IN THE HIGH COURT OF BOMBAY

AT GOA

Tax Appeal No. 7/2005

THE COMMISSIONER OF INCOME TAX
having Office at Aayakar Bhavan,
Patto – Plaza, Panaji, Goa

Vs

M/s ORIENT GOA PVT LTD
Dr. Atmaram Borkar Road,
Panaji, Goa.

S B Deshmukh And U D Salvi JJ.,

Dated: October 16, 2009

Appellant rep by: Mr. S. R. Rivonkar, Advocate
Respondent rep by: Mr. M. S. Usgaonkar, Senior Advocate with Mr. Iftikar Agha, Advocate

Income tax - Sec 195, 40(a)(i), 44B & 172 - Assessee makes payment to a non-resident company - Mitsui & Co Ltd of Japan - towards demurrage charges - deducts no TDS on the ground that the dmurrage payments debited in the hands of the non-resident recipient are in the nature of profits from occasional shipping business u/s 44B read with Sec 172 - AO disagrees and disallows the expenditure u/s 40(a)(i) - CIT (A) refers to CBDT Circular No 723 of 1995 and deletes the disallowance - Tribunal goes with the CIT(A) - held,

++ The assessee is a company incorporated in India. It cannot be said to be a non-resident. It also cannot lay fingers on section 172, since we are not dealing with profits of non-residents. The other aspect is that such profits of non-residents should be from occasional shipping business. It is not the case that the respondent assessee has earned some profit from occasional shipping and is a non-resident.

++ Section 172 does not have application in relation to the respondent assessee. The company from Japan viz. Mitsui & Co. Ltd., Japan, recipient of demurrage amount is not before the bench. The HC

is not examining the tax liability of the foreign company i.e. Mitsui & Co. Ltd., Japan. There is no dispute about interpretation of Section 172 or Section 195. Crucial point is as to how Section 172 applies to the facts of the present case wherein the respondent assessee is an Indian company, incorporated under the provisions of Indian Companies Act, 1956. The ITAT has recorded a perverse observation/finding regarding application of Section 44B and 172 of the Act 1961.

++ In the case on hand, the Commissioner of Income-tax (Appeals) and the appellate Tribunal have wrongly interpreted the Circular dated 19.9.1995 issued by the CBDT. This circular cannot be considered in the facts and circumstances of the present case, in aid to the respondent assessee. The AO has passed a legal, proper and reasoned order, holding that the provisions laid down under Section 40(a)(i) of the Act 1961 apply to the case on hand.

And the Bench finally quashes the Tribunal's order and allows the Revenue's appeal.

JUDGEMENT

Per: S B Deshmukh J.:

1. This appeal was admitted on the following substantial questions of law by this Court, by an order passed on 8.8.2005 :

(A) Whether on the facts and in the circumstances of the case, the ITAT was right in law in holding that in view of circular issued by the CBDT, disallowance under Section 40(a)(i) of the Act was not warranted ?

(B) Whether on the facts and in the circumstances of the case, the assessee was entitled to claim deduction of the demurrage charges of Rs.1,08,53,980/- paid to Foreign company, without deducting tax on it, under Section 40(a)(i) of the IT Act, in view of the circular No.723 dated 19.9.95, issued by the CBDT ?

(C) Whether on the facts and in the circumstances of the case, the assessee was entitled to claim deduction of the demurrage charges of Rs.1,08,53,980/- payable to Foreign Shipping Company on which tax has not been deducted, in view of the provisions of Section 172(8) introduced by the Finance Act, 1997 with retrospective effect from 1.4.1976 ?

(D) Whether the circular issued by the CBDT dated 19.9.95 has any relevance in applying provisions of section 40(a)(i) for the purpose of computation of income ?

