In the High Court of Judicature at Madras

Date : 14.07.2015

The Hon'ble Mr. Justice R. Sudhakar
and
The Honble Ms. Justice K.B.K. Vasuki

T.C.A. No: 398 of 2007

M/s. Anusha Investments Ltd.
8 Haddows Road
Chennai – 600 006. ... Appellant

-vs-

The Income Tax Officer
International Taxation II
Chennai. ... Respondents

.. .. ..

Tax Case Appeal filed under Section 260 A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, " A " Bench, Chennai, dated 29th September, 2005 in I.T.A. No: 651/Mds/04.

For appellant : Mr. R. Vijaya Raghavan for
M/s. Subbaraya Aiyar Padamanabhan
and Ramamani

For respondent : M/s. Hema Muralikrishnan

.. .. ..

J U D G M E N T

(Judgment of the Court was delivered by R. Sudhakar, J.)

The assessment year in question is 2002-2003. The cause of action for the present appeal is purchase of shares by the assessee / appellant from M/s.Suzuki Motor Corporation, Japan, who sold the same in dollar

terms in a sum of US $ 18,83,239 equivalent to Rs. 9 crores. M/s. Suzuki Motor Corporation, Japan, invested in the shares of M/s. TVS Suzuki Ltd., an Indian Company, in the years 1983 and 1987, for a value of US $ 50,21,054 equivalent to Rs. 6 crores. Due to the sale by M/s. Suzuki Motor Corporation, Japan, in favour of the assessee appellant, the Japanese Company incurred a Capital Loss in US $ 31,37,815 equivalent to Rs. 14.99 crores. The statement showing the computation of Capital Loss, as reflected in the Auditor's certificate, is extracted hereunder :

" Statement showing computation of capital loss on the sale of 6,000,000 equity shares of Rs. 10/- each held by M/s. SUZUKI MOTOR CORPORATION, Japan, in TVS SUZUKI LIMITED (now known as TVS Motor Company Limited), Chennai 600 006.

1. Agreed sale price in Indian Rupees 90,000,000

2. Sale price converted in US Dollars (A) 1,883,239
   @ Rs.47.79=1 US $ (as on 5.11.2001)

3. Cost of acquisition in the hands of Suzuki Motor Corporation, Japan, in foreign currency viz. US $

	Date of Remittance	No. of Shares	Amount in Rupees	Amount in US dollars
At 1 US $ = Rs. 10.41	25.11.1983	2,000,000	20,000,000	1,921,000
At 1 US $ = Rs.12.903	09.11.1987	4,000,000	40,000,000	3,100,054
Total		6,000,000	60,000,000	5,021,054 (B)

CAPITAL LOSS IN US $ (A – B) (C) 3,137,815

Capital Loss in US $ "C" covered into
Indian Rupees (INR) @ 47.79 =
1 US Dollars (as on 05.11.2001) 149,956,179

Certified as Correct

SUZUKI MOTOR CORP.

Asit Mehta & Co.
410, New Delhi House
27 Barakhamba Road
New Delhi – 110 001, India

Dated . .....

(sd....) (sd.....) "

2. This transaction, according to the Department, would attract the provisions of Section 195 of the Income Tax Act, and, therefore, the first assessment order was passed by the Assessing Authority on 25.04.2003. This was objected to by the assessee by way of appeal before the Commissioner of Income Tax (Appeals), who passed the following order on 30.01.2004 :

> " 24. Taking into consideration of the facts, I am of the considered opinion that the orders passed by the assessing officer under sec. 201 (1) and 201 (1A) be set aside and be restored to the assessing officer with the following directions :
>
> i) The assessing officer should re-compute the liability of the appellant under Sec. 201 (1A) by treating Rs.9,00,00,000/- as the amount on which the appellant was required to deduct tax at source at the rate of 20%. The interest under Sec. 201 (1A) would be charged from the date the appellant was required to deduct tax at source to

the date the assessing officer would be giving effect to this order.

ii) The assessing officer should re-compute the liability of the appellant under sec. 201 (1) by computing tax liability of the deductee and ignoring the return of income filed on behalf of the deductee unless the decision of the concerned assessing officer is reversed by a competent authority.

In the result, the appeal of the appellant is **partly allowed.** ”

Though the order in paragraph 24 as above appears to be misplaced, the effect of the order is that the Assessing Officer should first re-compute the liability of the assessee in terms of Sec. 201 (1) whereby the tax liability of the deductee should be determined and thereafter, if there is an element of tax liability, the provisions of Sec. 195 will come into effect; as a result, Section 201 (1) will apply and in default thereof, Sec. 201 (1A) will apply.

3. But in the present case, when there is no tax liability on the purchase of shares, the question of deduction of tax at source will not arise and consequently, payment of interest in terms of Sec. 201 (1A) would not arise is the contention of the assessee appellant.

