IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H' : NEW DELHI

ITA No. 1481/Del/2009
Assessment Year : 2004-05

M/s VAN OORD ACZ INDIA (P) LTD,
6TH FLOOR, SHANGHVI
UDYAN, B-18, VALKUNTHLAL MEHTA
ROAD, JVPD SCHEME, MUMBAI-400049
PAN NO: AABCV0555B

Vs

Dy COMMISSIONER OF INCOME TAX
CIRCLE-17(1), NEW DELHI

Rajpal Yadav, JM And R C Sharma, AM

Dated : October 30, 2009

Appellant Rep by: Shri Ajay Vohra & Sanchit Jolly, Advs.
Respondent Rep by: Shri Manish Gupta, Sr DR

Income tax - Sec 195 - Assessee executes dredging contract at Port Dahej - reimburses non-resident for incurring expenses towards mobilisation and de-mobilisation of dredger and other equipments - whether reimbursements of such expenses are subject to TDS u/s 195 - whether assessee-payer can sit in judgement to decide taxability of income in the hands of non-resident payee

Assessee claims deduction for expenses reimbursed to various non-residents who provided the dredger and survey equipment and their transportation costs to India and back to places of origin - AO disallows the sum u/s 40(a)(i) as the assessee fails to deduct tax at source u/s 195 - Since the issue is already decided against the assessee for other AYs, the assessee's appeal dismissed - counsel for assessee argues that since the Tribunal had not taken into account the various decisions relied upon by the assessee in its order, the issue may be referred to the Special Bench - held, since the assessee has already gone in appeal agains the Tribunal's decision for other AY, and the law point has been admitted by the High Court, the judicial propriety demands that the issue need not be referred to the Special Bench - Assessee's appeal dismissed

Per : R C Sharma:

This is an appeal filed by the assessee against the order of CIT(A) dated 5.2.2009 for the AY 2004-05, in the matter of order passed u/s 143(3) of the IT Act.

2. In this appeal, the assessee is basically aggrieved by the action of CIT(A) in conforming the disallowance made by the AO in respect of claim of mobilization and demobilization expenses of Rs.10,404,298/- reimbursed by the assessee to Van Oord ACZ Marine Contractors BV, Netherlands (VOAMC), invoking the provisions of Section 40(a)(1) of the Act.

3. Facts in brief are that during the relevant previous year the assessee executed, a dredging contract at Port Dahej for Ballast Nedam International. The assessee debited in its profit and loss account a sum of Rs.10,404,298/-, being the amount reimbursed to VOAMC towards expense incurred by VOAMC on mobilization and de-mobilization of the dredger. The said amount was claimed as deduction by the assessee in the computation of income for the relevant assessment year. Apart from the aforesaid, a sum of Rs.2,679,736/- incurred on mobilization and demobilization during financial year 2002-03, in relation to the above contract was also claimed as deduction during the relevant previous year, since the appellant had been following the completed contract method and the contract was completed during the relevant previous year. The said costs related essentially to transportation of dredger, survey equipment and other plant and machinery from countries outside India to the site in India and re-transportation of the same on completion of the contract, including fuel cost incurred on transportation. The aforesaid services were contracted by VOAMC and were provided by various non-resident parties. The appellant reimbursed the cost relating to mobilization and demobilization incurred by VOAMC on the basis of invoices received by VOAMC from the non-resident service providers. In the return of income, the assessee claimed, deduction for reimbursement of the aforesaid mobilization and demobilization cost of Rs.13,084,034/- (Rs.10,404,298/- + Rs.2,679,736/-) which had been disallowed by the assessing officer, on the ground that the appellant has not deducted tax at source under section 195, while making payment of the above amount to VOAMC, invoking provisions of section 40(a)(i) of the Act. The assessing officer followed the assessment order for AY 2003-04 passed in the appellant's own case wherein similar disallowance was made. The order of assessment for AY 2003-04 came to be confirmed by the CIT(A) and the Tribunal.

