Analysis of a recent judgement of ITAT on Non-Resident Taxation

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Taxation of non-residents in India has always been fraught with uncertainty. The existence of a business connection and also that of a permanent establishment has been a subject matter of frequent debate. In this context, The Special Bench (SB) of the Income-tax Appellate tribunal ('ITAT/ Hon'ble Tribunal'), New Delhi has recently delivered a judgement in the case of Motorola Communications Inc ('Motorola'), Ericsson Radio Systems AB ('Ericsson') and Nokia Networks OY ('Nokia').

The Special Bench (SB) of the Income-tax Appellate tribunal ('ITAT/Hon'ble Tribunal'), New Delhi's decision deals with a number of issues, which mainly affect taxation of non-residents in India.

Some of these are:

- Is a payment for software taxable as 'Royalty' under the domestic tax law and under the tax treaties entered into by India with Sweden, USA and Finland?
- Did the activities of the appellant taxpayers, on facts, result into a Business Connection (BC)/Permanent Establishment ('PE') in India, merely because the non-residents had wholly owned subsidiaries in India?
- How should profits of a non-resident be attributed to the PE of the non-resident, in India?
- Can a notice under section 142(1) of the Income-tax Act, 1961('the Act'), calling upon a taxpayer to file a return of income, be valid if issued after the end of the relevant assessment year?
- Does the levy of interest under sections 234A and 234B of the Act, require a specific direction in the assessment order? Is interest under section 234B leviable if the income of the non-resident taxpayer is fully subject to tax withholding even though no tax has actually been withheld there from?

The facts of the case and the decision of the Hon'ble Tribunal are set out below.

Facts

Motorola, Ericsson and Nokia [hereinafter referred to as Foreign Telecommunications Suppliers ('suppliers')] are companies incorporated in and tax residents of USA, Sweden and Finland respectively. These suppliers had jointly, either with their Indian subsidiaries with other group companies, entered into contracts with Indian cellular network operators for supply and installation of cellular telecommunications systems. The suppliers supplied hardware and software for setting up cellular telecommunications systems to various Indian cellular operators for which the contracts stipulated that the property in the said hardware and software would pass to the Indian cellular operators outside India.

Motorola and Nokia had wholly owned subsidiaries ('subsidiaries') in India, which were to carry on the installation of the systems. Ericsson had a wholly owned subsidiary of a group company ('subsidiary') which was to carry out the said installation, for the last nine months of the relevant financial year. For the initial three months, the contract for installation was entered into by the Indian branch of an Ericsson Group Foreign Company and was later novated to the subsidiary mentioned above. Nokia had a liaison office in India in addition to the subsidiary mentioned above.

The tax officers having ju-

risdiction over Motorola and Nokia had issued notices under section 142(1) of the Act to Motorola and Ericsson after the end of the relevant assessment year to file their tax returns. The tax officers had also completed assessments of these suppliers for the assessment years in question holding *inter alia* that the income of the suppliers from the sale of hardware and software was liable to income-tax in India.

The reasons *inter alia* given by the Tax officers were as under:

- The suppliers by breaking up the agreement into supply, installation and marketing and/or business promotion agreements had sought to evade tax. The agreements were in effect works contract and not a mere sale of goods and should be read together. The suppliers had a Business Connection ('BC') in India and so, under the domestic tax law, the income from the sale of hardware and software to Indian cellular operators was taxable in India.
- The suppliers also had a PE in India and so, even under the Double Tax Avoidance Agreement ('DTAA') with their home countries, the income from the supply of hardware and software was liable to tax in India.
- The tax officers held that the income of the suppliers was taxable in India and they had a BC/PE in India *inter alia* because:

- The contracts for supply of the equipment and software were entered into by the suppliers in India.

- The title and the risk in the equipment and software were transferred to the Indian operators in India.

- The responsibilities for execution of the entire turnkey contracts were that of the suppliers.

