IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.01.2010

Coram :

THE HONOURABLE MR.JUSTICE D.MURUGESAN
and
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.571 of 2004

The Commissioner of Income Tax,
Chennai. ... Appellant

v.

M/s Franco Tossi Ingegneria, S.P.A.,
C-4, 3rd floor, 'Chathura',
No.6, Dr.Nair Road, T.Nagar,
Chennai-600 017. ... Respondent

Appeal filed under section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai 'A' Bench dated 23.02.2004 made in ITA No.654/Mds/97.

For appellant : Mr.J.Narayanaswamy
For respondent : No appearance

JUDGMENT

(Judgment of the Court was delivered by P.P.S.JANARTHANA RAJA,J.)

The appeal is filed against the order of the Income Tax Appellate Tribunal, Chennai 'A' Bench dated 23.02.2004 made in ITA No.654/Mds/97.

2. The appeal was admitted on 18.08.2004 on the following substantial questions of law:

"1.Whether in the facts and circumstances of the case, the Tribunal was right in holding that Section 44BBB cannot be applied to the assessee?

2.Whether in the facts and circumstances of the case, the Tribunal was right in holding that the loss for the entire contract can be taken into account in the current assessment year, but the assessment cannot be done under Section 44BBB on the ground that the bills for payment were all raised prior to 01.04.1990?

3.Whether in the facts and circumstances of the case, the provisions of Section 44BBB can be applied to an assessee whose contract was entered into prior to the introduction of the section, but where the completion of the contract was only in the current year, and the assessee is declaring his income only on a completed contract basis?

3.The assessee is a non-resident foreign company with its headquarters at Legnano, Italy and Project office at Chennai, India and also for the purpose of establishing a place of business in India with effect from 01.10.1981. The non-resident company got itself registered with the Registrar of Companies and the Reserve Bank's permission has been obtained to carry out the operation of the project as per the contract. The relevant assessment year is 1994-1995 and the corresponding accounting year ended on 31.03.1994. The assessee company entered into an agreement as per the contract No.006/2701K/H/IIT/81 dated 8.6.1981 for unloading, erection, testing and commissioning of three numbers of steam turbine generators with ancillaries. For the said assessment year 1994-1995, the assessee has filed a return of income on 21.07.1994 declaring the total income as 'Nil'. In respect of the earlier assessment years 1982-83 to 1993-1994, the assessee had submitted return of income. By applying Rule 10 of the Income Tax Rules, 1962, the assessing officer was of the view that for the above said assessment years, the profit or loss would be ascertained and assessed on completion of entire contract work and therefore, the assessments were closed as "NA"(No assessment) or no loss or no income basis. The assessee has also accepted the same. Later, the assessee was asked to submit the consolidated profit and loss account for the period from 01.01.1981 to 31.03.1994 and the assessee has shown a net loss of Rs.5,80,69,876/- and in the said profit and loss account, the following payments made by the NLC to the assessee were shown.

Income	Amount
Erection payments from NLC	4,13,32,672/-
Specialist Services	44,57,943/-
Service charges	8,40,000/-
Miscellaneous receipts	12,44,317/-
Difference in Exchange	11,70,200/-
	4,90,45,132/-

The assessing officer applied the provision under Section 44BBB and completed the assessment under Section 143(3) of the Act and levied 10% of the payment made by the Neyveli Lignite Corporation to the assessee and the same was charged as deemed profit under Section 44 BBB of the Act and the same works out to Rs.49,04,510/-. Aggrieved by that, the assessee has filed appeal to the Commissioner of Income Tax (Appeals), contending that the provision of Section 44BBB is not applicable to the assessee. The CIT (Appeals) accepted the contention and allowed the appeal filed by the assessee. Aggrieved by that order, the revenue has filed an appeal to the Income Tax Appellate Tribunal. The Tribunal dismissed the appeal. As against the same, the revenue preferred the present appeal.

4. The learned counsel appearing for the revenue submitted that the Tribunal is wrong in invoking Section 44BBB of the Act on the ground that the bills for the payments were raised prior to 01.04.1990. He further submitted that all conditions laid down under Section 44BBB have been fulfilled and since the entire income relates to previous year, tax under Section 44BBB would have to be paid at this stage. He further submitted that the Tribunal ought to have considered that the contract had been completed only in November, 1993, which was proved by the assessee's own letter dated 24.01.1995 and therefore, the entire income of the contract has to be brought to tax on its completion, since the amounts received earlier were all treated as advance till then. He also submitted that the income from the project accrued to the assessee only during the accounting year and therefore, as per Section 44BBB, 10% of the payment shall be deemed to be the profit which was rightly assessed by the assessing officer and the order passed by the Tribunal is not in accordance with law and the same has to be set aside.

