees of the assessee in its capacity as employer were not profits in lieu of salary within the meaning of Section 17 (3) (ii) of the Income Tax Act, 1961?"

7. The High Court held, after considering Sections 15, 17 and 192 of the Income Tax Act, that tips would amount to 'profit in addition to salary or wages' and would fall under Section

15(b) read with Section 17(1)(iv) and 17(3)(ii). Even so, the High Court held that when tips are received by employees directly in cash, the employer has no role to play and would therefore be outside the purview of Section 192 of the Act. However, the moment a tip is included and paid by way of a credit card by a customer, since such tip goes into the account of the employer after which it is distributed to the employees, the receipt of such money from the employer would, according to the High Court, amount to "salary" within the extended definition contained in Section 17 of the Act. For arriving at this interpretation, the High Court relied upon the decision of this Court in **Karamchari Union, Agra v. Union of India,** (2000) 3 SCC 335, while distinguishing the judgments of this Court in **Rambagh Palace Hotel v. Rajasthan Hotel Workers' Union,** (1976) 4 SCC 817 and **Quality Inn Southern Star v. ESI Corpn.,** (2008) 2 SCC 549. After distinguishing the said judgments, the High Court arrived at the following conclusion:-

> "From the above discussion, we may conclude that the receipt of the tips constitute income at the hands of the recipients and is chargeable to the income tax under the head "salary" under Section 15 of the Act. That being so, it was obligatory upon the assessees

to deduct taxes at source from such payments under Section 192 of the Act."

8. Since the assesses were, therefore, declared to be assessees-in-default under Section 201 of the Act, the High Court found that despite the fact that the assessees did not deduct the said amounts based on a bonafide belief and no dishonest intention could be attributed to any of them, yet the High Court held that levy of interest under Section 201(1A) would follow, as the payment of simple interest under the said provision is mandatory; and not being penal in nature, no question of bonafide belief would arise to absolve the assessees from any interest liability under the said provision.

9. Learned senior advocates Shri Vohra and Shri Syali, assailed the judgment of the High Court before us. They argued that tips are paid by customers out of their own volition as payments to the employees being waiters in a restaurant for the quality of service provided to them and for courteous behavior. Since this payment is gratuitous, and the assessees act as mere trustees in collecting the tips charged to the customers' credit cards, and then pass over the same to the employees, it

is clear that no amount by way of tip has any connection with the contract of employment between the employer and the employee. They further submitted that the tips received by the employees are not remuneration or reward for services rendered by the employees to the assessees. They argued that there was no vested right of an employee to claim any tip from a customer. It was further argued that the expression "employer" contained in Sections 15 and 17 is of crucial importance, and must be contrasted with the expression "any person" occurring in Section 17 (3)(iii). It was also argued, based on the Hotel Receipts Tax Act and a circular issued thereunder, that tips do not form any part of taxable receipts of the employers. Further, we were shown a publication in which guidelines were issued by the Australian Tax Office stating that voluntary tips are not consideration for the supply of food or service in a hotel or restaurant. The intervenor represented by Shri S. Ganesh also argued that Section 192 is attracted only when any person responsible for paying any income chargeable under the head "salary" is to deduct income tax on the amount payable. According to the learned counsel, since

the income received from tips is not income chargeable under the head “salary”, so far as the employees are concerned, but income from other sources, Section 192 is not at all attracted. It was further agued by him that the machinery provision contained in Section 192 is not possible of compliance inasmuch as it is impossible for the employer to predicate how much each individual employee would get by way of income from tips, particularly when the schemes for distribution are many and varied and may include different sums being received by different employees based on various criteria. He also argued that no question of Section 201 would come into play in this case as it is only in consequence of failure to comply with Section 192 that Section 201 is at all attracted. It was also argued that since the High Court had found that the conduct of the assessees was bonafide, interest therefore could not have been charged from them under Section 201(1A). All the learned counsel have relied upon various judgments of this Court and other courts in support of their submissions.