- Employees of the suppliers visiting India and using the premises of the Indian branch/subsidiary to carry on the business of the suppliers in India and so, constituted a PE due to the existence of 'a fixed place of business' for the suppliers.

- In case of Motorola and Nokia, the Indian subsidiary also constituted a PE of the respective suppliers.

- In case of Nokia, the liaison office carried on commercial activities on its behalf and so, constituted its PE in India.

- In any case, the consideration for supply of software amounted to 'Royalty' both under the domestic tax law and the relevant DTAA and so, the same was taxable in India irrespective of whether the suppliers had a PE in India or not.

The tax officers having jurisdiction over Motorola and Nokia had issued notices under section 142(1) of the Act to Motorola and Ericsson after the end of the relevant assessment year to file their tax returns.

The submission of the suppliers (though overlapping at times) while refuting the contentions of the tax officers were as under:

Ericsson

The contracts were in effect three separate and self-functioning contracts; the supply contract clearly showed that the title to the property passes

outside India, the installation contract was a negotiated contract and therefore the price was lower and not to avoid tax and; the income therefrom was assessed independently; the "overall agreement" was only a sort of memorandum of understanding for better coordination between the parties and the operators and there was no consideration received thereunder.

There was no BC as there was no manufacture, sale or research activity in India, installation and marketing activities were not carried out by Ericsson and therefore no income could be said to arise/deemed to arise in India. With respect to the DTAA it was contended that there was no Agency PE as contended by the tax officers as, the entity carrying on the marketing activities was not acting on behalf of Ericsson neither did it have the authority nor did it conclude contracts to bind Ericsson. Authority to negotiate contracts did not tantamount to a PE. Ericsson did not have any fixed place in India thus there was no "fixed place PE".

Nokia contended that the Indian company was separately taxed and was independent and therefore not a PE. Its liaison office also, was not a PE as it could not earn income as per law and thus there was no question of attributing any income to the PE.

As regards the tax department's contention that the payment was royalty it was contended that the software was to make the hardware work and was not a license fee, the payment was not independent of the hardware sale and therefore not royalty. Furthermore it was a payment for the transfer of copyrighted article and not the rights thereto.

Motorola

With respect to the supply contract it was contended that the property in the goods passed outside India as the documents to title were given to a carrier outside India, merely because the risk passed in India the situation would not be altered. The services rendered in India were obligations to the sale and so, could not be considered a separate source for the constitution of PE in India.

There was no fixed place PE either as the employees performed work only for the Indian company and not Motorola. Even if it was considered a fixed PE the Indian company carried out only preparatory and auxiliary services for which it was separately compensated and thus, would not be Motorola's PE. Further, nothing could be attributed to a PE, if any, as no activities were carried out in India; if at all only 10 percent could be attributed as held in Annamalais Trust v. CIT [1961] 41 ITR 781 (Mad).

In respect of the tax authorities' contention that the software is used by the public at large and the payment is therefore royalty it was submitted that cell-users make use of the services only and are not concerned with actual working of the equipment and the payment is not linked to the number of subscribers.

There was also no BC as no activity was carried on by Motorola in India. The installation work was also done by the Indian company which was separately assessed and the fact that Motorola was standing as guarantor could not infer that a BC existed.

Nokia

In the case of Nokia also, it was argued that there was no BC as there was no obligation beyond the supply of the equipment and both title and risk were transferred outside India. The Indian subsidiary, and not Nokia was responsible for the installation and Nokia's power to supervise was incidental to the sale of the equipment. Here also the tax department contended that Nokia being a guarantor for installation was liable as if it was executing the contract. Nokia contended that the Indian company was separately taxed and was independent and therefore not a PE. Its liaison office also, was not a PE as it could not earn income as per law and thus there was no question of attributing any income to the PE.