5. In spite of notice being served on the respondent, there is no representation on behalf of the assessee.

6. Heard the learned counsel appearing for the appellant and perused the materials available on record. The relevant provision of Section 44BBB reads as follows:
"Notwithstanding anything to the contrary contained in sections 28 to 44AA, in the case of an assessee, being a foreign company, engaged in the business of civil construction or the business of erection of plant or machinery or testing or commissioning thereof, in connection with a turnkey power project approved by the Central Government in this behalf, a sum equal to ten per cent of the amount paid or payable (whether in or out of India) to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".
The said provision was inserted by the Finance Act, 1989 with effect from 01.04.1990 and it was applicable for the assessment year 1990-1991 and subsequent years. It is also clear that the said provision is a special provision for computing presumptive profit and gain of foreign enterprises engaged in the business of civil construction etc., in certain turnkey power projects. The said section provides 10% amount paid or payable to the foreign company on account of civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business. In this case, the assessee is a foreign company and engaged in the business as enumerated above and there is no dispute regarding the same. The only dispute arising for our consideration is as to whether the said Section has to be applied in respect of the amount paid to the assessee/respondent much earlier to the present assessment year. The scope of provision is explained by the Central Board of Direct Taxes in Circular No.550 dated 1.01.1990 reported in (1990) 182 ITR ST 124, which reads as follows:
"In the case of the non resident assessees, whose books of account are maintained in abroad and whose accounts are prepared in the light of the tax and other laws of the country concerned, there is a real difficulty in verifying various expenses and computing their income for our tax purposes in India on the basis of their books of account which some times would not even be available for scrutiny. This is particularly so in the

case of foreign companies engaged in the business of civil construction, etc. Therefore, as a measure of simplification, certain provisions have been incorporated in the Income-tax Act whereby the total income of certain non-resident assessees is computed on the basis of a certain percentage of their gross total receipts. In the series of such provisions, the Finance Act, 1989, has inserted a new section 44BBB for computing profits and gains of foreign companies engaged in the business of civil construction, etc., in certain turnkey power projects.

The new section 44BBB provides that, notwithstanding anything to the contrary contained in sections 28 to 44AA of the Income-tax Act, the income of foreign companies as are engaged in the business of civil construction or erection or testing or commissioning of plant or machinery in connection with a turnkey power project shall be deemed at 10 per cent of the amount paid or payable to such assessee or to any person on his behalf, whether in or out of India. For this purpose, the turnkey power project should be approved by the Central Government and should be financed under any international aid programme. It is also clarified that erection of plant or machinery or testing or commissioning thereof will include laying of transmission lines and systems.

This amendment will come into force with effect from 1st April, 1990, and will, accordingly apply in relation to the assessment year 1990-91.(Section 10 of the Finance Act, 1989)."

7. An agreement was entered into between the assessee with the Neyveli Lignite Corporation on 08.06.1981. But we do not have the benefit of looking into the copy of the agreement as the same is not enclosed by the Revenue in the typed set. Further the authorities below have considered the agreement and given a categorical finding that the assessee in the said agreement which comprised unloading, erection, testing or commissioning and other services in respect of three numbers of Steam Turbine Generators Services with ancillaries. Thus, the first activity in the execution of turnkey project was unloading which was followed by erection of the steam turbine generators. The next activity was testing of generators erected and the final activity was commissioning of the generators, whereafter the keys of the generators were to be handed over to the owner of the project i.e. NLC. Hence, the finding was given that the commissioning of the generators would signal the completion of the turnkey project under the relevant contract and also discharge of guarantee obligations would also be taken as part of the work. In para 9 of the CIT (A), it was held that the work in respect of the contract was completed by the assessee by 30.04.1989 and held as follows:-

"In the case of the appellant it is seen that clause 5.8 of the relevant contract construes provisional taking over of the units as completion of works. As per certificates signed and issued by NLC, units 1, 2 and 3 were provisionally taken over on 23.4.88, 8.5.87 and 28.9.86 respectively and the said units were formally commissioned and dedicated to the nation in the year of their completion i.e. 1988, 1987 and 1986 respectively. The guarantee obligations under the contract in respect of the three units were completed within the time allowed under the contract and the guarantee period of the said units also expired on 28.9.87, 7.5.88 and 23.4.89 respectively. I also find that the bank guarantees furnished by the banks under the contract were all returned to the appellant by NLC by

30.4.89. From the above, it will be evident that the works in respect of the contract were completed by the appellant by 30.4.89 i.e. prior to the date of coming into force of the provisions of section 44BBB."