10. Shri Neeraj K. Kaul, learned Additional Solicitor General, appearing on behalf of the Revenue, argued that Section 15(b)

referred to salary that is “paid” or “allowed” to an employee by or on behalf of an employer, and stated that the expression “allowed” is an expression of wide import and would include amounts such as tips paid by employers to their employees. He also relied upon Section 17(3) (ii) to state that any payment received by an assessee from an employer would be regarded as ‘profit in lieu of salary’, and that since the amount of tips received by way of credit cards from the customer are first put into the employer’s account and thereafter received by the employees from the employer, that was sufficient to attract ‘profits in lieu of salary’ as defined. According to the learned counsel, the section makes no reference to the contract of employment, which is therefore a foreigner to the Section. The learned Additional Solicitor General for this proposition relied heavily upon **Karamchari Union, Agra’s case** (supra), to buttress this submission and stated that the High Court correctly relied upon the said decision. He went on to add that the judgments contained in **Rambagh Palace Hotel** and **Quality Inn Southern Star** were not directly on point and were rightly distinguished by the High Court. He also supported the

finding of the High Court that bonafide belief would have no bearing on payability of interest under Section 201(1A). He referred to the provision of section 192(3) in order to buttress his submission that the machinery provisions contained in Section 192 could easily be worked out as monthly estimates of the tips that were received or receivable had to be made by the employer.

11. Before adverting to the contentions raised by counsel for both the parties, it will be necessary to set out some of the provisions of the Income Tax Act.

> **"192. Salary** (1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year.
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> (3) The person responsible for making the payment referred to in sub-section (1) or sub-section (1A) or sub-section (2) or sub-section (2A) or sub-section (2B) may, at the time of making any deduction, increase or reduce the amount to be deducted under this section for the purpose of adjusting any excess or deficiency arising out of any previous

deduction or failure to deduct during the financial year.

201. Consequences of failure to deduct or pay.

(1) Where any person, including the principal officer of a company,—

(*a*) who is required to deduct any sum in accordance with the provisions of this Act; or

(*b*) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—

(*i*) has furnished his return of income under section 139;

(*ii*) has taken into account such sum for computing income in such return of income; and

(*iii*) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:

Provided further that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,—

(*i*) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and

(*ii*) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,

and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200:

Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso to sub-section (1), the interest under clause (*i*) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident.

15. Salaries. The following income shall be chargeable to income-tax under the head "Salaries"—

(*a*) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;

(*b*) any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him;

(*c*) any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer, if not charged to income-tax for any earlier previous year.

Explanation 1.—For the removal of doubts, it is hereby declared that where any salary paid in advance is included in the total income of any person for any previous year it shall not be included again in the total income of the person when the salary becomes due.

Explanation 2.—Any salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from the firm shall not be regarded as "salary" for the purposes of this section.

17. "Salary", "perquisite" and "profits in lieu of salary" defined. For the purposes of sections 15 and 16 and of this section,—

(*1*) "salary" includes—

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(*iv*) any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages;

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(*3*) "profits in lieu of salary" includes—

(*i*) the amount of any compensation due to or received by an assessee from his employer or former employer at or in connection with the termination of his employment or the modification of the terms and conditions relating thereto;

(*ii*) any payment (other than any payment referred to in clause (*10*), clause (*10A*), clause (*10B*), clause (*11*), clause (*12*), clause (*13*) or clause (*13A*) of section 10), due to or received by an assessee from an employer or a former employer or from a provident or other fund, to the extent to which it does not consist of contributions by the assessee or interest on such contributions or any sum received

under a Keyman insurance policy including the sum allocated by way of bonus on such policy.

Explanation.—For the purposes of this sub-clause, the expression "Keyman insurance policy" shall have the meaning assigned to it in clause (*10D*) of section 10;

(*iii*) any amount due to or received, whether in lump sum or otherwise, by any assessee from any person —

(*A*) before his joining any employment with that person; or

(*B*) after cessation of his employment with that person."

12. At this stage it is important to analyse Section 192 of the Income Tax Act. First and foremost, under sub-section (1) thereof, "any person responsible" for paying any income chargeable under the head "salaries" is alone brought into the dragnet of deduction of tax at source. The person responsible for paying an employee an amount which is to be regarded as the employee's income is only the employer. In the facts of the present case, it is clear that the person who is responsible for paying the employee is not the employer at all, but a third person – namely, the customer. Also, if an employee receives income chargeable under a head other than the head "salaries", then Section 192 does not get attracted at all. In **Emil Webber**