The tax officers had also levied interest under section 234A and section 234B of the Act while determining the income-tax payable by the suppliers in India. The assessment orders did not contain specific directions to charge interest under the relevant sections though the interest under these sections was in fact, computed in the form of computation of tax (ITNS 150) which was signed by the tax officers and issued to the

suppliers alongwith the assessment order and the notice of demand.

The suppliers appealed against the Assessment Orders to the Commissioner of Income-tax (Appeals) ['CIT (A)'] and obtained partial relief.

Appeal to the Tribunal

The suppliers and the Indian Income-tax Authorities both appealed against the order of the CIT (A) to the ITAT New Delhi. After considering the facts and circumstances of the case, the ITAT referred the matter to a Special Bench ('SB') consisting of three members. The question referred to the SB was whether on the facts and circumstances of the case, the revenue earned by the suppliers from the supply of equipment and software to Indian telecom Operators was taxable in India. Subsequently, one of the suppliers also wanted to contest the validity of the assessment on the ground that the notice issued under section 142(1) was *void ab initio* and therefore the assessment was bad in law. Striking down the revenue's objection to increasing the scope of the question, the Hon'ble Tribunal decided that all three appeals in entirety would be heard by the SB.

Tribunal's Ruling

The SB has given its ruling on several issues raised by both sides in appeal. To the extent the issues involved were common to Ericsson, Motorola and Nokia; these issues are discussed in general without particular reference to these three companies. Where however, the issues relate only to one or some of these companies, the issues are discussed with particular reference to the company or companies.

The decision of the SB on significant issues is summarised below:

Taxability of the income from the supply of equipment in India

Position under the domestic tax law

Taxation of payment for software as 'Royalty'

The SB held that the profit from the supply of software by the suppliers was not taxable in India. It was not 'Royalty' under the domestic tax law[1]. On going through the terms of the agreement for supply of equipment between the suppliers and the Indian operators, the SB came to the conclusion that the suppliers had transferred only a restricted right in the software to the Indian operators. The Indian operators had no right to sub-license or deal with the software in the manner they liked. The Indian operators had, therefore, no right to commercially exploit the software supplies to them by the suppliers. The Indian operators had only acquired the software for the purpose of use of the equipment (hardware) and so, what they acquired was an article and not a copyright. As the payment was not made for the use of a copyright, it could not be termed as 'royalty', under the Indian domestic tax law

The SB referred to the definition of the term 'copyright' contained in the Copyright Act, 1957[2]. It held that to constitute a copyright, the right to be transferred should be an exclusive right. In the instant case, the agreement clearly mentioned that the Indian operators were acquiring a non-exclusive restricted license to use the software and that, too, only for the purpose of efficient functioning of the system. The agreement also clearly specified that the operator could not make the software or portions thereof available to any person other than its employees and to the employees, too, on only a 'need to know' basis. The operator was also denied the right to make copies of the software except for archival back up purposes. This was contrary to the provisions of the Copyright Act[3] and also, the Copyright Act did not consider making copies of software for back up or archival purposes to be an infringement. Therefore, by acquiring the hardware alongwith the software, the Indian operators acquired only a copyrighted article and not the copyright itself. The payment to the suppliers therefore, could not be characterised in the hands of the suppliers as 'Royalty'. The

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[1] *Section 9(1)(vi) of the Act,* [2] *Section 14 of the Indian Copyright Act, 1957,* [3] *Section 14(a)(i) of the Indian Copyright Act,1957*

SB also held that the payment for hardware and the software was a consolidated payment and the assessing officer could not divide the same into estimated payments for hardware and software respectively.

The SB held that the subscriber gets only connectivity by using the handset and is not concerned with the technical aspect of the service; therefore the payment is not towards royalty even on that basis argued by the tax authorities.

