REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5749 OF 2012

PILCOM …Appellant

VERSUS

C.I.T. WEST BENGAL-VII …Respondent

WITH

SPECIAL LEAVE PETITION (CIVIL) No.7315 of 2019

AND

SPECIAL LEAVE PETITION(CIVIL)NO.6829 OF 2019

JUDGMENT

Uday Umesh Lalit, J.

Civil Appeal No.5749 OF 2012

1. This appeal by special leave challenges the Judgment and Order dated 11.11.2010 passed by the High Court[1] dismissing Income Tax Appeal No.196 of 2000 and thereby affirming the view taken by the Tribunal[2] in I.T.A.Nos. 110/Cal/1999 and 402/Cal/1999 on 04.01.2000.

1 The High Court of Judicature at Calcuttta
2 Income Tax Appellate Tribunal, Calcutta

2. The facts leading to the filing of the proceedings before the Tribunal were set out in the Order dated 04.01.2000 as under:-

> "2. The assesse before us is PAK-INDO-LANKA, JOINT MANAGEMENT COMMITTTEE (known in short as PILCOM) which is actually a Committee formed by the Cricket Control Boards/Associations of three countries viz. Pakistan, India and Sri Lanka, for the purpose of conducting the World Cup Cricket tournament for the year 1996 in these three countries. Actually, International Cricket Council (ICC) is a non-profit making organization having its Headquarters at London, which controls and conducts the game of cricket in the different countries of the world. ICC has got nine full members and twenty associate members in a special meeting of ICC held on 2.2.1993 at London, India, Pakistan and Sri Lanka were selected, on the basis of competitive bids, to have the privilege of jointly hosting the 1996 World Cup Cricket Tournament. These three host countries were required to pay varying amounts to the Cricket Control Boards/Associations of different countries as well as to ICC in connection with conducting the preliminary phases of the tournament and also for the purpose of promotion of the game in their respective countries. For the purpose of conducting the final phase of the tournament in India, Pakistan and Sri Lanka, a Committee was formed by the three host members under the name PILCOM. Two Bank accounts were opened by PILCOM in London to be operated jointly by the representatives of Indian and Pakistan Cricket Boards, in which the receipt from sponsorship, T.V. rights etc. were deposited and from which the expenses were met. The surplus amount remaining in the said Bank account was decided to be divided equally between the Cricket Boards of Pakistan and India after paying a lump-sum amount to Sri Lanka Board as per mutual agreements amongst the three Boards. For the purpose of hosting the World Cup matches in India, the Board of Cricket Control of India (BCCI) appointed its own committee for discharge of its responsibilities and functions. The Committee was to be known as INDICOM. Since the

Convener-Secretary of INDCOM was functioning from Calcutta necessary Bank accounts were opened in Calcutta by INDCOM for receipts and expenditure relating to matches to be held in India. From the said Bank accounts in London, certain amounts were transferred to the three co-host countries for disbursement of fees payable to the umpires and referees and also defraying administrative expenses and prize money. During the course of enquiry, it came to the knowledge of tie I.T.O. (TDS), Ward-21(4), Calcutta that PILCOM had made payments to ICC as well as to the Cricket Control Boards/Associations of the different Member countries of ICC from its two London Bank Accounts. The ITO issued a notice to the Office of PILCOM located at Dr. BC Roy Club House, Eden Gardens, Calcutta- 700 021 asking it to show-cause why actions under Section 20(I)/194E of the I.T. Act, 1961 would not be taken against PILCOM for its failure to deduct taxes from the payments made by it and as referred to above in accordance with the provisions of Sec. 194E. The PILCOM represented before the I.T.O. that the provisions of Sec. 194E would not be attracted to the payments for various reasons to which we shall advert later on. It was furthermore stated that, inasmuch as, the books accounts of PILCOM had not been completed by its Pakistani Treasurer, the said books could not be produced before the I.T.O.