2. We have heard learned Counsel for the respective parties. This appeal is filed on behalf of the Commissioner of Income Tax (hereinafter referred to as the “Revenue” for short). Respondent in this appeal is assessee under Section 2(7) of the Income Tax Act, 1961 (hereinafter referred to as the “Act 1961” for short). It is not in dispute that the assessee had filed its return of income tax on 1.12.1997. Taxable income was declared as Rs.2,10,31,738/-. This declaration was after claiming deduction of Rs.2,18,99,636/- on account of Section 80HHC. The return submitted by the assessee was processed under Section 143(1)(a) on December 16, 1997. The assessment under Section 143(3) was completed on March 16, 2000. Addition of Rs.4,50,528/- on account of foreign tour expenses of the partners being personal expenses of the partners of the assessee company was made. A notice under Section 148 was issued by the Revenue to the assessee on January 19, 2001. Learned Deputy Commissioner of Income-tax, Circle -1, Panaji passed an assessment order Annexure “A” (page 13). The order passed by the Deputy Commissioner of Income-tax, Circle -1 Panaji (Annexure A) was challenged by filing ITA No.73/PNJ/02-03 before the Commissioner of Income-tax (Appeals), Panaji, Goa. Before the learned Commissioner of Income-Tax (Appeals), ground regarding disallowance of foreign tour expenses of Rs.4,50,528/- was not pressed at the time of hearing of the appeal. This appeal has been decided by the learned Commissioner of Income-tax (Appeals) by an order passed on August 28, 2002. The appellate authority, recorded a finding that disallowance made by the Assessing Officer under Section 40(a)(i) is incorrect. The disallowance was directed to be deleted. In substance, on this ground, the appeal succeeded before the learned Commissioner of Income-tax (Appeals). This order in favour of the assessee had been challenged by the present appellant-revenue by filing ITA No.231/PNJ/2002. This appeal was heard by the learned appellate Tribunal and dismissed by the learned Vice President of the Income Tax Appellate Tribunal, Panaji Bench by Order dated 2.12.2004 (Annexure “D”). It is this order of the appellate Tribunal which is challenged in this appeal on behalf of the Revenue.

3. Learned Counsel on behalf of the Revenue, invited our attention to Section 40(a)(i) of the Act 1961. According to him, facts of the present case are being governed by the words “or other sum chargeable under this Act” occurring in section 40(a)(i) of the Act 1961. He further points out that amount under this clause is payable outside India. It is his submission that the assessee was under obligation to deduct the tax, in view of Section 40(a)(i) in relation to the amount payable outside India.

Learned Senior Advocate Mr. M. S. Usgaonkar, appearing for the appellant took us to Section 172 of the Act 1961. He submitted that Section 172 of the Act 1961 starts with non obstante clause. It has overriding effect to all other provisions of the Act. He submitted that Section 172 is a complete code in itself. According to him, present is a case of occasional shipping. He also emphasized the circular issued by the Central Board of Direct Taxes (CBDT), (Annexure “C” to the petition). This Circular bears No. 723 and dated 19.9.1995. He supports the Judgment of the learned Tribunal, impugned in this appeal. He also relied on some judicial pronouncements, to which we shall make reference at appropriate stage.

4. We have seen the orders passed by the Assessing Officer, the Commissioner of Income-tax and the appellate Tribunal which are part of the compilation i.e. the paper book of the present appeal. Polemic issue pertains to deduction of tax on Rs.1,08,53,980/-, paid or payable on account of demurrage. This demurrage is payable to a non-resident Company viz. Mitsui & Co. Ltd., Japan. Factually, it is not disputed by the assessee that no tax had been deducted on the amount of demurrage i.e. Rs.1,08,53,980/-. The Assessing Officer had called upon the assessee to explain as to why payment

of demurrage, as provided, on which no tax had been deducted, should not be considered as non-deductible claim and should not be added back. In substance explanation was sought from the assessee as to why amount of Rs.1,08,53,980/-, the amount on which no tax has been deducted, should not be considered as non-deductible claim and should not been added back. In fact the assessee had factually admitted before the Assessing Officer that tax was not deducted on the amount of demurrage in view of Section 40(a)(i) of the Act 1961. The contention was raised that the assessee be allowed such deduction as and when payment was made. The learned Assessing Officer records his agreement in his order that deduction would be admissible on the basis of actual payment of tax on the above demurrage. The Assessing Officer, however, observed that the non-addition, in this respect, amounts to incorrect claim and filing inaccurate particulars of income, and therefore, directed penalty proceedings under Section 271(1)(c) of the Act 1961.

5. Our attention was drawn to the order passed by the learned Commissioner of Income-tax (Appeals) dated August 28, 2002. The issue as regards deduction on account of demurrage, disallowed by the Assessing Officer, was in question before the learned Commissioner. There the learned Commissioner of Income-tax (Appeals) observed that the demurrages debited by the appellant therein (assessee), in the hands of recipient, are in the nature of profits of non-resident from the occasional shipping business under Section 44B, read with Section 172 of the Act 1961. There the learned Commissioner has also referred to sub-section (8) of Section 172. The amended provision has been brought on statute by the Finance Act, 1997 with effect from April 1, 1976. The appellate authority has also considered the CBDT Circular No.723 dated 19.9.1995. The appellate authority allowed the appeal holding that disallowance made by the Assessing Officer under Section 40(a)(i) of the Act 1961 is incorrect.