Existence of a Business Connection (BC) of the suppliers in India

SB held that there was no 'BC' of the suppliers, except for two of the suppliers, in India. The SB held that the suppliers and their subsidiaries were independent entities doing business independently. The three contracts viz - the supply contract, the installation contract and the marketing and business promotion agreement were separate and independent contracts and were not to be treated as a single works contract despite the overall agreement. Relying on an internal instruction[4], the SB held that the existence of an overall arrangement whereby the suppliers assumed responsibility of proper implementation of the supply and installation contracts could not take away the separate and distinct identity of the supply and installation contracts entered into by two different entities namely the suppliers and the Indian branch/subsidiary respectively.

In the case of one of the suppliers, the office of the Indian subsidiary was held to be a virtual projection of it in India which constituted its BC, as its employees used it as a matter of right. There was no deeming provision in the Act to exclude from BC preparatory activities similar to an exception in the DTAA exempting preparatory activities from the ambit of PE.

In the case of the other supplier, it was held that on facts there was a BC through its subsidiary in India as it was a 100 per cent subsidiary engaging in activities to support the suppliers main activity and became a projection of it in India. Further, the fact that all the agreements with Indian cellular operators were signed in India by the country manager of the liaison office who thereafter immediately assigned the contracts to the supplier and then became its employee also persuaded the SB to believe that the supplier was in a position to control the subsidiary.

Other Issues

The SB held that no income arose to the suppliers in India from the supply of the telecommunications system by virtue of the title and the risk in the equipment and software passing to the Indian Operators outside India. The contract for the supply of telecommunications system was entered into by two independent parties, namely the suppliers and the Indian operators. The parties from the wordings of the contract clearly intended that the title

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and the risk were to be passed on to the Indian operators outside India and they had not done any thing which indicated otherwise. Therefore, the sale having taken place outside India, no income therefrom accrued or arose to the suppliers in India.

The mere fact that the suppliers guaranteed to the Indian operators that the hardware supplied by it would be new and unused and also undertook to rectify all the defects that the Indian operators would point out during the warranty period, did not imply that the suppliers carried on the risk in the equipment even after its delivery to the Indian operators outside India. During the testing phase, it would be the installation contractor and not the suppliers that would be responsible for removal of defects in the equipment.

Thus, the agreement between the suppliers and the Indian operators for the supply of hardware and software and the agreement between the Indian subsidiaries and the Indian operators for installation of the system sold by the suppliers to the Indian operators could not be construed as being part of a single works contract for which the suppli-

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[4] *Instruction No. 1829 issued by the Central Board of Direct Taxes*

ers were responsible. Therefore, no part of income from the installation of the system could be taxed in the hands of the suppliers in India.

Position under the relevant Double Tax Avoidance Agreements ('DTAAs')

Taxation of payment for software as 'Royalty'

The SB held that the profit from the supply of software by the suppliers was not taxable in India. It was not 'Royalty' under the relevant DTAAs entered into by India with Sweden, USA and Finland. On going through the terms of the agreement for supply of software between the suppliers and the Indian operators, the SB came to the conclusion that the suppliers had transferred only a restricted right in the software to the Indian operators. The Indian operators had no right to sub license or deal with the software in the manner they liked. The Indian operators had, therefore, no right to commercially exploit the software supplies to them by the suppliers. The Indian operators had only acquired the software for the purpose of use of the equipment (hardware) and so, what they acquired was an article and not a copyright. As the payment was not made for the use of a copyright, it could not be termed as 'royalty' under the respective DTAAs.

The SB referred to the decisions of Madras High Court[5] , the decision of the Bangalore Bench of the ITAT[6] and the Commentary on Article 12 of the OECD Model Convention on DTAAs and the guidance of the United States Inland Revenue Service on characterization of software payments for coming to the said conclusion.

Existence of a PE under the relevant DTAA

For one of the suppliers (supplier 1) it was argued by the Department that there was a "fixed place PE", "service PE", "installation PE", and "Group PE" as the marketing company and the installation company were all its group companies and the country manager's residence was also a PE. The supplier (1) contended that that the companies carrying on marketing and installation works were group companies but they were independently assessed to tax in India. The mere use of their offices did not constitute a PE. In the case of this supplier (1), the SB held that it did not have a PE in India on account of there being no 'fixed place of business'. Also, there was no 'Agency PE' as the subsidiary of its group company could not be said to be a 'dependant agent' of the supplier as it had no authority to conclude contracts on the supplier's behalf. Also, as the profits in respect of the installation had already been taxed in the hands of the Indian subsidiary, the same could not be taxed once again in the hands of the supplier.