The I.T.O. did not agree with the contentions of PILCOM. He referred to the provisions of Sec. 115BBA and held that taxes should have been deducted at source from the payments made by PILCOM in accordance with the provisions of Sec 194E. The details of the payments as made by PILCOM and as had been collected by the ITO were supplied by him to the PILCOM. Finally, the ITO passed an order under Sec. 20(I)/194E dated 6.5.1997, in which he held that the PILCOM was liable to pay under Sec.201(I) the amount it had failed to deduct from the payments under consideration arid furthermore held that the PILCOM was also liable to pay interest on the said amount under Sec. 291(1A) from the date of tax was deductible upto the date of

actual payment. The ITO computed the total short deduction u/s. 194E to be Rs.2,18,293,00.00

3. The PILCOM appealed against the said order passed by the ITO and the CIT(A) disposed of the appeal by his order dated 17.11.1997. In further appeal preferred by PILCOM before the ITAT, the ITAT by its order dated 25.6.1990 in ITA No. 62/Cal/1998, set aside the order passed by the CIT(A) and restored the matter back to his file for redeciding the issue after affording opportunity of being herd to PILCOM. Accordingly, the appeal was re-heard by the CIT(A), in which both the sides were allowed an opportunity to represent their respective cases and the CIT(A) finally passed his appellate order on 28.12.1998, which is being challenged before us by both sides.

4. After discussing the basic facts of the case, the Ld.CIT(A) detailed out the actual payments made by PILCOM (in sterling pound) and classified the same into seven distinct categories, as listed before, on the basis of the purposes for payments as well as the difference between categories of recipients off the payments.

		Amount (£)
i)	Guarantee money paid to 17 countries which did not participate in the World Cup matches	17,00,000
ii)	Amounts transferred from London to Pakistan and Sri Lanka for disbursement of prize money in those countries	1,20,000
iii)	Payment to ICC as per Resolution dated Feb. 2, 1993	3,75,000
iv)	Payment for ICC Trophy for qualifying matches between ICC Associate members held outside India	2,00,000
v)	Guarantee money paid to South Africa and United Arab Emirates both of which did not play any match in India	3,60,000
vi)	Guarantee money paid to Australia, England, New Zealand, Sri Lanka and Kenya with whom	8,85,000

	double taxation avoidance agreements exist	
vii)	Guarantee money paid to Pakistan, West India, Zimbabwe and Holland	7,10,000
		43,50,000

5. Various arguments were taken up by both the sides before the CIT(A), which we shall also be discussing and taking into consideration in due course. The CIT (A) held that so far as the payment of pound 1,20,000 being of the nature of amounts transferred from London to Pakistan and Sri Lanka for disbursement of prize money in those countries for matches played there is concerned, the prize money is always paid to the winner and other individual players in a particular match and, inasmuch as, these prizes were meant for matches outside India, the same could not be brought within the scope of Sec.115BBA. He thus finally decided that this amount does not fall within the scope of tax deduction at source and ordered for deletion of this amount from the total amount considered by the ITO. As regards the other six payments, the CIT(A) held that the provisions of Sec. 115BBA would be attracted to all those payments. By arguing that all the different Cricket Control Boards/Associations would come within the purview of Sec. 115BBA read with Sec. 9(I)(I), inasmuch as, income accrued or arose to the way of guarantee money, etc. through the playing of the matches in India which constituted the source of income in India, in the hands those non-resident foreign Cricket Boards/Associations. The Ld. CIT(A), however, found out at the same time that out of 37 matches played in all in the aforesaid World Cup Tournament, only 17 had been played in India. He argued that since the payments made by PILCOM related to all the matches played in the tournament, only such proportion of the guarantee money, etc. received by the non-resident parties could be considered to be deemed income in India in the hands of those non-resident parties, which corresponds to the ratio of the number of matches played in India to the total number of matches. Thus, the CIT(A) held that only 17/37th portion i.e. 45.94 percent of the other

> six types of payments could be considered to be attracted by the provisions of Sec.291(I)/194. He thus directed that so far as other six categories of payments are concerned. 45.94 percent of the payments covered by those categories should alone be taken into consideration for the purpose of considering PILCOM as defaulter under Sec.201(I)/194B. …"

3. As stated above, out of the payments classified in seven distinct categories, the payment at serial no. (ii) amounting to £.1,20,000/- was found by the CIT(A) to be beyond the scope of Section 115BBA of the Act[3], whereas, the other six payments were found to be governed by said provision. However, only 17/37th portion or 45.94% of said six payments were held to be covered. The Appellant as well as the Revenue, being aggrieved, approached the Tribunal by filing ITA Nos.11/Cal/1999 and 402/Cal/1999 respectively.