4. At the outset, learned AR fairly conceded that issue in dispute is squarely covered by the order of the Tribunal dated 30.11.2007 = (**2008-TIOL-60-ITAT-DEL**) in assessee's own case in favour of the Revenue. He contended that various decisions relied on by the assessee were not taken care of by the Tribunal while arriving at the conclusion, therefore matter may be referred to the Special Bench for considering the various other decisions of the Tribunal and High Court so cited by him. As per ld AR the Tribunal, however, vide order dated 30.11.2007, for assessment year 2003-04 declined to go into the issue of chargeability to tax in India of mobilization and demobilization expenses reimbursed by the applicant to VOAMC on the ground that the appellant was required to approach the assessing officer for such determination under section 195(2) of the Act and the Tribunal could not decide the said issue on its own.

5. We have considered the rival contentions and found that Tribunal vide its order for AY 2003-04 in assessee's own case, order dated 30.11.2007 held that since assessee has failed to deduct tax at source as required by Section 195, the payment made to the non-resident recipient was liable to be disallowed as per specific provisions contained in Section 40(a)(i). Following was the precise observation of the Tribunal:-

"33. Thus, in view of our detailed discussions and applying the ratio of the decision of the Apex Court in the case of Transmission Corporation of AP Ltd. (Supra), we conclude that it is not for the assessee/payer to decide the taxability of payments made by it in the hands of non-resident redolent as the machinery for this purpose was provided in sub section (2) of section 195 itself, whereby the concerned Assessing Officer could have been approached to decide this aspect. That the chargeability of Income in the hands of

recipient nonresident to be taxed in India is a separate issue and in the absence of any certificate obtained from the concerned Assisting Officer u/s. 195 (2), it was obligatory on the part of the assessee to deduct tax at source from the payments made to the concerned nonresident. That the payer/assessee having failed to deduct such tax as required by section 195 the payments made to the recipient non-resident were liable to be disallowed as per the specific provisions contained in section 40(a) (i). That while deciding the issue whether for such payments made to non-resident by the payer/assessee deduction u/s 40(a) (i) could be allowed to the payer or not. We are not required to look into the nature of such payments made to non-resident nor are required to look into whether such payments are income or part of the income in the hands of recipient non-resident taxable in India and many other relevant factors relating to taxability of the payments in the hands of recipient non-resident as its income in India. That having held so the detailed arguments of both the parties on the question of the nature of the payments made by the payer to the payee non-resident and the taxability of such payment as income in the hands of recipient non-resident is thus beyond the scope of provisions of section 40(a) (i) where we are only required to consider the deduction of such payments claimed by the payer/assessee to the non-resident in case of non compliance of provisions of section 195 of IT Act i.e. non-deduction of tax at source for the payments made to non-resident."

6. It was contended by learned AR that the said order of the Tribunal is contrary to the provisions of the law and the judicial pronouncements and cannot, therefore be regarded as a binding precedent. The same requires reconsideration in the light of the relevant judicial precedent. Learned AR referred to decision of Hon'ble Karnataka High Court in the case of in the can of *Hyderabad Industries Ltd. v. ITO: 188 ITR 749, 752,* wherein while examining the scope of section 195 of the Act, the Court observed that the purpose at deduction of tax at source is not to collect a sum which is not a tax levied under the Act but is to facilitate the collection of the tax lawfully leviable under the Act. It further observed, that an Interpretation, which would result in collection of certain amounts by the State which is not a tax qualitatively, is impermissible in case of a taxing statute. He further contended that the Tribunal erred in conforming the disallowance of the aforesaid amount invoking the provision of section 40(a)(i), read with section 195 of the Act, without determining the chargeability to tax in India of the aforesaid mobilization and demobilization costs in the hands of VOAMC, which is sine qua non for invoking the said section.

7. As per Ld. AR Section 195 Act which falls under Chapter XVII-B of the Act, requires an assessee to deduct tax at source from payment by way of interest, royalty, fee for technical services or any other sum, to a non-resident, which is chargeable to tax in India. In case, the assessee fails to deduct tax at source under the aforesaid provision, the assessing officer may disallow deduction of such payments by invoking section 40(a)(i) of the Act. Therefore, in terms of section 195 of the Act, the obligation to deduct tax at source is triggered only when the payment required to be made to the non resident is chargeable to tax in India in the hands of the non-resident recipient. Equally, the mischief of section 40(a)(i) is attracted only when there is a contravention of the provisions contained in section 195 at the Act, i.e., where tax is not deducted out of payment chargeable to tax in India, in the hands of the non-resident.