The SB held that a PE i.e. a Fixed Place of Business of a non-resident would exist in India if one is able to point to a physical location at the disposal of the non-resident through which its business is carried on in India. Employees of the non-resident supplier having use of its Indian subsidiary's office as a matter of right would constitute a PE of the Non-resident supplier in India and further there was nothing to indicate that that an employee could straightaway walk into the office and occupy a space.

In case of the other supplier (supplier 2), the facts of the case showed that its employees were using the premises of the subsidiary not only for the work of the supplier (2) alone but were also working for its' Indian subsidiary. While the supplier (2) paid salaries to these employees, its Indian subsidiary provided them perquisites, which it reimbursed to the subsidiary with a mark up. The SB held without discussion that this led to a perception of the subsidiary being a projection of the activities of the supplier (2) in India and hence its PE could be said to be constituted in India. On facts it was however established that the activities car-

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[5] *Skycell Communications Ltd. v. Dy. CIT[2001] 251 ITR 53 (Mad.)*

[6] *Lucent Technologies Hindustan Ltd v. ITO [2005] 92 ITD 366 (Bang.)*

ried on by the employees (the PE) were only preparatory and auxiliary in character and because, as per Article 5(3) (e) of the DTAA between India and USA, there was a specific exclusion from the constitution of a PE by the carrying on of such activities, the SB held that no PE of this supplier (supplier 2) was constituted in India.

In case of the third supplier (supplier 3), the SB held that its liaison office would not constitute its PE in India as it was not carrying on commercial activities. In fact it was specifically barred by the Reserve bank of India from doing so. The case of its subsidiary was different, however, as the facts led to a perception of the subsidiary being a projection of the activities of the supplier (3) in India.

The SB held that it need not be established that there was actually a projection of the activities of the Non-resident in India. It was enough if the facts of the case resulted in a perception of the subsidiary being a projection of the non-resident in India. The following facts were found to be relevant in this supplier's (3) case by the SB in this context:

- The contracts for the supply of equipment and software were signed in India by an employee of the supplier's (3) liaison office. The same person took up employment with its Indian subsidiary the very next day and signed the contracts for the installation also.
- The supplier (3) had given an undertaking to the Indian operators that it would not dilute its stake in the Indian subsidiary to below 51 per cent.

Attribution of Profits to the Indian PE of a non-resident

The SB held that the attribution of profits of a Non-resident to its Indian PE should be done in two steps, as follows:

1. Ascertain the profit on the transaction(s) attributable to the PE; and

2. Apportion the profit computed in step 1 above, to the Indian PE based on the extent of the operations of the PE in India.

As regards the attribution of profits to the PE of one of the suppliers (supplier 3 discussed above), the SB held that the PE had carried on the activities of network planning, negotiation in connection with the sale of equipment and the signing of the supply and the installation contracts in India. Relying on a couple of decisions[7] where the Courts had taken a view that the income attributable to the signing of contracts in India was 10 percent of the contract value, the SB held that as the Indian PE of the supplier (3) had carried on more activities than the mere signing of the contracts, 20 per cent of the contract value should be the income attributable to the PE.

Therefore the working of the income of the PE would be as under:

- Apply the global net profit ratio (in this case 10.8 per cent and 8.1per cent in the two years under consideration) to the entire contract value (for supply of both, equipment and software).
- Take 20 per cent of the resultant figure as income of the PE attributable to Indian operations.