4. The Tribunal in its Order dated 04.01.2000 approved the view taken by the CIT(A) in respect of payment at serial no.(ii) amounting to Rs.1,20,000/-. As regards payments at serial nos. (i), (iii), (iv) and (v), it was observed:-

> "17. It is not at all possible to hold that the source of guarantee money in the hands of the cricket associations of those countries, which either did not play at all or did not play in India, can be the games played in India. … … We, therefore, hold that so far as the guarantee moneys paid by PILCOM to the 17 countries, which did not participate in World Cup

3 The Income Tax Act, 1961

> matches [(Clause (i) of the detailed chart of payment as shown at page 4 above], or to South Africa and United Arab Emirates, which did not play any match in India [Clause (V) of the chart as above] are concerned, it cannot be held that the cricket associations of these countries earned the guarantee money through any Source of income in India. …
>
> … … …
>
> 24. Clause (iii) of the above chart refers to a payment of £3,75,000 to ICC as per Resolution dated 2.2.1993. According to the said Resolution, the amount was required to be paid to ICC partly towards expenses incurred by ICC in connection with the tournament and partly to be spent by it for development of cricket. Even if an element of income may, therefore, be considered out of this payment, it is hardly possible to conceive any connection of such payment to income of ICC taxable in India. … …
>
> 25. Another amount of £2,00,000/- being payment for ICC trophy for qualifying matches between ICC Associate Members held outside India is covered under Clause (iv) of the abovementioned chart. The entire payment appears to be of the nature of reimbursement of expenses in connection with the tournament. Again, the payment does not have any connection with any match played in India. … …"

As regards amounts at serial nos. (vi) and (vii) were concerned, it was stated:-

> "… …In the cases of the cricket associations of these countries, although the guarantee money was payable by virtue of the Resolution passed in the meeting ICC as in the cases of the cricket associations of other countries, at the same time again, these associations did some activities in India and can be considered to have earned the guarantee money through such activity alone. We are, therefore, of the opinion that so far as these countries (covered by clauses (vi) & (vii) of the chart as above) are concerned, the payments received by then from PILCOM have arisen directly as a result of their taking part in the cricket

> matches. However, the cricket associations of all these countries played not only in India but in Pakistan and Sri Lanka also. Hence, only that proportion of the total receipt made by each such country from PILCOM, which bears the same ratio as the number of matches played by each such country in India to the total number of matches played by each such country in the tournament, should be considered to be income arising or accruing to the cricket association of that particular country. We are, therefore, of the opinion that PILCOM should have deducted tax at source in respect of this portion of the payment made by it to that particular association and the order under Sec. 201 would be considered to be valid in respect of the payment to each such country in the above manner."

5. The Order passed by the Tribunal was challenged by the Appellant as well as by the Revenue by filing I.T.A. Nos.196 of 2000 and 200 of 2000 respectively. After considering rival submissions, by its Judgment and Order under appeal, the High Court affirmed the view taken by the Tribunal and dismissed I.T.A. Nos.196 of 2000 and 200 of 2000. In its judgment, the High Court considered the matter as under:-

> "On perusal of the said section it would appear that once income referred to in Section 115BBA is held to be payable to foreigner non-resident sportsman or non-resident sports association or institution the person responsible for making payment is obliged at the time of making payment or at the time of credit of such income to the account of the payee to deduct income tax thereon at the rate of 10%. It is significant that said section nowhere says whether the income is chargeable to tax or not. It therefore be concluded that once the income accrues deduction is a matter of course. Naturally failure to deduct will have a consequence under Section 201 of the said Act. … …

> Once the payment is made and received by way of a participation in any matches played in India the said on resident assesse has to meet deduction of tax under Section 115BBA. Similarly, if any amount including the guaranteed amount is paid to any non-resident sports association in relation to any match played in India, the said income has to be subjected to deduction of tax at source. … … We are unable to accept the contention of Mr. Bajoria that the source of income of the foreign Cricket Associations was the grant of the privilege for the bid money and have no relation to the matches, for grant of privilege for the bid money is the origin but it is not essential component or part for accrual of income by reason of the fact hypothetically if after bid is accepted, and payment is not made question of deduction of tax at source does not and cannot arise, consequently acceptance of bid becomes redundant. Relevant factor is the payment and then matches having taken place in India where participation of the sports personality is in question. … …"

As regards the submission regarding applicability of DTAA[4], the High Court observed:-

> Although it is not argued but we feel that obligation to deduction under Section 194E is not affected by the DTAA since such a deduction is not the final payment of tax nor can be said to be an assessment of tax. The deduction has to be made and after it is done the assesse concerned gets the credit of the same and once it is found later on that income from which the deduction is made is not eligible to tax then on application being made refund with interest is always allowed. Fundamental distinction between the deduction at source by the payer is one thing and obligation to pay tax is another thing.
>
> Advantage of the DTAA can be pleaded and taken by the real assessee on whose account the deduction is made not by the payer.