8. It was further submitted that the liability of deduct tax at source under section 195 of the Act or sustainability of disallowance under section 40(a)(i) cannot be determined in vaccum of the ultimate liability to pay tax fastened upon the non-resident recipient. It is incumbent upon the assessing/appellate authority to come to a definite finding that the non-resident is chargeable to tax in India in respect of the remittance before invoking the provisions of section 40(a)(i) of the Act. Our attention in this regard was invited to the landmark decision of the Supreme Court in the case of Transmission

Corporation of *A.P. Ltd. v. CIT: 239 ITR 587* = **(**2002-TIOL-471-SC-IT **)** wherein the apex Court, at page 594 of the judgment, observed that:

".....

The scheme of sub-sections (1), (2) and (3) of section 195 and section 197 leaves no doubt that the expression "any other sum chargeable under the provisions of this Act" would mean "sum" on which Income-tax is leviable. In other words, the said sum is chargeable to tax and could be assessed to tax under the Act. The consideration would be - whether payment of the sum to the non-resident is chargeable to tax under the provisions of the Act or not? That sum may be Income or income hidden or otherwise embedded therein. If so, tax is required to be deducted on the said sum, what would be the income is to be computed on the basis of various provisions of the Act including provisions for computation of the business income, if the payment is a trade receipt. However, what is to be deducted is income-tax payable thereon at the rates in force. Under the Act, total income for the previous year would become chargeable to tax under section 4. Sub-section (2) of section 4, inter alia, provides that in respect of income chargeable under sub-section (1), income-tax shall be deducted at source where it is so deductible under any provision of the Act. If the sum that is to be paid to the non-resident is chargeable to tax, tax is required to be deducted.

The purpose of sub-section (1) of section 195 is to see that the sum which is chargeable under section 4 of the Act for levy and collection of income-tax, the payer should deduct Income-tax thereon at the rates in force, if the amount is to be paid to a non-resident."

9. Ld AR further clarified that the aforesaid decision by the apex Court lays down that the obligation to deduct tax at source is attracted only when that payment is chargeable to tax in India in the hands of the non-resident. Where such payment is liable to tax, it is not open for the assessee to decide what is the proportion of income embedded therein. In that eventuality, viz., the payment being taxable in India, the assessee must necessarily approach the assessing officer under section 195(2) of the Act to determine the sum on which tax needs to be deducted and at what rate.

Reference was also be made to the decision of the Bombay High Court in *Commissioner of Income Tax Vs. Cooper Engineering Ltd. : 68 ITR 457,* wherein the Court while considering section 18(3B) of the Income Tax Act, 1922, which contained provisions related to tax deduction at source in respect of payment of interest to non resident and is similarly worded as section 195 of the Act, held that if the interest paid to the non resident was not chargeable to tax under the relevant Act, then the liability to deduct tax by the payer/assessee under section 18(3B) did not arise.

10. Our attention in this regard was also invited to the recent decision of the Special Bench in the Tribunal in the case of *Mahindra & Mahindra Ltd. Vs. Dy. CIT: 122 TTJ 577 (Mum) (SB)* = **(**2009-TIOL-255-ITAT-MUM-SB**)** wherein the Tribunal has elucidated the scheme and scope of section 195 of the Act as under:

18.4 If however the amount paid or payable to the non-resident is not chargeable to tax under the regular provisions of this Act or such amount is not taxable by virtue of the provisions Double Taxation Avoidance. Agreement (hereinafter called the DTAA) entered into by India with such other country of which the non-resident is resident, in accordance with Chapter IX, then the provisions of Chapter XVII about the collection and recovery of tax are ruled out and the person responsible for paying such sum cannot be fastened with any liability for deduction of tax at source and cannot under any circumstance be treated as assessee in default.