It is relevant to point out that the completion of contract is prior to coming into force of the provisions of Section 44BBB of the Act. It is also considered by the authorities below that the payments at intermediate stages of work were made against the invoices duly supported by the purchaser's certificates of completion as provided in Clause 7.6 of the agreement. The invoice in respect of erection bills was raised on 16.04.1988 and the total amount paid under the contract was Rs.4,90,45,132 and all the bills of the assessee were settled prior to 30.04.1990. It is pertinent to note that the assessee has been regularly filing its return of income and the same has also been processed by the assessing officer. For the assessment years 1988-1989 and 1989-1990, the assessments have been completed accepting the loss returned by the assessee in these two years. The said returns were processed under Section 143 (1)(a) of the Act and also they reached finality. The Tribunal in para 12 has stated as follows:

"We had perused the assessment orders for the assessment years 1988-89 and 1989-90 found at pages 70 and 75 of the paper book and note that these two assessments have not been completed on a "No Income No Loss"basis and computation of loss returned by the assessee is accepted."

During the above two assessment years, the assessee/respondent has received a sum of Rs.3,02,10,878.21. But the assssee has filed a return of loss and the same was accepted by the Department. The total amount received by the assessee/respondent was Rs.4,90,45,132.72. Out of the said sum, Rs.3,02,10,878.21/- was received during the assessment years 1988-1989 and 1989-1990 and the balance amount of Rs.1,88,34,254.51 was received and also the same was declared in the respective returns filed for the assessment years 1986-1987, 1987-1988, 1990-1991 and 1991-1992. The assessment for all these years were completed under the provision of Section 143(3) as "NA". From these facts, it is very clear that no amount was received during the accounting year and all these amounts were received much earlier to the concerned assessment year 1994-1995. During the relevant assessment year, the assessee has filed a return of loss at Rs.5,80,69,876/-. The assessing officer should have considered the return of loss and completed the assessment in accordance with law. The CIT (Appeals) also rightly had taken a view and made observation that the assessing officer is at liberty to scrutinise the said loss and follow the normal procedure of assessment and determine the amount of loss for being carried forward to the subsequent year for set off. Therefore, the assessing officer is not justified in levying tax of 10% on the amount of Rs..4,90,45,132.72, which was received much prior to the assessment year 1994-1995. The only reason given by the assessing officer is that the assessee has written a letter dated 24.01.1995, in which, it is stated that the contract had come to an end on 5.11.1993. Because of the same the assessing officer invoked Section 44BBB of the Act. It is pertinent to point out that the assessing officer has to consider the return of loss filed by the assessee for the relevant assessment year 1994-95 by following the procedure contemplated by the Act. The mere completion of the contract alone will not be sufficient to levy 10% on the consolidated amount paid to the assessee much earlier to the assessment year 1994-95 as a deemed profit under Section 44BBB of the Act. The assessing officer cannot rely on 44BBB of the Act and levy 10% on the consolidated

amount paid to the assessee by the NLC. Section 44BBB of the Act is a deeming provision, which enables the revenue to levy 10% of the amount paid or payable to the assessee and the said 10% deemed to be the profits and gains of such business under the head "Profits and gains of business". From a reading of the above provision, it is clear that unless and until the amount is paid or payable to the assessee during the year, the revenue cannot levy 10% on the gross amount. In this case, the finding given by the authorities is that nothing was paid or payable during the accounting year. The finding is that the assessee has received a sum of Rs.4,90,45,132/- much prior to the assessment year 1994-1995. To invoke the said provision there should be amount paid or payable during the accounting year. Therefore, the assessing officer is wrong in taking the consolidated amount of Rs.4,90,45,132/-, which was paid by the NLC to the assessee over the period of assessment years 1987-1988 to 1991-1992. The said consolidated amount cannot be the basis for levying 10% on the amount under Section 44 BBB of the Act. Unless and until the conditions stipulated in the deeming provision are satisfied, the revenue cannot invoke Section 44 BBB of the Act. The finding given by both the authorities is that nothing was paid or payable during the accounting year. Therefore, the finding given by the authorities are based on valid materials and it is a question of fact. It is not a perverse order. In these circumstance, we confirm the order passed by the Tribunal and the assessing officer is not justified in levying 10% on the consolidated amount, which is received much earlier to the assessment year 1994-1995 and we do not find any error or illegality in the order of the Appellate Tribunal warranting interference. We answer the questions in favour of the assessee and against the revenue. Accordingly, the Tax Case (Appeal) is dismissed. No costs.