4. The Income Tax Officer, while giving effect to the order of the Commissioner (Appeals) dated 30.01.2004 accepted the assessee's

contention that there is no tax liability in terms of Section 201 (1). However, by complying with the directions issued by the Commissioner (Appeals) in his order dated 06.08.2004, the Income Tax Officer, vide his order dated 12.08.2004, determined the interest component at Rs.60,30,000/- . We extract hereunder the order passed by the said Officer :

" ORDER UNDER SECTION 154 READ WITH SECTION 250 OF THE IT ACT, 1961

An order under section 201 (1) and 201 (1A) was passed on 25.04.2003. This was set aside by the order of CIT (A) in ITA No. 40/2003/04 dated 30.01.2004 wherein the CIT (A) had given directions to recompute the demand. Subsequently, an order u/s.201 (1) and 201 (1A) was passed on 22.03.2004. The assessee has filed a petition for rectification of the order dated 22.03.2004. This petition was disposed by an order u/s. 154 dated 16.04.2004. The assessee had filed an appeal with the CIT (A) against the order u/s 201 (1) and 201 (1A) dated 22.03.2004. The order of the CIT (A) in ITA No.8/2004-05/A-XI dated 06.08.2004 has been received.

2. The CIT (A) has stated in page 4 "The stand of the apellant is correct. The AO is hereby directed to give effect to para 24 (ii) of the order of CIT (A) dated 30.01.2004 and compute the tax liability of the deductee limiting himself to the transaction of purchase of shares made by the appellant from M/s. Suzuki Motor Corporation.'' It is seen that the capital gains in the hands of M/s.Suzuki Motor Corporation, Japan, is a loss in respect of the transaction of purchase of shares made by M/s. Anusha

Investments at a consideration of Rs. 9 crores. Giving effect to the order of CIT (A), the order u/s. 154 dated 16.04.2004 is hereby rectified as under.

	201 (1)	201 (1A)
Demand vide order dt.16.04.2004	Rs.1,80,00,000/-	Rs. 60,30,000/-
Demand as per this order	Nil	Rs. 60,30,000/-
Reduction in demand	Rs.1,80,00,000/-	Nil

3. The reduction in demand as a result of this order is Rs.1,80,00,000/-. The assessee is hereby directed to make payment of demand of Rs. 60,30,000/- which was levied u/s. 201 (1A), immediately."

5. Aggrieved against paragraph 24.1 of the Order of the Commissioner of Income Tax Appeals, the assessee approached the Tribunal by way of an appeal. The Tribunal, in its order dated 29.09.2005, took a stand that irrespective of the fact whether the Japan Company suffered a loss or gain on the sale of shares, a duty is cast on the assessee to deduct the tax whenever it made payment to the non-resident. It, further, went on to hold that not only is the assessee liable to deduct the tax at source, but it also has to pay the tax to the exchequer so collected. The Tribunal held that the assessee neither deducted the tax, nor paid the tax to the Government and therefore, the assessee is in default in respect of the tax not deducted or paid to the exchequer and once, it is found that the

assessee is in default, the interest under Section 201 (1A) is mandatory.

6. Assailing the said order, the assessee has preferred this appeal which was admitted on the following questions of law :-

" 1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the appellant is liable to pay interest under Section 201 (1A) without appreciation that the Department has already accepted that the appellant is not liable to deduct tax under Section 201 (1) in the transaction ?

2. Whether on the facts and circumstances of the case, the Tribunal was right in holding that the Appellant was an assessee in default and hence liable to pay interest under Section 201 (1A), even though the appellant did not have any liability to deduct tax at source in the transaction under Section 201 (1) ?

3. Whether on the facts and circumstances of the case, the Tribunal was right in confirming the computation of levy of interest under Section 201 (1A) on the basis of notional rate of tax on the entirety of sale consideration and computed till date of the order passed by the assessing officer totally ignoring the provsions of Section 201 (1A) ? "

7. The provisions of law which are relevant to the issue on hand viz.

Sections 195, 201 (1) and 201 (1A) of the Income Tax Act, read as follows :

" Sec. 195. [(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") 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 the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Consequences of failure to deduct or pay.

201. [***(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:

....

[**(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 43[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 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 actually paid 45[and such interest shall be paid before furnishing the quarterly statement for each quarter in accordance with the provisions of sub-section (3) of section 200].] "

8. A reading of Section 195 of the I.T. Act makes it clear that any person responsible for paying to a non – resident shall, at the time of credit of such income to the account of the payee or at the time of payment thereof, whichever is earlier, deduct income tax thereon at the rates in force. This provision came to be interpreted by the Supreme Court of India, in the case of GE India Technology Centre P. Ltd. vs. Comissioner of Income Tax and another, reported in 2010 (327) I.T.R. 456 (S.C.) in the following manner : -

" Submissions and findings thereon

8. If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in section 195(1). The said expression in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not so assessable,

there is no question of TAS being deducted. (See : Vijay Ship Breaking Corporation v. CIT [2009] 314 ITR 309).

9. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in section 195. ***For example, section 194C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, sections 194EE and 194F, inter alia, provide for deduction of tax in respect of "any amount" referred to in the specified provisions.*** In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in section 195(1). Therefore, this court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the Income-tax Officer (TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, section 195 has to be read in conformity with the charging provisions, i.e., sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in section 195(1). 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 de hors the machinery sections. The Act is to be read as an integrated code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of CIT v. Eli Lilly and Co. (India) (P.) Ltd. [2009] 312 ITR 225 the provisions for deduction of TAS which are in Chapter XVII dealing with collection of taxes and the charging provisions of the Income-tax Act form one single integral, inseparable code and, therefore, the provisions relating to TDS apply only to those sums which are "chargeable to tax" under the Incometax Act. It is true that the judgment in Eli Lilly [2009] 312 ITR 225 was confined to section 192 of the Income-tax 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, do not find place in other sections of Chapter XVII. It is in this sense that we hold that the Income-tax 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 Incometax Act. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the Income-tax Act by***

which a payer can obtain refund. Section 237 read with section 199 implies that only the recipient of the sum, i.e., the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments, the payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable is liable to tax. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department, huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the Incometax Officer (TDS) of payments made to non-residents. In other words, according to the Department, section 195(2) is a provision by which the payer is required to inform the Department of the remittances he makes to non-residents by which the Department is able to keep track of the remittances being made to non-residents outside India. We find no merit in these contentions. As stated hereinabove, section 195(1) uses the expression "sum chargeable under the provisions of the Act." We need to give weightage to those words. Further, section 195 uses the word "payer" and not the word

"assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The abovementioned contention of the Department is based on an apprehension which is ill-founded. The payer is also an assessee under the ordinary provisions of the Income-tax Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income-tax Act for the said sum as an "expenditure". Under section 40(a)(i), inserted, vide Finance Act, 1988, with effect from April 1, 1989, payment in respect of royalty, fees for technical services or other sums chargeable under the Income-tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the Income-tax Act. This provision ensures effective compliance with section 195 of the Income-tax Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the Income-tax Act. In a given case where the payer is an assessee he will definitely claim deduction under the Income-tax Act for such remittance and on inquiry if the Assessing Officer finds that the sums remitted outside India come within the definition of royalty or fees for technical service or other sums chargeable under the Income-tax Act then it would be open to the Assessing Officer to disallow such claim for deduction. Similarly, vide the Finance Act, 2008, with effect from April 1, 2008, sub-section (6) has been inserted in section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from April 1, 2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent

revenue leakage. "

(emphasis supplied)

9. The Order of the Income Tax Officer dated 12.08.2004, giving effect to the order of the C.I.T. (Appeals) dated 30.01.2004, is in consonance with the decision of the Supreme Court. In the present transaction, admittedly there is no liability to tax. As a result, the question of deducting tax at source and the assessee violating the provisions of Section 195 does not arise and therefore, the assessee cannot be treated as an assessee in default. The Supreme Court has clearly held that the provisions relating to TDS would apply only to those sums which are chargeable to tax under the Income Tax Act and also has clearly held that in a transaction of this nature, the assessee was entitled to take a plea that there arises no tax liability and therefore, the provisions of Sec. 195 do not get attracted. Once we hold that there is no tax liability, the question of deduction of tax at source, terming the assessee as ''assessee in default" will not also arise and the resultant question of levy of interest becomes purely academic and the demand unsustainable in law. In the instant case, we hold that the original authority having accepted "Nil" tax liability, the question of levy of interest would not arise. The C.I.T. (Appeals), in paragraph 24.1 of his order dated 30.01.2004, had held that there should be determination of interest under Section 201 (1A) contrary to his own findings in paragraph 24.2. The authority has accepted in the second limb

that there exists '' no tax liability'' in terms of Section 201 (1) of the I.T.Act.

10. In such view of the matter, the liability to interest does not arise at all. Even otherwise, by virtue of the ratio of the decision of the Supreme Court rendered in the case of GE India Technology Centre P. Ltd., cited supra, the transaction in the present case will not fall within the para meters of Section 195 and 201 (1) of the I.T. Act. We, therefore, answer the questions of law raised in favour of the appellant and against the Department.

11. In the result, this Civil Miscellaneous Appeal is allowed. No costs.

Index : Yes
Website : Yes
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(R.S.J.) (K.B.K.V.J.)
14.07.2015

To

1. The Income Tax Officer
   International Taxation II
   Chennai.

2. The Income Tax Appellate Tribunal,
   " A " Bench, Chennai.

R. Sudhakar, J.
and
K.B.K. Vasuki, J.

T.C.A. No: 398 of 2007

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