Validity of notice under section 142(1) of the Act

The arguments on this point *inter alia* revolved around the basic postulate that where no limitation period has been prescribed it has to be read into the statutory provisions, considering the consequences of not doing so. It was contended by the appellants that it was logical that the repository of power shall initiate the proceedings for assessment and issue a final order within a reasonable time. This was not a point disputed; the larger issue was what the reasonable time is.

Two alternatives were put forth one that the starting point under section 148 to initiate reassessment proceedings should be the concluding point for the issue of notice under section 142(1), notice for reassessment can be issued after the end of the assessment year (AY) upto 4/6 years. After the end of the AY, the taxpayer acquired a vested right not to be disturbed except by procedure of law for reassessment and as no reassessment proceedings had been issued the assessment was without jurisdiction and void. The AO cannot have concurrent jurisdiction under Sections 142(1) and 148 as this would put him in a position to discriminate between

[7] *Annamalais Timber Trust & Co v. CIT [1961] 41 ITR 781 (Mad.) and CIT v. Bertrams Scott Ltd [1987] 31 Taxman 444 (Cal.)*

different taxpayers and would allow him to choose to issue a notice under section 148 and buy more time to complete the assessment.

Second narrower alternative proposed was to borrow from the time limit prescribed under section 139(4) i.e. one year from the end of the AY because, as long as it is open for the taxpayer to file a belated return, it cannot be said that no return was filed.

The tax authorities contended that the notice could be issued till the time the tax officer can make an assessment and the taxpayer, having filed a return and submitting himself to the assessment, was now estoped from challenging the validity of the notice. In response thereto it was submitted that the return was filed to comply with the notice and was not challenged as the taxpayer was not appropriately advised at that time.

The SB held that a notice issued under section 142(1) of the Act calling upon the taxpayer to file his tax return, cannot be issued after the end of the relevant assessment year. The SB held that looking to the historical background and the intention of the Legislature when introducing section 142(1) on the statute, even though no limitation was contained in the said section, a period of limitation should be read into it. The SB, after analysing the options of what could be that period of limitation, came to the conclusion that the limitation should only be upto the end of the relevant assessment year. The SB was greatly influenced by the fact that the provisions of reassessment become applicable after the end of the assessment year and amongst others, this was the reason for coming to the conclusion that a notice under section 142(1) calling upon a taxpayer to file a tax return should not be issued after the end of the relevant assessment year. The AO can always issue a notice under section 148 of the Act for reassessment.

The SB also relied on a decision of the Hyderabad Bench of the ITAT[8] and on the decision of the Supreme Court[9], which held that a period of limitation, even though not prescribed under a statute can be read into the statute to make it workable. The Hyderabad Tribunal in the case of Dr. Vijay Kumar Dalta v. ACIT [1997] 58 ITD 339 (Hyd.) held that *"The requirement of issuing a notice to initiate proceedings within the assessment year itself is inbuilt in the system and if no such initiation was taken within the assessment year, it would be a case of escaped assessment within the meaning of Explanation 2 to section 147 and, therefore, notice under section 148 would be a must to empower the Assessing Officer to proceed with the assessment."*

The SB referred to the judgment of the Supreme Court[10] in the case of CIT v. Narseee Nagsee and Co. [1960] 40 ITR 307 (SC) which was a case dealing with the provisions of the Business Profits Tax Act, 1947. Under that Act there was no procedure of filing a return suo motto and the income tax officer was to issue a notice under section 11of that Act to furnish a return in the prescribed Form in respect of chargeable accounting period. It was in this context that the Supreme Court held that *"It must be given within the financial year which commences next after the expiry of the accounting period or the previous year which by itself or includes the chargeable accounting period in question."*

It, therefore, follows that the notice under section 142(1) must be issued before the end of the relevant assessment year.

