IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16074 of 2011

With

SPECIAL CIVIL APPLICATION No. 16076 of 2011

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS JUSTICE SONIA GOKANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRASAD KOCH TECHNIK TECH PVT LTD - Petitioner(s)

Versus

ASSISTANT COMMISSIONER OF INCOME (OSD)-TAX - Respondent(s)

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Appearance :
MR SN SOPARKAR, SR.ADV. with MRS SWATI SOPARKAR for Petitioner(s) : 1,
NOTICE SERVED for Respondent(s) : 1,
MR MR BHATT, SR. ADV. with MRS MAUNA M BHATT for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS JUSTICE SONIA GOKANI

Date : 02/12/2011

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Rule. Learned advocate Mrs. Mauna M. Bhatt, wavies service of rule on behalf of the respondent.

2. Considering the issues involved in these petitions, they are taken up for final hearing today.

3. In both these petitions similar issues are involved and factual background is also similar. For the purpose of this order, therefore, we may note the facts as stated in Special Civil Application No.16074 of 2011.

4. The petitioner assessee is a Private Limited Company and is regularly assessed under the Income Tax Act, 1961. For the assessment year 2006-07, the petitioner filed its return of income on 26.12.2006 declaring total income at Rs.1,00,86,370/-. This return of the petitioner assessee was taken into scrutiny by the Assessing Officer. After notices and hearings, the Assessing Officer framed scrutiny assessment under Section 143(3) of the Act on 18.6.2008 and assessed the income of the assessee at Rs.1,08,59,370/-.

5. Against the order of the Assessing Officer to the extent the petitioner was aggrieved, he preferred appeal before the Commissioner (Appeals), who partially allowed the appeal by his order dated 2.3.2010.

6. To the extent the petitioner's appeal was not allowed by the Commissioner (Appeals), the assessee approached the Tribunal. The Tribunal, however, dismissed the assessee's appeal.

7. In the meantime, the Assessing Officer on 30.6.2010 asked for certain clarifications from the petitioner with respect to payment for purchases of raw-materials from a foreign supplier without deducting TDS. In response to such a communication, the petitioner replied under its letter dated 6.7.2010. Particularly, the assessee contended that the provisions of Section 195 of the Act (for deduction of tax at source) are not applicable, when no part of payment made to non-resident is chargeable to tax in India. With respect to the decision of Karnataka High Court taking out somewhat contrary view in case of Commissioner of Income-Tax and another vs. Samsung Electronics Co.Ltd reported in [2010] 320 ITR 209(Karn) referred to by the Assessing Officer in his letter dated 30.6.2010, the assessee contended that such judgment of Karnataka High Court has been stayed by the Apex Court. Undeterred by such explanation of the petitioner, the Assessing Officer issued a notice dated

4.3.2011 seeking to reopen the assessment of the petitioner for the assessment year 2006-07 stating that he had reason to believe that income chargeable to tax for said assessment year has escaped assessment. He, therefore, called upon the petitioner to file a return within 30 days from the date of receipt of the notice. At the request of the petitioner, the Assessing Officer supplied reasons he had recorded for reopening the assessment, which read as under:-

> "The assessee company filed its return of income on 22.12.2006, declaring total income of Rs.1,00,86,370/-. The assessment u/s.143(3) was finalized on 18.06.2008 determining the taxable income of Rs.1,00,86,370/-.
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> It is seen that the assessee company had made payment of Rs.21,60,399/- in Foreign Company for purchase of raw materials. However, neither did the company deduct TDS on this amount nor any certificate obtain from the concerned Assessing Officer for non-deduction of TDS. Thus, in view of the provisions of section 40a(i) and judgment of Karnataka High Court, entire amount was required to be disallowed and added back to the total income.
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> As discussed above, the disallow expenditure of Rs.21,60,399/- resulted in under assessment of same income.
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> In view of the facts discussed above, I have reason to believe that income of Rs.21,60,399/- being the amount of disallowable u/s.40a(i) chargeable to tax has escaped assessment for A.Y.2006-07 and accordingly it is the fit case for reopening the assessment u/s. 147 for the A.Y.2006-07."