4 Double Taxation Avoidance Agreements

> We are of the view irrespective of the existence of DTAA the obligation under Section 195E has to be discharged once the income accrues under Section 115BBA."

6. The Appellant is in appeal against the dismissal of ITA No.196 of 2000. The Revenue has not appealed against the dismissal of ITA No.200 of 2000 and as such the deletion as regards amounts at serial nos. (i) to (v) has attained finality and even as regards amounts at serial nos. (vi) and (vii) the liability could at best be in the proportion as observed by the Tribunal. As per the statement of case filed by the Respondent, the demand in terms of the Order of the Tribunal would be in the sum of Rs.38,88,731/-.

7. We heard Mr. J.P. Khaitan, learned Senior Advocate for the Appellant and Mr. Vikramjit Banerjee, learned Additional Solicitor General for the Respondent.

Mr. Khaitan, learned Senior Advocate submitted that the payments were for grant of a privilege and not towards matches; that such payments were made in accordance with the decision of International Cricket Council in a meeting held in London; that the amounts were made over in England and that the basic question would be whether any income accrued

in India. He invited our attention to Sections 115BBA and 194E and other provisions of the Act and relied upon the decision of this Court in ***G.E. India Technology Centre Pvt. Ltd. Vs. Commissioner of Income Tax and Another***[5]**;** the decision of the Patna High Court in ***Metallurgical and Engineering Consultant (India) Ltd. Vs. Commissioner of Income Tax***[6], which, in turn, had referred to the decision of this Court in ***Performing Right Society Ltd. Vs. CIT***[7]; and the decision of the Kerala High Court in ***Commissioner of Income Tax Vs. Manjoo and Co.***[8]

Mr. Banerjee, learned Additional Solicitor General pressed for acceptance of the Judgment under appeal and submitted that for attracting the provisions of Section 115BBA of the Act, participation would not be material and what would be relevant is that the payment was for the matches held in India and that in the present case, the income was deemed to accrue or arise in India.

8. The relevant provisions of the Act namely Sections 2(24)(ix), 5(2), 9(1), 115BBA and 194E are to the following effect:-

> "**2(24)(ix)** "income" includes –
>
> ... ...
>
> *(ix)* any winnings from lotteries, crossword puzzles, races including horse races, card games and other

5 (2010) 327 ITR (SC) = (2010) 10 SCC 29
6 (1999) 238 ITR 208 (Pat)
7 (1977) 106 ITR 11 (SC) = (1976) 4 SCC 37 : 1976 SCC (Tax) 426
8 (2011) 335 ITR 527 (Ker)

games of any sort or from gambling or betting of any form or nature whatsoever;

… … …

5. Scope of total income. –

… … …

(2) subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which-

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.- Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this Section by reason only of the fact that it is taken into account in a balance-sheet prepared in India.

Explanation 2.- For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

… … …

9. Income Deemed to accrue or arise in India. – *(1)* The following incomes shall be deemed to accrue or arise in India –

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India

Explanation.- For the purposes of this clause-

(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;

(c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India;

(d) in the case of a non-resident, being-

(1) an individual who is not a citizen of India; or

(2) a firm which does not have any partner who is a citizen of India or who is resident in India; or

(3) a company which does not have any shareholder who is a citizen of India or who is resident in India, no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations

which are confined to the shooting of any cinematograph film in India;

… … …

115BBA. Tax on non-resident sportsmen or sports associations. (1) Where the total income of an assessee,—

(a) being a sportsman (including an athlete), who is not a citizen of India and is a non-resident, includes any income received or receivable by way of—

(i) participation in India in any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport; or

(ii) advertisement; or

(iii) contribution of articles relating to any game or sport in India in newspapers, magazines or journals; or