18.10. The underlying principle behind the deduction of tax at source is the presumption that there will be some liability of the payee towards tax on the sum paid to him. If there is no such liability then the entire exercise of firstly getting the amount of tax collected. Deducted at source and then refunding to the payee will be futile. If there is no tax liability of the payee then there cannot be any question of treating the person responsible for paying the sum without deducting tax at source as assessee in default. Thus the essence of the provisions of deduction of tax at source is that there is a presumption of liability of the payee to tax on the income.

18.12 Advertising to the facts of the instant case we find that that no assessment has been made in the hands of the payee in respect of the sums received from the assessee in respect of both the Euro issues. Similarly no proceedings have been taken against him till date for assessing such income. We further find that now the time limit for issuing notice u/s. 148 has obviously come to an end since the assessment year under consideration is 1998-99. As the time limit for taking action against the payee u/s. 147 is also not available, and there is no course left to the Revenue for making the assessment of the non-resident, ex consequent, no lawful order can be passed against the assessee either u/s. 201(1) or (1A). We therefore hold that in the facts and circumstances of the present case, the order passed under section 195 read with section 201(1) or (1A) of the income tax Act, 1961 is invalid. Resultantly the impugned order, flowing out of such invalid order, will also meet with the same fate, which is hereby set aside.

11. Our attention was also invited to the decision of the Delhi Tribunal in the case of *ACIT Vs. Modicon Network (P) Ltd.: (2007) 14 SOT 204 (Del) =* ***(2007-TIOL-469-ITAT-DEL)***. In that case, the issue before the Tribunal was whether the assessee was required to deduct tax at source under section 195 of the Act from remittance made by it to M/s. Distacom Communication Ltd., Hong Kong which represented reimbursement of expenses actually incurred by the non-resident. The Tribunal, while dealing with the decision of the apex Court in the case of Transmission Corporation (supra), held as follows:

12. We have carefully considered the facts and the rival contentions. Under the section 195(1) of the Act, any person responsible for paying to a non-resident any interest or any other sum chargeable under the provisions of the Act (except salaries) 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. Under sub-section (2), the person paying the amount, if he considers that the whole of the amount would not be income chargeable to tax in the hands of the recipient, may make an application to the Assessing Officer to determine the appropriate proportion of such sum so chargeable and upon such determination, the tax shall be deducted only on the chargeable proportion of the amount. It is, therefore, clear that the obligation to deduct tax is only with reference to the income element imbedded in the remittance. This position has been affirmed by the judgment of the Supreme Court in the case of Transmission Corpn. of AP Ltd. (supra) in the penultimate paragraph of the judgment where it has been held that the High Court was right in holding that the obligation of the assessee to deduct tax under section 195 is limited only to the appropriate proportion of income chargeable under the Act. It is therefore clear that any remittance which does not have an income element which is chargeable to tax need not suffer tax deduction at source.

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14. In the very nature of things, reimbursement of expenses cannot be considered as having an income element imbedded therein so as to attract section 195(1) of the Act. The question has been considered by the Hon'ble Delhi High Court in Industrial Engg. Projects (P.) Ltd.'s case (supra). In this case, the assessee had an agreement with a foreign company whereby some services were to be rendered by the assessee for remuneration. .....

The relevant clause under which a consortium partner is entitled to defray his share of the pre-bid expenses and get the same reimbursed by the joint venture vehicle has also been placed before the departmental authorities and no question has been raised about the existence of the clause. Since the HK company lacked the expertise to draw up the pre-bid documents., it had to engage the services of another consultancy firm. It paid the consultancy firm and raised an invoice for the amount on the assessee-company, under the terms of the consortium arrangement, to get reimbursed. The argument of the department is that the nature of the remittance as FTS does not change merely because the HK company had to engage another agency to prepare the pre-bid documents. In our view, the argument cannot be accepted having regard to the objective of the consortium and the agreement between the partners of the consortium to the effect that the pre-bid expenses incurred by them will be reimbursed by the joint venture vehicle. Furthermore, in our view, in the light of the authorities cited above, reimbursement per se cannot bear the character of income. Thus, the preliminary question, namely, whether the amount remitted would in its entirety or partly be considered as income of the HK company has to be resolved in favour of the view that it being a mere reimbursement it cannot be so considered. As held by the Karnataka High Court in the case of Hyderabad Industries Ltd. (supra), the purpose of deduction of tax at source is not to collect a sum which is not a tax levied under the Act. It is only to facilitate the collection of tax lawfully leviable under the Act. The Interpretation put on the statute by the income-tax authorities, as pointed out in the judgment, would result in collection of amounts which are not qualitatively to be considered as a tax.