6. Learned Senior Advocate Mr. Usgaonkar invited our attention to the Judgment of the learned Single Bench of Karnataka High Court in the matter of V.M. Salgaonkar and Brother Ltd., and ors., vs. Deputy Controller and ors., reported in (1991) 187 ITR 381 (Kar). It is seen from the Judgment that the petitioners were mineowners, and also exporters of the ores to foreign countries, mostly to Japan and Korea. The agreement of the petitioners in the first writ petition, entered into with the foreign buyers on credit price, is referred to. Reference is also made to the letter of the Deputy Controller, Reserve Bank of India, Exchange Control Department, Panaji, Goa. Reference is further made to a communication dated October 11, 1988 of the Chairman, Central Board of Direct Taxes, Ministry of Finance, New Delhi. Learned Senior Advocate Mr. Usgaonkar has invited our attention to para 7 of the judgment of the learned Single Bench. There the scheme of Section 172 of the Act 1961 and Section 44B have been considered. Learned Senior Advocate, in view of this Judgment, seeks dismissal of the present appeal filed by the Revenue.

7. We have given anxious consideration to the submission of the learned Senior Counsel. On reading of the entire judgment of the learned Single Bench, it is not possible for us to countenance the submission of the learned Senior Advocate that the ratio of the Judgment is applicable to the facts of the case on hand. In our view, this Judgment does not help the present respondent i.e. the assessee. Another Judgment relied on by the learned Senior Advocate Mr. Usgaonkar for the respondent assessee is in the matter of Central Board of Direct Taxes and Others vs. Chowgule and Co. Ltd. and others, reported in (1991) 192 ITR 40 (Kar). There the learned Division Bench observed that “The question for consideration is whether demurrage payable to a non-resident owner or charterer of a ship for the delay in loading the ore sold to the foreigner is liable to be taxed under the provisions of the Income-tax Act.” We have seen the facts obtaining in that case. In our view, the facts are distinguishable. The ratio of this Judgment also does not help the present assessee i.e. the respondent in this appeal. We have noticed the various dates in the cited judgment. We have also considered the definition of word “demurrage” to which our attention was invited by learned Senior Advocate

Shri Usgaonkar. Learned Senior Advocate also invited our attention to dictionary meaning of the word “demurrage” (Black's Law Dictionary).

8. Section 172 of the Act 1961 is carefully considered by us. Chapter XV titles as “LIABILITY IN SPECIAL CASES”. We have no concern with sections, starting from Section 159, till Section 171 from this Chapter XV. Section 172 comes under sub-title “H.-Profits of non-residents from occasional shipping business”. Title of Section 172 is “Shipping business of non-residents.” For bringing a case under Chapter XV, H of the Act 1961, one has to establish a case of profits of non-residents from occasional shipping business. “Non-resident” is defined under section 2(30), as a person who is not a “resident” and for the purpose of Sections 92, 93 and 168, includes a person who is not ordinarily resident within the meaning of clause (6) of Section 6. The respondent assessee is a company, incorporated under the provisions of Indian Companies Act, 1956, is fairly an admitted position. The assessee cannot be said to be non-resident. We have also taken notice of section 6 i.e. “Residence in India”. In short, respondent assessee cannot be said to be non-resident. The present appeal pertains to the respondent assessee. In our view, in the facts of the present case, the respondent assessee cannot lay fingers on section 172, since we are not dealing with profits of non-residents. The other aspect is that such profits of non-residents should be from occasional shipping business. It is not the case that the respondent assessee has earned some profit from occasional shipping and is a non-resident. In our view, Section 172 does not have application in relation to the respondent assessee and in the facts and circumstances of the present case. The company from Japan viz. Mitsui & Co. Ltd., Japan, recipient of demurrage amount is not before us. In other words, we are not examining the tax liability of the foreign company i.e. Mitsui & Co. Ltd., Japan. On our query to the learned Senior Advocate Shri Usgaonkar as to material on record for occasional shipping, part of para 3 from the Judgment of the learned Commissioner of Income-tax has been pointed out to us. His observations are in very few lines. We may reproduce the said portion herein below. *“ 3. We have heard the rival submissions in the light of material placed before us. Assessee claimed deduction of Rs.1,08,53,980/- being the amount of demurrage payable to Mitsui Co. Ltd., Japan. The Assessing Officer opined that since the assessee did not deduct tax at source, as such the case of the assessee falls within the mischief of section 40(a)(i) of the Income Tax Act, 1961.”* Provisions of Section 172 are to apply notwithstanding anything contained in the other provisions of the Act. Therefore, in such cases, the provisions of Section 194C and 195 relating to tax deduction at source, are not applicable. The recovery of tax is to be regulated for voyage undertaken from any port in India by a ship, under the provisions of Section 172. In this view, these observations of the learned Vice President of Income Tax Appellate Tribunal have no concern with the factual aspect that it is a case of occasional shipping, pleaded or raised by assessee. There is no dispute about interpretation of Section 172 or Section 195. Crucial point is as to how Section 172 applies to the facts of the present case wherein the respondent assessee is an Indian company, incorporated under the provisions of Indian Companies Act, 1956. In our view, the learned Vice President of the ITAT has recorded a perverse observation/finding in para 3 regarding application of Section 44B and 172 of the Act 1961.