(*b*) being a non-resident sports association or institution, includes any amount guaranteed to be paid or payable to such association or institution in relation to any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport played in India,

(*c*) being an entertainer, who is not a citizen of India and is a non-resident, includes any income received or receivable from his performance in India, the income-tax payable by the assessee shall be the aggregate of —

(*i*) the amount of income-tax calculated on income referred to in clause (*a*) or clause (*b*) or clause (*c*) at the rate of ten per cent; and

(*ii*) the amount of income-tax with which the assessee would have been chargeable had the total income of the assessee been reduced by the amount of income referred to in clause (*a*) or clause (*b*):

Provided that no deduction in respect of any expenditure or allowance shall be allowed under any provision of this Act in computing the income referred to in clause (*a*) or clause (*b*).

(2) It shall not be necessary for the assessee to furnish under sub-section (1) of section 139 a return of his income if—

(*a*) his total income in respect of which he is assessable under this Act during the previous year consisted only of income referred to in clause (*a*) or clause (*b*) of sub-section (1); and

(*b*) the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.

… … …

194-E. Payments to non-resident sportsmen or sports associations. – Where any income referred to in Section 115-BBA is payable to a non-resident sportsman (including an athlete) who is not a citizen of India or a non-resident sports association or institution, the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rate of ten percent[9].”

9 By Finance Act, 2012; for “ten per cent”, the expression “twenty per cent” stands substituted.

9. Amounts at serial numbers (vi) and (vii) are in the nature of Guarantee Money paid to Non-resident Sports Associations. The payments were not made by the Appellant in India but were made by the Appellant through its Bank accounts at London or elsewhere. The principal issue to be considered is whether any income accrued or arose or was deemed to have accrued or arisen to said Non-resident Sports Association in India. If the answer is in the affirmative, the next question would be about the liability on part of the Appellant to deduct Tax at Source and make appropriate deposit in accordance with Section 194E of the Act.

10. In terms of Sub-Section (2) of Section 5 of the Act, the total income of a non-resident may include income from whatever source which is received or deemed to be received in India or accrues or arises or is deemed to accrue or arise to such non-resident in India. According to Section 9(1), the income shall be deemed to accrue or arise in India if *"the income accrues or arises, whether directly or indirectly"* under any of the following postulates:-

- through or from any business connection in India; or
- through or from any property in India; or
- through or from any asset or source of income in India; or
- through the transfer of a capital asset situate in India

11. According to the Respondent, the income in question had arisen from a source of income in India, which was playing of cricket matches in India and as such the requirement of law was fully satisfied. On the other hand, according to the Appellant, the payment was towards grant of privilege and had nothing to do with matches that were played in India.

12. In ***Performing Right Society Ltd.***[7]**,** under an agreement, the appellant Society had granted to All India Radio, the authority to broadcast from all its stations, the musical works included in the repertoire of the Society, in respect of which payments at the rate of £2 per hour of broadcasting were payable to the Society. The Society, a non-resident company, contended that the agreement was executed in England, payments were made in England and the "source of income" was the agreement that was entered into in England. The contention was rejected by the High Court. The conclusion that "the income derived from broadcast of copyright music from the stations of All India Radio arose in India" was affirmed by this Court.

13. In the present case, the Non-resident Sports Associations had participated in the event, where cricket teams of these Associations had played various matches in the country. Though the payments were

described as Guarantee Money, they were intricately connected with the event where various cricket teams were scheduled to play and did participate in the event. The source of income, as rightly contended by the Revenue, was in the playing of the matches in India.

14. The mandate under Section 115 BBA (1)(b) is also clear in that if the total income of a Non-resident Sports Association includes the amount guaranteed to be paid or payable to it in relation to any game or sports played in India, the amount of income tax calculated in terms of said Section shall become payable. The expression *'in relation to'* emphasises the connection between the game or sport played in India on one hand and the Guarantee Money paid or payable to the Non-resident Sports Association on the other. Once the connection is established, the liability under the provision must arise.