v. CIT, (1993) 2 SCC 453, the Ballarpur Paper and Straw Board Mills wanted to set up a caustic soda/chlorine manufacturing plant at Ballarpur. For this purpose, it entered into two agreements with Krebs, a French concern, which in turn entered into an agreement with a Swiss concern for making available services of certain personnel. The assessee, Emil Webber, was a person engaged by the Swiss concern. The assessee came to India and worked in connection with the setting up of the said plant. The question that was posed before this Court was whether the tax component paid by Ballarpur of the assessee's taxable income could be included within the income of the assessee. This Court, in answering the said question, specifically stated in paragraph 8, that the question arose as to under which head of income should the said income be placed. This Court held that inasmuch as the assessee is not an employee of Ballarpur, which made the payment, it cannot be brought within the purview of Section 17 of the Act. Thus, such income must necessarily be placed under Section 56(1) of the Act as 'income from other sources'.

13. Following the aforesaid decision, it is clear that as income from tips would be chargeable in the hands of the employees as income from other sources, such tips being received from customers and not from the employer, Section 192 would not get attracted at all on the facts of the present case.

14. Section 15 of the Act is in three parts. Sub-clause (a) refers to salary that is "due" from an employer or a former employer, whether paid or not. Under this sub-clause, salary is taxable upon accrual – it matters not whether payment is actually made or not. On the other hand, under sub-clause (b), with which we are directly concerned, any salary that is paid or allowed to an employee by or on behalf of an employer or former employer though not due, or before it becomes due, becomes taxable. Under this sub-clause, it matters not whether the salary is at all due. Payment made or allowance given to the employee by or on behalf of an employer or former employer is sufficient to bring such payment or allowance to tax under the said sub-clause. Under sub-clause (c) any arrears of salary paid or allowed to an employee by or on behalf of an

employer or previous employer if not earlier charged to income tax in any previous year is also brought to tax.

15. It can be seen, on an analysis of Section 15, that for the said Section to apply, there should be a vested right in an employee to claim any salary from an employer or former employer, whether due or not if paid; or paid or allowed, though not due. In **CIT v. L.W. Russel** reported in 53 ITR 91 (SC), this Court dealt with the provisions of Section 7(1) of the 1922 Act, which preceded Sections 15 and 17 of the present Act. Holding that it is necessary for the employee to have a vested right to receive an amount from his employer before he could be brought to tax under the head "salaries", this Court held:-

> "Now let us look at the provisions of section 7(1) of the Act in order to ascertain whether such a contingent right is hit by the said provisions. The material part of the section reads:
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> > "7.(1)-The tax shall be payable by an assessee under the head 'salaries' in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites, or profits in lieu of, or in addition to, any salary or wages, which are allowed to him by or are due to him, whether paid or not, from, or are paid by or on behalf of..... a company.....

> Explanation I- For the purpose of this section, 'perquisite' includes-
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> (v) any sum payable by the employer, whether directly or through a fund to which the provisions of Chapters IXA and IXB do not apply, to effect an assurance on the life of the assessee or in respect of a contract of annuity on the life of the assessees."

This section imposes a tax on the remuneration of an employee. It presupposes the existence of the relationship of employer and employee. The present case is sought to be brought under the head "perquisites in lieu of, or in addition to, any salary or wages, which are allowed to him by or are due to him, whether paid or not, from, or are paid by or on behalf of a company". The expression "perquisites" is defined in the Oxford Dictionary as "casual emoluments, fee or profit attached to an office or position in addition to salary or wages". Explanation 1 to Section 7(1) of the Act gives an inclusive definition. Clause (v) thereof includes within the meaning of "perquisites" any sum payable by the employer, whether directly or through a fund to which the provisions of Chapters IXA and IXB do not apply, to effect an assurance on the life of the assessee or in respect of a contract for an annuity on the life of the assessee. A combined reading of the substantive part of Section 7(1) and clause (v) of Explanation 1 thereto makes it clear that if a sum of money is allowed by the employee by or is due to him from or is paid to enable the latter to effect an insurance on his life, the said sum would be a perquisite within the meaning of section 7(1) of the Act and, therefore, would be eligible to tax. But before such sum becomes so exigible, it shall either be paid to the employee or allowed to him by or due to him from the employer. So far as the expression "paid" is concerned, there is no difficulty, for it takes in every receipt by the employee from the employer