8. The petitioner raised objection to the reopening of the assessment under his letter dated 14.6.2011. Such objections, however, were rejected by the Assessing Officer by his letter dated 30.9.2011. At that stage, the petitioner has approached this Court challenging the notice

for reopening of assessment on various grounds.

9. Counsel for the petitioner submitted that only ground on which the Assessing Officer sought to reopen the assessment was that in view of the judgment of Karnataka High Court since the assessee was required to deduct TDS on the payment made to the foreign company for purchase of raw-materials, which the petitioner had not done, entire amount was required to be disallowed and added back to the total income. Counsel submitted that on the date when such reasons were recorded and on the basis of which notice was issued, decision of Karnataka High Court in the case of Commissioner of Income-Tax and another vs. Samsung Electronics Co. Ltd. (supra) was already reversed by the Apex Court vide its decision in the case of GE India Technology Centre P.Ltd. vs. Commissioner of Income-Tax and another reported in [2010] 327 ITR 456(SC). Counsel, therefore, submitted that the Assessing Officer had no basis to hold a belief that income chargeable to tax had escaped assessment.

10. Counsel further submitted that the payments to the foreign supplier did not attract any income tax in India on such supplier of raw-materials. In that view of the matter, there was no liability to deduct tax at source on the petitioner. This is precisely what has been held by the

Apex Court in the case of GE India Technology Centre P.Ltd. vs. Commissioner of Income-Tax and another (supra).

11. On the other hand, learned Counsel for the Revenue opposed the petition contending that the assessment is sought to be reopened within a period of 4 years from the end of relevant assessment year. Admittedly, in the assessment originally framed, Assessing Officer had not examined this issue. He had therefore, obviously, not formed any opinion on the requirement of deducting TDS. He, therefore, submitted that the notice of reopening was validly issued. Counsel further contended that the nature of payment to the foreign company is required to be verified. Taxability of such foreign supplier in India would depend on various facts. He relied on the Circular of CBDT dated 23.7.1969 annexed at Annexure-K to the petition. The petitioner contended that Section 9 and the Circular of CBDT dated 23.7.1969 provides that income accruing or arising, directly or indirectly, through or from any business connection in India, shall be deemed to be income accruing or arising in India and, therefore, where the person entitled to such income is a non-resident, it will be includible in his total income.

12. Having thus heard learned counsel for the parties and having perused the documents on record, we notice that the assessments

previously framed are sought to be reopened within period of 4 years from the end of the relevant assessment year. We also notice that admittedly in the assessment originally framed, the Assessing Officer had not decided the issue of requirement of the petitioner deducting the tax at source on its payments for purchase of raw-materials to foreign supplier. In that view of the matter, it cannot be stated that the Assessing Officer had formed any opinion in the original assessment or that reopening would amount to permitting the Assessing Officer to change his opinion.

13. However, as held by the Apex Court in the case of Commissioner of Income-Tax vs. Kelvinator of India Ltd. reported in [2010]320 ITR 561(SC), even after the amendment in Section 147 of the Act with effect from 1.4.1989, the basic requirement for reopening the assessment that the Assessing Officer has to have reason to believe that the income chargeable to tax has escaped assessment, would continue to apply. In that view of the matter, we would have to ascertain whether from the reasons recorded by the Assessing Officer for reopening the assessments, there is any such belief emerging.

14. We have already noted that the Assessing Officer had recorded that looking to the provisions contained in Section 40a(i) of the Act and the

decision of the Karnataka High Court in the case of Commissioner of Income-Tax and another vs. Samsung Electronics Co.Ltd (supra), the assessee was required to deduct tax at source on the payments made by it to the foreign supplier for the purchase of goods. On the very date when the Assessing Officer recorded such reasons, the decision of the Karnataka High Court in the case of Commissioner of Income-Tax and another vs. Samsung Electronics Co.Ltd (supra) stood reversed by the decision of the Apex Court by virtue of its judgment in the case of GE India Technology Centre P.Ltd. vs. Commissioner of Income-Tax and another (supra).

15. In that view of the matter, the Assessing Officer could not have any reason to believe that looking to the decision of the Karnataka High Court in the case of Commissioner of Income-Tax and another vs. Samsung Electronics Co.Ltd (supra), income chargeable to tax in case of the assessee had escaped assessment.