15. In ***CIT vs. Eli Lilly and Co. (India) Pvt. Ltd.***[10], this Court was called upon to consider the following issue:-

> "**56.** Whether TDS provisions which are in the nature of machinery provisions enabling collection and recovery of tax are independent of the charging provision which determines the assessability in the hands of the assessee employee (recipient)? In other words, whether TDS provisions under the Income Tax Act, 1961 are applicable to payments made abroad by

10 (2009) 15 SCC 1

> the foreign company, which payments are for income chargeable under the head "salaries" and which are made to expatriates who had rendered services in India?"

After considering the entirety of the matter and rival submissions, the issue was answered as under:-

> "**97.** For the reasons stated hereinabove, we hold that the TDS provisions in Chapter XVII-B relating to payment of income chargeable under the head "Salaries", which are in the nature of machinery provisions to enable collection and recovery of tax form an integrated code with the charging and computation provisions under the 1961 Act, which determine the assessability/taxability of "salaries" in the hands of the assesse employee. Consequently, Section 192(1) has to be read with Section 9(1)(ii) read with the Explanation thereto. Therefore, if any payment of income chargeable under the head "salaries" falls within Section 9(1)(ii) then TDS provisions would stand attracted."

16. In ***G.E. India Technology Centre Pvt. Ltd.***[5]**,** the question that arose was whether the appellant was liable to deduct Tax at Source in respect of payments made to certain foreign software suppliers. According to the appellant, the payments were for purchase of software whereas according to the Revenue, the payments also included payments towards royalty. The Tribunal, while accepting the case of the appellant had held that the amount paid by the appellant to foreign software suppliers was not royalty and the same did not give rise to any income taxable in India. The High Court had reversed the decision of the Tribunal and held that unless the

payer had obtained appropriate permission under Section 195(2) of the Act, the payer was obliged to deduct Tax at Source. In this context the matter was considered by this Court. While dealing with scope of Section 195(1) of the Act, it was stated:-

> **"8.** The most important expression in Section 195(1) consists of the words *chargeable under the provisions of the Act*. A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the IT Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the IT Act.
>
> **9.** It may be noted that Section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which have an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated 30-10-1995 CBDT has clarified that the tax deductor can take into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS. It may also be noted that Section 195(1) is in identical terms with Section 18(3-B) of the 1922 Act.

… … …

16. The fact that the Revenue has not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from Section 195(1). While interpreting a section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one cannot read the charging sections of that Act dehors the machinery sections. The Act is to be read as an integrated code.

17. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in *CIT* v. *Eli Lilly & Co. (India) (P) Ltd.* [(2009) 15 SCC 1 : (2009) 312 ITR 225] the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the IT Act form one single integral, inseparable code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax" under the IT Act. It is true that the judgment in *Eli Lilly*[(2009) 15 SCC 1 : (2009) 312 ITR 225] was confined to Section 192 of the IT Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head 'Salaries'". Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under the provisions of the Act", which expression, as stated above, does not find place in other sections of Chapter XVII. It is in this sense that we hold that the IT Act constitutes one single integral inseparable code. Hence, the provisions relating to

> TDS applies only to those sums which are chargeable to tax under the IT Act."

16.1 The submission that unless permission was obtained under Section 195(2) of the Act, the liability to deduct Tax at Source must be with respect to the entire payment, was not accepted. Relying on the expression "chargeable under the provisions of the Act" occurring in Section 195(1) of the Act, it was held "the obligation to deduct TAS, is however, limited to the appropriate proportion of the income chargeable under the Act forming part of the gross sum of money payable to the non-resident".

16.2 This decision, in our view, has no application insofar as payments at serial nos. (vi) and (vii) are concerned. To the extent the payments represented amounts which could not be subject matter of charge under the provisions of the Act, appropriate benefit already stands extended to the Appellant.

17. We now deal with two other decisions relied upon by the Appellant:-

A) In ***Metallurgical and Engineering Consultant (India) Ltd.***[6], under an agreement the appellant was to acquire technical "know-how" and then use the acquired "know-how" in the design of contract articles. In terms of paragraph (a) of article-II of the agreement, the personnel of the appellant

were to acquire “know-how” and necessary skills by on the job placement at the place of the foreign company, in respect of which, certain amounts were paid to the foreign company. Said payment was not found by the High Court to have accrued or arisen in India and the matter was dealt with as under:-