12. The following decisions were also referred to the same effect:

i) CIT Vs. Estel Communication Pvt Ltd: 217 CTR 102 (Del) = ***(2008-TIOL-331-HC-DEL-IT)***

ii) CIT Vs. ICL Shipping Ltd. 315 ITR 195 (Mad) = ***(2009-TIOL-320-HC-MAD-IT)***

iii) Raymond Ltd. Vs. ACIT: 86 ITD 791 (ITAT Mum) = ***(2003-TIOL-53-ITAT-MUM)***

iv) Sonata Software Vs. ITO (2006) 9 SOT 700 (ITAT Bangalore) = (2006-TIOL-270-ITAT-BANG)

v) MPHSIS BFV Vs. ITO (2006) 9 SOT 756 (ITAT Bangalore)

vi) Royal Airways Ltd. Vs. ADIT: 90 ITD 259 (ITAT Delhi) = (2006-TIOL-43-ITAT-DEL)

vii) NQA Quality Systems Registrar Ltd. Vs. DCIT (2005): 2 SOT 249 (ITAT Delhi) = ***(2004-TIOL-147-ITAT-DEL)***

viii) Wipro Ltd. Vs. ITO: 90 TTJ 191 (ITAT Bangalore) = ***(2003-TIOL-59-ITAT-BANG)***

ix) ACIT Vs. Malayalee Monorama Co. Ltd: 94 ITD 121 (ITAT, Cochin)

x) Cushman & Wakefield (S) Pte Ltd., In Re: 305 ITR 208 (AAR) = ***(2008-TIOL-08-ARA-IT)***

xi) KnoWerX Education India (P) Ltd. Vs. DIT: 301 ITR 207 (AAR) = ***(2008-TIOL-06-ARA-IT)***

xii) Cairn Energy India (P) Ltd Vs. ACIT in ITA Nos. 208 to 211/Mds/2006 for AYs 1996-97 to 1999-2000 - ITAT Chennai = ***(2009-TIOL-220-ITAT-MAD)***

xiii) IMP Power Ltd. Vs. ITO: 107 TTJ (Mum) 522

xiv) JCIT Vs. George Williamson (Assam) Ltd: 116 ITD 328 (Gau) = ***(2007-TIOL-504-ITAT-GUW)***

xv) AB Hotel Ltd. Vs. DCIT: 2008 25 SOT 368 = ***(2008-TIOL-732-ITAT-DEL)***

xvi) DCIT Vs. Venkat Shoes in ITA No. 996/Mds/2008 for AY 2004-05. = ***(2009-TIOL-241-ITAT-MAD)***

xvii) HNS India VSAT Inc. Vs. Dy. DIT: 95 ITD 157 (Del) = ***(2005-TIOL-142-ITAT-DEL)***

xviii) ITO Vs. Kirtilal Kalidas Diamond Exports in ITA No. 1868/Mum/2005 for AY 2001-02 = ***(2009-TIOL-236-ITAT-MUM)***

xix) Advance Ispat India Ltd. Vs. DCIT in ITA Nos. 2378& 4484/Del/2002 for AYs 1998-99 & 99-00 = ***(2006-TIOL-229-ITAT-DEL)***