16. Counsel for the Revenue, however, would contend that reasons recorded by the Assessing Officer also made a mention of the provisions of 40(a)(i) of the Act. He, therefore, contended that whether the payments made by the petitioner to the foreign buyer attracted any tax in India or not, was required to be ascertained. The Assessing Officer was, therefore,

within his right to reopen the assessment for which notice was issued within 4 years from the end of relevant assessment year and particularly, when in the assessment originally framed, he had not addressed this issue and, therefore, could not be stated to have formed any opinion.

17. To our mind, however, the reasons recorded do not reveal any reason for the Assessing Officer to believe that income chargeable to tax had escaped assessment. The contention of the Assessing Officer is that the assessee had made payment to foreign supplier for purchase of raw-materials. He further states that the assessee company had not deducted TDS on such payments nor certificate was obtained from the concerned Assessing Officer for non-deduction of TDS. He is further of the opinion that due to these factors, entire amount was required to be disallowed and added back to the total income of the assessee.

18. For the assessee to deduct tax at source, it was necessary that the payee had liability to pay any tax on such payment in India. So much is beyond doubt by virtue of the decision of the Apex Court in the case of GE India Technology Centre P.Ltd. vs. Commissioner of Income-Tax and another (supra). The decision of the Karnataka High Court in the case of Commissioner of Income-Tax and another vs. Samsung Electronics

Co.Ltd. taking a contrary view stands reversed.

19. We may notice that the Karnataka High Court in the case of Commissioner of Income-Tax and another vs. Samsung Electronics Co.Ltd.(supra) had come to the conclusion that on any payment being in the nature of a payment resulting in some possible income in the hands of the non-resident recipients, the obligation imposed on the resident payers in terms of section 195(1) of the Act sprang into action, the moment there was to be a payment to a non-resident.

20. On the other hand, the Apex Court in the case of GE India Technology Centre P.Ltd. vs. Commissioner of Income-Tax and another (supra) held that " A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable tot ax under the Income-tax Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the Income-tax Act. It may be noted that section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which have an element of income embedded or incorporated in them. Thus, where

an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in section 195(1), namely, " chargeable under the provisions of the Act". It is for this reason that vide Circular No.728 dated October 30, 1995 the Central Board of Direct Taxes has clarified that the tax deductor can take into consideration the effect of the DTAA in respect of payment of royalties and technical fees while deducting TAS. It may also be noted that section 195(1) is in identical terms with section 18(3B) of the 1922 Act."

21. In view of the above legal position, it is indisputable that the assessee was required to deduct tax at source on the payment made to foreign supplier, if any such payment to the foreign supplier incorporated any tax liability under the Indian Income Tax Act.

22. In the reasons recorded, there is not even a prima facie belief or disclosure that on what basis, the Assessing Officer has formed his reason to believe that such payment to the foreign supplier attracted tax

in India. In absence of any live link with the reasons recorded and the belief formed, we are of the opinion that the notice was wholly invalid.

23. If, as suggested by the counsel for the Revenue, we permit the Assessing Officer to ascertain full facts and bring them on record, and then decide whether income chargeable to tax had escaped assessment or not, we would permit the Assessing Officer to reopen the assessment only for fishing enquiry. Significantly, before issuing notice for reopening the assessment, the Assessing Officer had gathered the assessee's views on the nature of payment made. The assessee had firmly contended that the payments did not incur any tax liability in India on the supplier. The assessee, therefore, contended that despite the decision of Karnataka High Court in the case of Commissioner of Income-Tax and another vs. Samsung Electronics Co.Ltd (supra), since the said judgment is stayed by the Apex Court, the assessee was not required to deduct tax at source. Without any further enquiry, the Assessing Officer straightaway issued notice for reopening such assessment. As we have already held, the Assessing Officer did not have any basis to permit the Assessing Officer to form a belief that income chargeable to tax in case of the assessee had escaped assessment. In that view of the matter, both the petitions are allowed. Notices impugned at Annexure-A to both the petitions, are quashed. Rule is made absolute.

(Akil Kureshi, J.)

(Ms. Sonia Gokani, J.)