> “The main question is whether the payment under article III(a) was in the nature of income to the U.S. company accruing or arising in India? In this connection, the Tribunal has solely relied upon a Supreme Court decision in the case of *Performing Right Society Ltd.* [1977] 106 ITR 11. The facts of that case were that the society was an association of composers, authors and publishers of copyright musical works established to grant permission for the performing right in such works. The society collected royalties for the issue of licences granting such permission and distributed the royalties to the members of the society who were composers, authors, music publishers and other persons having an interest in the copyright, in proportion to the extent to which a member's work was publicly performed or broadcast after a pro-rata deduction of the expenses. The society entered into an agreement with the resident of India granting licence to broadcast from the licensee's sound broadcasting stations in India all musical works included in the repertoire of the society. Under the agreement, for the rights granted to it, the licensee was to pay to the society annually a sum calculated at two pounds per hour of broadcasting western music from each of the licensee's broadcasting stations and the annual payment was to be made to the society in London. On those facts, the Supreme Court held that though it received the income out of the agreement executed not in India but in England, the income undoubtedly accrued or arose in India.
>
> I am unable to see how the decision in *Performing Right Society Ltd.'s case* [1977] 106 ITR 11 (SC), can be of any help to the Revenue in this case. To my

> mind the facts of the two cases are not quite similar; the acquisition of technical know-how and the use of the acquired know-how in the design of machines and accessories and their manufacture in India does not seem to me to be comparable to the playing and broadcasting of copyright musical compositions in India on the basis of the licence granted under an agreement. To my mind the facts of the case in hand would be comparable to a situation where some people went to England to learn western music from the members of the society, on payment of some specified fee and on coming back used the acquired skill to write musical compositions that were played and broadcast in this country. The decision in *Performing Right Society Ltd.'s case* [1977] 106 ITR 11 (SC), would surely not apply to such a case."

It was thus held that the income mentioned in article III (a) of the agreement did not accrue or arise in India. No connection was found as regards the payment for on the job placement in a foreign country to acquire necessary skills, whereas in the instant case the connection is very much evident. This case, thus, has no application.

B) In ***Manjoo and Co.***[8], a wholesale distributor of lotteries organised by the State was obliged under the distribution agreement to bear the loss in case lottery tickets were not sold before the "draw date". Some of the unsold tickets emerged as prize winning tickets. The submission that prize won from lottery in such case be treated as receipt of income in the profit and loss account and not as "winnings from lottery" resulting in

assessment at the special rate provided under Section 115BB of the Act, was not accepted by the High Court. It was observed:-

> "… …Therefore, assuming for argument's sake the contention of the respondent that winnings from lotteries are received by him in the course of his business and are incidental to the business and as such they are his business income is right, still, we feel in view of the specific provision contained in Section 115BB, the special rate of tax is applicable for all winnings from lottery. … …"

This decision has no application insofar as the present controversy is concerned.

18. We now come to the issue of applicability of DTAA. As observed by the High Court, the matter was not argued before it in that behalf, yet the issue was dealt with by the High Court. In our view, the reasoning that weighed with the High Court is quite correct. The obligation to deduct Tax at Source under Section 194E of the Act is not affected by the DTAA and in case the exigibility to tax is disputed by the assesse on whose account the deduction is made, the benefit of DTAA can be pleaded and if the case is made out, the amount in question will always be refunded with interest. But, that by itself, cannot absolve the liability under Section 194E of the Act.

19. In the premises, it must be held that the payments made to the Non-Resident Sports Associations in the present case represented their income which accrued or arose or was deemed to have accrued or arisen in India. Consequently, the Appellant was liable to deduct Tax at Source in terms of Section 194E of the Act.

20. This appeal, therefore, must be dismissed.

21. Ordered accordingly. No costs.

Special Leave Petition(Civil)Nos.6829 of 2019 and 7315 of 2019

22. Both these petitions are filed by Board of Control for Cricket in Sri Lanka through PILCOM (the Appellant in the lead matter) challenging the common Judgment and Order dated 25.09.2018 passed by the High Court allowing I.T.A. Nos. 242 of 2008 and 279 of 2008. These matters arise from the consequential assessment orders passed by the Department pursuant to the Judgment and Order under appeal in the lead matter.

23. Notice was issued in these petitions because of the pendency of the lead matter.

24. Since the lead matter is dismissed, we dismiss these Special Leave Petitions as well.

…….J.
[Uday Umesh Lalit]

…….J.
[Vineet Saran]

New Delhi;
April 29, 2020.