whether it was due to him or not. The expression "due" followed by the qualifying clause "whether paid or not" shows that there shall be an obligation on the part of the employer to pay that amount and a right on the employee to claim the same. The expression "allowed", it is said, is of a wider connotation and any credit made in the employer's account is covered thereby. The word "allowed" was introduced in the section by the Finance Act of 1955. The said expression in the legal terminology is equivalent to "fixed, taken into account, set apart, granted". It takes in perquisites given in cash or in kind or in money or money's worth and also amenities which are not convertible into money. It implies that a right is conferred on the employee in respect of those perquisites. One cannot be said to allow a perquisite to an employee if the employee has no right to the same. It cannot apply to contingent payments to which the employee has no right till the contingency occurs. In short, the employee must have a vested right therein."

16. On the facts of the present case, it is clear that there is no vested right in the employee to claim any amount of tip from his employer. Tips being purely voluntary amounts that may or may not be paid by customers for services rendered to them would not, therefore, fall within Section 15(b) at all. Also, it is clear that salary must be paid or allowed to an employee in the previous year "by or on behalf of" an employer. Even assuming that the expression "allowed" is an expression of width, the salary must be paid by or on behalf of an employer. It must first

be noticed that the expression “employer” is different from the expression “person”. An “employer” is a person who employs another person under a contract of employment, express or implied, to perform work for the employer. Therefore, Section 15(b) necessarily has reference to the contract of employment between employer and employee, and salary paid or allowed must therefore have reference to such contract of employment. On the facts of the present case, it is clear that the amount of tip paid by the employer to the employees has no reference to the contract of employment at all. Tips are received by the employer in a fiduciary capacity as trustee for payments that are received from customers which they disburse to their employees for service rendered to the customer. There is, therefore, no reference to the contract of employment when these amounts are paid by the employer to the employee. Shri Kaul, however, argued that there is an indirect reference to the contract of employment inasmuch as but for such contract, tips to employees could not possibly have been paid at all. We are afraid that this argument must be rejected for the simple reason that the payments received by the

employees have no reference whatsoever to the contract of employment and are received from the customer, the employer only being a conduit in a fiduciary capacity in between the two. Indeed, if Shri Kaul's arguments were to be accepted, even the position accepted by the revenue and consequently the High Court that tips given in cash, which admittedly are not covered by Section 192, would also then be covered inasmuch as such tips also would not have been given but for the contract of employment between employer and employee. Clearly, therefore, such argument does not avail Revenue.

17. However, the sheet anchor of Shri Kaul's submission is Section 17(3)(ii) in which Shri Kaul stressed that any payment received by an assessee from an employer would be regarded as profits in lieu of salary. According to Shri Kaul it is undisputable that payments were received by the employees from their employer and that, without more, Section 17 would therefore be attracted to the facts of the case. This argument again cannot be countenanced for the simple reason that Section 17(3) itself uses two different expressions – "employer" in sub-clause (ii) and "person" in sub-clause (iii). Obviously

"person" is wider than "employer". Even the word "person" which appears in the said sub-clause has reference either to a future employer or a past employer. Therefore, it is clear that under the scheme of Section 17, payment must be by an employer, whether such employer is a future employer or a past employer of the employee in question. When sub-clause (ii) uses the expression "employer", it uses the said expression in the same sense as is used in Section 15, as the opening line of Section 17 itself states that "for the purposes of Section 15" salary includes profits in lieu of salary. We have already held that the word "employer" in Section 15 necessarily brings in a contract of employment, express or implied, and for this reason also we are afraid we are not able to accept Shri Kaul's argument.

18. The judgment of this Court in **CIT v. L.W. Russel** reported in 53 ITR 91 (SC) was relied upon by Shri Kaul stating that the expression "allowed" is of a wider connotation and would be equivalent to "fixed, taken into account, set apart or granted". We have already held that given the fact that the expression "allowed" is of wide amplitude, yet the other

expressions in Section 15 as construed by us would exclude tips from its purview.