13. As per Ld AR another aspect which requires consideration is whether the assessing officer or the appellate authorities can go into the question of chargeability to tax in India of the amount of remittance in the hands of the non-resident during the assessment/appellate proceedings of the remitter-assessee. Ld AR further submitted that while answering the aforesaid question in the affirmative, the Karnataka High Court in the case of *Jindal Thermal Power: 182 Taxmann 252 (Kar)(HC)* **=** ***(2006-TIOL-302-HC-KAR-IT)*** held that since the payer-assessee is ultimately responsible for affecting the TDS, the payer--assessee can question the the chargeability of the sum in the hands of the recipient in its own assessment proceedings. The relevant observations of the Court are as under:

"The decision however does not lay down that the person is obliged to effect TDS u/s. 195 has no right to question the assessment of tax liability. Since in law, if TDS is not effected by the payer (Jindal), the payer would be ultimately responsible to pay the tax liability of the payee (REOL). The conjoint reading of Section 195, 201 read with Section 246(1)(i) and Section 248 makes it clear that the Jindal as a payee has every right to question the tax liability of its payee to avoid the vicarious consequences. Therefore the contention that Jindal has no right of appeal is to be rejected."

14. Similarly, the Hyedrabad Bench of the Tribunal in the case of *DCIT Vs. Avanthi Leathers Ltd. in ITA No. 45/Hyd/02 for AY 1998-99 [pgs 222-224 of PB dated 11.08.2009]* held that the assessing officer must come to a definite conclusion that the sum payable by the assessee was chargeable to tax in the hands of the recipient before the said sum could be disallowed by invoking section 40(a)(1) of the Act. The relevant observations of the Court are as under:

7. With regard to the commission payment to Mr. Berger, the Assessing Officer relied on the decision of the Supreme Court in the case of *Transmission Corporation in 239 ITR 587 =* ***(2002-TIOL-471-SC-IT)*** and the decision of the Tribunal in the case of *Cheminor Drugs Ltd. in 76 ITD 307* **=** ***(2003-TIOL-62-ITAT-HYD)*****.** In the case of Cheminor Drugs, the assessee had not deducted tax u/s. 195 under similar circumstances and hence an order u/s 201 was pressed raising demand against the assessee of the said tax amount. It was in the backdrop of sec. 201 proceedings, the Tribunal held that the provisions contained in sec-195 are urgent provisions meant for collecting tax during the financial year itself. Therefore, the nature of enquiry and the nature of adjudication u/s. 195 (1) is necessarily summary and generally peremptory in nature. The proceedings u/s. 201 provides an opportunity to the assessee to show that he is not liable to deduct tax and the only way to show it is either u/s. 195(2) or by producing a certificate u/s. 195(3). It was in this context, the Tribunal held that it was obligatory for the assessee to approach the Assessing Officer u/s. 195(2) or for the payee to obtain a certificate u/s. 195(3), only to absolve the assessee of his liability. However,

in the present case, we are dealing with the regular assessment of the assessee itself in which we are concerned with the deductibility of expenditure u/s. 40(a)(1) of the Act. Under these proceedings, the Assessing Officer has to come to a definite finding whether commission paid to foreign agent was in fact chargeable to tax in India or not because on that finding depends the determination of the total income of the assessee. Accordingly, in these proceedings, the revenue cannot be heard of saying that since the assessee has not deducted tax u/s. 195(1), it will make disallowance u/s. 40(a)(1) of the Act. To repeat, it has to come to a definite conclusion that the income was chargeable to tax in India.

15. In view of the above arguments, learned AR contended that matter may be referred to the Special Bench for considering the issue in correct perspective.

16. As per our considered view, learned AR's submission for referring the matter to the Special bench, when in assessee's own case the Tribunal has taken one view, cannot be accepted, more particularly in view of the fact that against the order of the Tribunal the assessee has already approached to the High Court and the Hon'ble High Court vide its order dated 5.10.2009 had accepted the substantial question of law. As the matter is already before the High Court, there does not appear to be any judicial propriety to refer the matter to the Special Bench.

17. Respectfully following the order of the Tribunal in assessee's own case for immediately preceding assessment year, the appeal of the assessee is dismissed.

In the result, the appeal of the assessee is dismissed.

Decision pronounced in the open Court on 30.10.2009.