9. We may notice that the Judgment of the learned Appellate Tribunal is unreasoned and cryptic one. This judgment runs in around 20 to 25 lines. We are not oblivious of the fact, that not the form, but substance is material. The learned appellate Tribunal seems to have referred to the Circular of CBDT No.723 dated 19.9.1995.

10. We have considered the submission of the learned Counsel appearing for the parties pertaining to the Circular No.723 dated 19.9.1995 by CBDT (Annexure “C”). Section 119 empowers the Central Board of Direct Taxes to give instructions to subordinate authorities. We have considered Section 119 of the Act 1961. We have also perused the Circular Annexure C. This Circular

seems to have been issued by the CBDT, clarifying the scope of Sections 172, 194C and 195 of the Act 1961. Advocate on behalf of the Revenue points out from para 4 of the Circular and submits that Section 172 operates in the area of computation of profits from shipping business of non-residents and there is no overlapping in the areas of operation of these sections. Learned Senior Advocate Shri Usgaonkar, appearing on behalf of the respondent assessee, also drew our attention to the Judgment of the Hon'ble Supreme Court in the matter of Commissioner of Sales Tax vs. Indra Industries, reported in (2001) 248 ITR 338 (SC). It is a three Bench Judgment of the Honourable Supreme Court. It has been held by the Honourable Supreme Court that the circulars issued by Commissioner of Sale Tax not binding on assessee or Court, however, binding on the Department. In the case on hand, in our view, learned Commissioner of Income-tax (Appeals) and the learned appellate Tribunal have wrongly interpreted the Circular dated 19.9.1995 issued by the CBDT. This circular, in our opinion, cannot be considered in the facts and circumstances of the present case, in aid to the respondent assessee. The learned Assessing Officer, in fact, has passed a legal, proper and reasoned order, holding that the provisions laid down under Section 40(a)(i) of the Act 1961 apply to the case on hand.

11. We may notice here the Judgment of the Honourable Supreme Court in the matter of Union of India vs. Gosalia Shipping P. Ltd. reported in (1978) 113 ITR 307. This judgment seems to be the basic judgment which is being referred to by the learned Single Bench of the Karnataka High Court. In that case, Gosalia Shipping P. Ltd., a company incorporated under the provisions of the Indian Companies Act, 1956 indulged at the relevant time in business of clearing and forwarding and as steamship agents. Gosalia Shipping P. Ltd., had acted as the shipping agent of “Aluminium Company of Canada Limited” which was a non-resident company. That nonresident company had chartered a ship “M.V. Sparto” belonging to a non-resident company called Sparto Compania Naviera of Panama. The said ship called at the port of Betul, Goa on March 1, 1970. On March 20, 1970, the ship had left for Canada. The ship was allowed to leave port of Betul on the basis of guarantee bond, executed by the respondent in favour of the President of India. On April 15, 1970, the First Income-tax Officer, Margao, Goa issued a Demand Notice to the respondent Gosalia Shipping P. Ltd. for payment of Rs.51,000/- and odd amount, by way of income tax. We have noticed all these facts only to say that in the case on hand, there are no pleadings or material brought on record to show that the case is governed by occasional shipping within the meaning of Section 172 of the Act, 1961 and said section applies.

12. Having considered the submissions of the learned Counsel appearing for the parties, in our view, the facts of the present case, are governed by Section 40(a)(i) of the Act 1961. Order passed by the Assessing Officer, in our view, is legal, proper and in accordance with the Scheme of Act 1961. In view of the view which we have taken in the matter, the appeal deserves to be allowed by quashing and setting aside the Order passed by the learned Commissioner of Income-Tax (Appeals) dated 28.8.2002 and the Order passed by the Income Tax Appellate Tribunal, Panaji dated 2.12.2004. The same are, accordingly, quashed and set aside and the Order passed by the Assessing Officer stands upheld. Appeal is, accordingly, allowed and disposed of with no order as to costs.