19. Interestingly, this Court in **Rambagh Palace Hotel's case** (supra), in paragraph No.2 held as under:-

> "We regret to be unable to agree with the counsel on this point. It is well-known that in important hotels in the country — the appellant is now a five star hotel — the customers are of the affluent variety and pay tips either to the waiters directly or in the shape of service charges or otherwise to the management along with the bill for the items consumed. In short, the true character of tips cannot be treated as any payment made by the management out of its pocket but a transfer of what is collected to the staff as it is intended by the payer to be so distributed. It may also happen that more money comes in by way of tips into the pockets of the management than distributed by it. We cannot therefore consider the receipt of tips by the staff as anything like a payment made by the management to its employees warranting consideration by the tribunal to depress the award of dearness allowance. Of course, it is a factor which may perhaps be in the mind of the tribunal when he finalised the actual figures. There is no reason for us to think that although not specifically put down in his order, the tribunal has lost sight of this circumstance. For this reason, we think there is no ground for interference with the award of the Industrial Tribunal. Having regard to the fair way the case has been placed before us, we do not regard this as a case where costs should be awarded while dismissing the appeal. The appeal is dismissed but the parties will bear their own costs."

This judgment was followed in **Quality Inn Southern Star v. ESI Corpn.,** (2008) 2 SCC 549.

20. Shri Kaul sought to distinguish the aforesaid judgments as they arose in contexts that were outside the Income Tax Act. For this, he relied upon **Jagatram Ahuja v. Commissioner of Gift Tax, Hyderabad,** (2000) 8 SCC 249 at paragraph 23, for the proposition that words judicially construed in a particular statute cannot be a guide to construction of the same words in another statute, unless the concerned statutes are statutes in *pari materia*. He argued that the **Rambagh Palace Hotel** judgment arose in the context of an award made by the Industrial Tribunal in favour of the workers of the Rambagh Palace Hotel who had raised a dispute on the score that the price index having gone up, the workers were entitled to adequate compensation by way of dearness allowance. It is in this context, that according to Shri Kaul, this Court held that the true character of tips cannot be treated as any payment made by the management out of its pocket but only as a transfer of

what is collected, to the staff, as it is intended by the employer to be distributed to the staff.

21. Shri Kaul may be right in his submission that generally speaking the context of the two statutes being different, no reliance can be placed as a precedent on the **Rambagh Palace Hotel** case. However, we may point out that the statement by this Court that the true character of tips cannot be treated as any payment made by the management but only as a transfer of what is collected from the customer and paid to the staff is equally applicable to the facts of the present case. Similarly, the **Quality Inn Southern Star** case was also a judgment in a different context, namely the Employees' State Insurance Act, 1948. In that case, it was held that the amounts of tips received by employees were not in the nature of wages as they were not given to the employees under the terms of the contract of employment, either express or implied. The aforesaid statement made by this Court, though made in a different context, would apply on all fours in the present case, again for the reasons mentioned hereinabove.

22. Along the lines of the aforesaid judgments, the House of Lords, in **Wrottesley v. Regent Street Florida Restaurant,** [1951] 2 K.B. 277 dealt with a case in which, under a tronc system, customers' tips are shared out between the waiters, and, in some cases, other members of the staff. This judgment arose under Section 9(2) of the Catering Wages Act, 1943 which provided that if an employer fails to pay to a worker, to whom a wages regulation order applies, remuneration not less than the statutory minimum remuneration (clear of all deductions), he shall be guilty of an offence. The question that arose in that case is whether tips received by waiters under the tronc system were to be regarded as "remuneration" so as to take the employer out of Section 9 (2) aforesaid. In this context, the House of Lords held:

> "What we have to decide is whether, when a waiter receives a payment from the tronc in the manner found in the case, that sum can be regarded as remuneration paid to him by, or as remuneration obtained by him in cash from, his employer. In our opinion, when a customer gives a tip to a waiter the money becomes the property of the latter. The customer has no intention of giving anything to the employer. Mr. Salmon, indeed, did not contend that in a case where no tronc existed, a tip given by a customer could be regarded as remuneration paid

> by or obtained from the employer. But where the tronc system obtains the money given by the customer is paid into a tronc or pool by the waiter so that it then becomes the joint property of all those entitled to share in the pool. In parenthesis, it may be seen by reference to a French dictionary, that the word tronc is applied to a box or receptacle for money, and can be used to indicate, for instance, a poor box.
>
> It seems to us that there is no ground for saying that these tips ever became the property of the employers. Even if the box were kept in the actual custody of the employer he would have no title to the money: the position would be exactly the same as if the owner of some bank notes and coin put them in a bag and handed it to some person to keep for him. When the tronc money is shared out the waiters are dividing up their own money. Accordingly, we hold that the sums received from the tronc by the waiters cannot be taken into account in computing the amounts paid by the respondents to them."