Interest under Sections 234A and 234B of the Act

The suppliers challenged the levy of interest on law and on merits. On law, the contention is that there are three or four possibilities; first there is no mention at all in the order on levy of interest; second, as in this case, a direction to charge interest without any section being mentioned; third/fourth is to charge interest/charge per law. The judgement of CIT v. Ranchi Club [2001] 247 ITR 209 (SC) after considering all these possibilities held that a vague direction would leave the decision under which section to charge the interest to the discretion of the staff of the tax officer which was not as per law. The decisions of Kalyankumar Ray v. CIT [1991] 191 ITR 634 (SC) and CIT v. Anjum Ghaswala [2001] 252 ITR 1 (SC) relied on by the Department were also

[8]Dr. Vijay Kumar Dalta v. ACIT [1997] 58 ITD 339 (Hyd.), [9]CIT v. Narseee Nagsee and Co. [1960] 40 ITR 307 (SC), [10]CIT v. Narseee Nagsee and Co. [1960] 40 ITR 307 (SC)

distinguished as the decision in Kalyan Kumar.Ray's *(supra)* case was only concerned with whether the calculation of interest should be in the order or was it enough if it is shown in the ITNS-150, the case of Anjum Ghaswala supra was concerned with whether the Settlement Commission had the power to waive interest in which context it was held that levy of interest is mandatory.

On merits it was contended that there was no obligation to pay advance tax and as tax was deductible at source, irrespective of whether it is actually deducted, there is no liability to pay interest.

The SB held that in Anjum Ghaswala's case (supra) it was held that levy of interest is mandatory which follows that a default attracting the provisions of sections 234A-C would automatically impose interest on the taxpayer and that the tax officer had no discretion in the matter of its levy. Following the decision of the Supreme Court[11], the SB held that the ratio of the judgement was that if the interest was computed in the computation of tax made by the tax officer (ITNS 150) and signed by him, it becomes part of the order and the taxpayer cannot contend that the charge of the interest is invalid as it has not been specifically mentioned in the assessment order. The Supreme Court in the decision of Kalyan Kumar. Ray (supra) has held *that* "… *all that is needed is that there must be some writing initialled or signed by the Income-tax Officer before the period of limitation prescribed for completion of the assessment has expired in which the tax payable is determined and not that the form usually styled as the "assessment order" should itself contain the computation of tax as well."*

The SB also noted that the aforesaid decision of the Supreme Court had not been brought to the notice of the bench of the Supreme Court[12] or of the Patna High Court[13] that had heard the case of Ranchi Club and in any case, the decision of the Supreme Court in Ranchi Club was based on the old provisions of the Act. The SB also held that interest under section 234A of the Act was to be levied on the assessed income and not on the returned income as held in the decision in case of Ranchi Club *(supra)*.

The SB, following the decisions of the Delhi Bench of the ITAT[14] and the Mumbai Bench of the ITAT[15v] , held that if the income of a taxpayer is subject to tax withholding, the taxpayer is not liable to pay interest under section 234B of the Act, even if the tax was not actually withheld by the payer thereof.

Conclusion

The decision of the Special Bench has dealt with a number of significant issues relating to the taxation of non-residents. The observations of the Special Bench should serve as a useful reference for non-residents desiring to carry on business in India. Chartered Accountants practicing Income-tax and Tax Counsel should also find this decision stimulating and a useful tool for guiding non-resident taxpayers in optimizing their Indian income-tax liability. ❐

[11] *Kalyan Kumar Ray v. CIT [1991] 191 ITR 634 (SC)*
[12] *CIT v. Ranchi Club Ltd [2001] 247 ITR 209 (SC)*
[13] *Ranchi Club Ltd v. CIT [1996] 217 ITR 72 (Pat.)*
[14] *Sedco Forex International Drilling Inc. CIT [2000] 72 ITD 415 (Del.) and Asia Satellite Telecommunications Co. Ltd v. Dy. CIT [2003] 85 ITD 478 (Del.)*
[15] *Rheinbraun Engineering and Wasser GMBH (R.A. No. 36/Mum/98 arising out of ITA no. 1915 Mum/96, order dated 5 June 1998 of Mumbai bench 'A')*