23. We approve of the reasoning contained in this judgment and hold that payments of collected tips made in the manner indicated in Paras 7 and 9 above would not be payments made "by or on behalf of" an employer. We agree with the statement of law that there is no ground for saying that these tips ever became the property of the employers. Even if the box were kept in the actual custody of the employer he would have no title to the money as he would hold such money in a fiduciary

capacity for and on behalf of his employees. In the said circumstances, it is clear that such payments would be outside the purview of Section 15(b) of the Act.

24. It remains to deal with the sheet anchor of Shri Kaul's submission, which is this Court's judgment in **Karamchari Union, Agra v. Union of India,** (2000) 3 SCC 335. In this judgment, this Court was faced with whether city compensatory allowance and other allowances such as house rent allowance are "salary" under Section 17. This Court held that Section 17 gives an exhaustive meaning to the expression "salary" by extending the ordinary connotation of the word to fees, commissions, perquisites or payments of profits in lieu of salary which are not ordinarily considered to be salary. The question posed before this Court was what does the expression "salary" signify. Would it also include any payment received from the employer relatable to or out of the profits or could it be understood as any pecuniary gain or advantage? This Court held:-

"In our view, even though there is much substance in the contentions raised by the learned counsel for the assessee yet it is to be stated that the Act is a self-contained code and the taxability of the receipt of any amount or allowance is to be determined on the basis of the meaning given to the words or phrases in the Act. Section 2(24) of the Act gives a wide inclusive definition to the word "income". Similarly, for levying tax on salary income, an exhaustive definition is given under Section 17, which includes perquisites and profits in lieu of salary. The only exclusion provided under sub-section (3) is any payment referable to clause (10), clause (10-A), clause (10-B), clause (11), clause (12), clause (13) or clause (13-A) of Section 10. In view of this specific inclusion and exclusion in the meaning of the word "income" and "salary", it is rightly submitted that payment received by the assessee has no connection with the profits of the employer. The word "profits" is used only to convey any "advantage" or "gain" by receipt of any payment by the employee.

Applying the aforesaid general meaning of the word "profits" and considering the dictionary (*sic* statutory) meaning given to it under Sections 17(1)(*iv*) and (3)(*ii*), it can be said that "advantage" in terms of payment of money received by the employee from the employer in relation or in addition to any salary or wages would be covered by the inclusive definition of the word "salary". Because of the inclusive meaning given to the phrase "profits in lieu of salary" would include "any payment" due to or received by an assessee from an employer, even though it has no connection with the profits of the employer. It is true that the legislature might have avoided giving an inclusive meaning to the word "salary" by stating that any payment received by the employee from an employer would be considered to be salary except

> the payments which are excluded by Section 17(3) (*ii*) i.e. clause (10), (10-A), (10-B), (11), (12), (13) or (13-A) of Section 10. However, it is for the legislature to decide the same. This would not mean that by giving an exhaustive and inclusive meaning, the word "profits" can be given a meaning only when it pertains to sharing of profits by the employer. For the assessee, the receipt of such amount would be a profit, gain or advantage in addition to salary, even though it is not named as salary. Therefore, the word "profits" in context is required to be understood as a gain or advantage to the assessee. Hence, it is not possible to accept the contention of the learned counsel for the employee that as the CCA amount is paid to meet the additional expenditure as contemplated by the statutory Service Rules, it cannot be said to be profit, gain or additional salary. Under the Act, such receipt of the amount as conceded is covered by the definition of the word "income" and as provided it would be in addition to salary. Hence, it would be part and parcel of income by way of salary, which would be a taxable one.
>
> In the result, we hold that DA, CCA and HRA would be taxable income. Since, counsel for the employees did not make any submission with regard to other allowances like night allowance, tuition fee, leave encashment linked with leave travel concession, running allowance etc. we do not pass any order with regard to those allowances." [at paras 23, 25 and 28]

25. All that was held by this Court in the aforesaid decision is that even if an amount is received by an employee which has no connection with the profits of the employer, it may yet be

salary as any advantage or gain by receipt of such payment would be included in the expression “profits in lieu of salary”. Hence, this court did not accede to the contention of learned counsel for the assessee that as the CCA amount is paid to meet additional expenditure as contemplated by statutory service rules, it cannot be said to be “profit”. This Court finally held that CCA and HRA would be taxable income in the hands of the employee.

26. It is well settled that a case is an authority, for what it decides, and not for what logically follows from it. This case in no manner supports Shri Kaul’s submission on Section 17(3)(ii) that the moment any amount is received from an employer by an employee, without more, such amount becomes a profit in lieu of salary. In the **Karamchari Union** judgment, CCA and HRA arose directly from the employer – employee relationship. The question the Court had to answer was whether a pecuniary advantage in the form of CCA and HRA would be covered by Section 17, which the Court answered in the affirmative. This Court’s decision cannot be understood to mean that even de hors the employer – employee relationship, any amount

received from the employer by an employee would become 'salary' under Section 17. We are, therefore, unable to subscribe to the High Court's view in understanding this decision to mean that so long as the employer pays an amount to an employee, even in a fiduciary capacity and de hors the employer – employee relationship, the amount so paid would come within the head "salary".

27. Shri Kaul also relied upon two English judgments and one Australian judgment to buttress his submission.

28. Before adverting to the English judgments, it is necessary first to set out the statutory scheme contained in Schedule E of the English Income Tax Act, 1918.

"SCHEDULE E

> Tax under Schedule E shall be charged in respect or every public office or employment of profit and in respect of every annuity, pension, or stipend payable by the Crown or out of the public revenue of the United Kingdom, other than annuities charged under Schedule C, for every twenty shillings of the annual amount thereof."
>
> "1. Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule, or to whom any annuity, pension, or

> stipend, as described in this Schedule, is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, except as otherwise provided, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

29. The difference in language between the U.K. Act and Sections 15 and 17 of the Income Tax Act, 1961 is obvious. There need not be an employer employee relationship under Schedule E read with Rule 1 to attract the aforesaid provision. Since this is the case, it is clear that amounts that are received by any person chargeable under the said Schedule and Rule become taxable even if the said amount is paid by a third person. Keeping this vital difference in view, let us analyse the two English judgments relied upon by Shri Kaul.

30. In **Calvert (Inspector of Taxes) v. Wainwright**, [1947] 1 KB 526, the question posed before the King's Bench was: Are tips received by taxi drivers from their customers assessable to income tax in their hands? The King's Bench Division held that such tips are assessable under Schedule E read with Rule 1 of

the Income tax Act, 1918. In so holding, the King's Bench held that though persons like taxi drivers have no vested right to ask for tips, they would yet be covered. This is for the reason that Rule 1 indicates that emoluments may be received either from the employer or from a third party as a reward for services rendered in the course of employment. This case is obviously distinguishable, first, on the ground that an emolument received from a third party is not covered by Sections 15 and 17 of the Indian Income Tax Act unless such emolument is on behalf of an employer. Secondly, the case dealt with whether such emoluments may be taxable in the hands of the taxi driver. It is nobody's case that the amount of tips received by the employees in the present cases are not taxable in their hands – indeed learned counsel for the assessees have stated that they are so taxable as income from other sources. The question that we have to determine is somewhat different – whether the person responsible for paying salary income to his employee is liable to deduct the tax of the employee and pay it over on an estimated basis under Section 192 of the Income Tax Act. For

both the aforesaid reasons, this judgment therefore does not take Shri Kaul's case any further.

31. Similarly, the judgment in **Moorhouse (Inspector of Taxes) v. Dooland**, [1955] 2 W.L.R. 96, also arose under Schedule E Rule 1. The question posed in that case was whether collections made by a professional cricketer for his own benefit under a contract with a cricket club could be assessed to tax under the aforesaid provisions. The Court of Appeal, in holding that such sum could so be assessed to income tax, held that by an express term in the contract of employment the cricketer was entitled to solicit contributions from spectators. Since this was the actual situation before the Court of Appeal, the Court of Appeal held that from the standpoint of the recipient, such voluntary payments accrued to him by virtue of his employment by the cricket club. A distinction was made by the Court of Appeal, regard being had to the U.K. statute, between voluntary payments made in circumstances on a ground personal to the recipient as opposed to those which arise from his contract of employment. The Court of Appeal held that given the special facts of the case, being the clause

contained in the contract of employment, that the said amounts could not be said to be purely personal to the cricketer but arose from his contract of employment. For the very reasons given in distinguishing the earlier U.K. judgment, we find this judgment also has no application as the U.K. statute is markedly different from Sections 15 and 17 of the Indian Income Tax Act, and that consequently the tests applied by the English Courts, being based upon the language of the U.K. Income Tax Act, would not apply to the situation in India.

32. A judgment cited by the appellants has also to be dealt with in this context. In **Hochstrasser (Inspector of Taxes) v. Mayes,** [1960] A.C. 376, a certain company employed many persons in numerous factories in different places. The employees were required by their service agreement to be prepared to serve the employer wherever required. A housing scheme was entered into with the employees under which, whenever the employee had to shift residence, and in so shifting would incur a loss on selling the house in the place from which he was transferred, the Company would compensate such loss. This loss was the subject matter of assessment

under Schedule E of the Income Tax Act, 1918. The House of Lords, in this judgment, had to deal with paragraph 2 of Schedule E which reads as follows:-

> "2. Tax under this Schedule shall also be charged in respect of any office employment or pension, the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for the proviso to paragraph 1 of that Schedule…."

33. The House of Lords held that it is not enough for the Crown to establish that the employee would not have received the sum on which tax is claimed had he not been an employee at all. The Court must be satisfied that the service agreement was the *causa causans* and not merely the *causa sine qua non* of the receipt of the amount.

34. Having held that the judgments cited by Shri Kaul would have no application to the facts of this case because they deal with the U.K. Act, which is different in material particular from the Indian Act, this case would also be tarnished with the same brush. However, we find that paragraph 2 of Schedule E speaks of profits or gains arising or accruing from any office or employment. This statutory provision, unlike paragraph 1 of the

Schedule E, comes somewhat close to Section 15 of the Indian Income Tax Act as construed by us, and consequently the test of proximity with the service agreement, which was applied by the House of Lords, is a test applicable to the facts of the present case. We find, therefore, that the contract of employment in the present cases, not being the proximate cause for the receipt of tips by the employee from a customer, the same would be outside the dragnet of Sections 15 and 17 of the Income Tax Act.

35. Shri Kaul also cited before us the decision of the Supreme Court of Western Australia reported in 85 ATC 4283 (Kelly v. Federal Commissioner of Taxation). Suffice it to say that this very judgment distinguished some of the English judgments on the ground that the Australian Act was not in *pari materia* with Schedule E of the English Income Tax Act, 1918. This being the case, and the Australian Act being far removed from the Indian Income Tax Act, we do not feel this judgment throws any further light on the issue at hand.

36. Shri Kaul further argued that in a cross appeal filed by the Commissioner of Income Tax, we should set aside all

observations made by the High Court insofar as penalty is concerned. We find on a reading of the assessment order dated 29.3.2007, that penalty proceedings under Section 271C were separately initiated by the Assessing Officer, and consequently form no part of this appeal. Indeed we have been told that by an order dated 19.6.2013, penalty under the said Section has been levied against ITC in Civil Appeals arising from SLP(C) Nos.20822-20824 of 2011. Since the High Court judgment is being set aside in toto, none of the observations on penalty would consequently bind either of the parties.

37. A great deal of argument was made by both sides on the nature of interest contained in Section 201(1A) of the Act. We find it unnecessary to go into this question for the simple reason that as held in **Commissioner of Income Tax, New Delhi v. Eli Lilly and Company (India) Private Limited**, (2009) 15 SCC 1 at paragraph 91, interest under section 201(1A) can only be levied when a person is declared as an assessee-in-default. Having found that the appellants in the present cases are outside Section 192 of the Act, the appellants cannot be stated

to be assessees-in-default and hence no question of interest therefore arises.

38. In the view we have taken it is unnecessary to go into various other submissions made by counsel on both sides. The appeals filed by the assessees are, therefore, allowed and civil appeals arising out of SLP (Civil) Nos.9587-9589 of 2012 filed by Revenue are dismissed. The judgment of the High Court is set aside with no order as to costs.

.....J.

(Kurian Joseph)

.....J.

(R.F. Nariman)

New Delhi;

April 26, 2016