IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

FRIDAY, THE 10TH DAY OF AUGUST 2018 / 19TH SRAVANA, 1940

ITA.No. 100 of 2011

AGAINST THE ORDER/JUDGMENT IN ITA 606/COCH/2010 of I.T.A.TRIBUNAL,COCHIN BENCH DATED 10-02-2011

APPELLANT(S)/RESPONDENT/REVENUE

THE COMMISSIONER OF INCOME TAX (TDS),
KOCHI.

BY ADV.SRI.PKR MENON, SENIOR COUNSEL, GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX DEPT.

RESPONDENT(S)/APPELLANT/ASSESSEE:

M/S.JEEVAN TELECASTING CORPORATION LTD.,
32/24901, B, RASHTHRA DEEPIKA BUILDING, PALARIVATTOM- 682 025.

BY ADV. SRI.JOSEPH MARKOS (SR.)
SRI.RAMESH CHERIAN JOHN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 10-08-2018, ALONG WITH ITA NOS.104 TO 112 OF 2011, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S EXHIBITS

ANNEXURE-A : COPY OF ORDER OF AO UNDER SECTION 201(1) DATED 25.8.2008 FOR THE ASSESSMENT YEAR 2004-05.

ANNEXURE-B : COPY OF ORDER DATED 24.9.2010 OF THE COMMISSIONER OF INCOME TAX (APPEALS).

ANNEXURE-C : COPY OF ORDER DATED 10.2.2011 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH IN ITA NO.606/COCH/2010.

ANNEXURE-D : COPY OF KARNATAKA HIGH COURT'S ORDER/JUDGMENT IN ITA NO.53/2001 DATED 19.2.2007 IN ITO V. MITHY GRANITE P (LTD).

//TRUE COPY//

PS TO JUDGE.

jg-30/8

K.VINOD CHANDRAN & ASHOK MENON, JJ.

ITA Nos.100, 104, 105, 106, 107, 108,
109, 110, 111 and 112 of 2011

Dated this the 10th day of August, 2018

J U D G M E N T

Vinod Chandran, J.

Revenue is before this Court against the order of the Income Tax Appellate Tribunal which remanded the issue for consideration to the Assessing Officer (AO). The question of law raised is reframed as follows:-

> "Whether the Tribunal could have adopted the directions issued by the Honourable Supreme Court in a decision where the facts or law therein are not applicable squarely to the facts of the present case?

2. ITA Nos.100, 104, 105, 106 and 107 of 2011 arise from the orders passed under sub-Sections (1) and (1A) of Section 201 of the Income Tax Act, 1961 ('Act' for short). ITA Nos.108, 109, 110, 111 and 112 of 2011 arise from the orders of penalty passed under Section 271C of the Act. The allegation against the assessee was with respect to there being no deduction of tax at source on the various transactions entered into by the assessee in the said years as also delay in payment of Tax Deducted at Source (TDS) in certain instances. The

transactions on which the allegations were raised were five in number:

(1) Tax deductions to be made from the payment against contracts, commission, rent, salary, professional and consultancy charges not deposited or deposited late for the aforesaid years.

(2) Tax deduction under Section 194J as against payment of uplink charges.

(3) Tax deduction under Section 194J from payment of backhaul link usage charges.

(4) Tax deduction on equipment hire charges and

(5) Tax deducted on camera rental payments.

3. The Tribunal followed the directions of the Honourable Supreme Court in ***(2009) 312 ITR 225 (SC) [Commissioner of Income Tax v. Eli Lilly And Co. (India) P. Ltd.]*** and ***2010 (234) CTR(SC) 146 [Commissioner of Income Tax v. Bharati Cellular Ltd.]***. The Honourable Supreme Court had in ***Eli Lilly*** *(surpa)* directed the AO to examine and find out whether interest has been paid or recovered for the period between the date on which tax was deductible till the date on which the tax was actually paid. The Tribunal

hence directed the AO in the present case also so to do, on the question of tax deduction as raised under issues (1), (4) and (5). On the question of the tax deduction under Section 194J, the direction in ***Bharati Cellular Ltd.*** *(supra)* was followed insofar as directing examination of a technical expert to ascertain as to whether there is a human intervention which alone could lead to the TDS being deducted as has been laid down in ***Bharati Cellular Ltd.*** *(supra)*.

4. The learned Standing Counsel, Government of India (Taxes) appearing for the Revenue would submit that the Tribunal ought not to have issued such directions as issued by the Honourable Supreme Court. The Tribunal ought to have first examined whether the facts and law apply and only then could have directed the AO to make an enquiry. It is pointed out that ***Eli Lilly*** *(supra)* arises in a totally different context where there was a dispute as to whether the home salary received by foreigners in their home State in foreign currency was assessable to tax within India as income arising in India. There was a *bona fide* dispute raised for the first time on which dispute the Honourable

Supreme Court answered finally by the above decision and in that context directed an enquiry into the payment of tax by the employee itself. This cannot have any application to the facts of the present case is the submission. On the question of deduction under Section 194J, it is the submission that the Tribunal itself could have examined the expert and there was no requirement for a remand to the AO.

5. We cannot but observe that the Tribunal being the fact finding authority ought to have looked into facts without making a remand on the basis of the directions issued by the Honourable Supreme Court. The Tribunal being a creature of the statute, cannot adopt the directions issued by the Honourable Supreme Court without looking into the distinction on facts, on which the directions were issued as against the facts available in the case before it. The Honourable Supreme Court's powers to issue directions cannot be assumed by the Tribunal to issue directions in a similar manner. In any event, we notice that the issues could be dealt with by the Tribunal itself.

6. ***Eli Lilly*** *(supra)* was a case in which the

question arose as to whether the employees of the foreign Company deputed to an Indian Company are liable to tax for the amounts received as salary from the foreign Company paid in their home country, which was termed as home salary by the Hon'ble Supreme Court. The first question to be decided was whether there was any liability on such expatriates; who were at the time residing and working in India, for the amounts they received outside the country. The Honourable Supreme Court found that Section 9(1)(ii) speaks of tax liability on the amount accrued within India and the test to be applied is whether the payments of home salary paid abroad by the foreign Company to the expatriates had any connection or nexus with his rendition of service in India. On facts, it was found that expatriates were working within India for the Indian Company in the said period and were not at all discharging any duties for the foreign Company. On reading Sections 9(1)(ii) and 5(2)(b) it was held that income which falls under the head salaries, if it is deemed to accrue or arise in India, the same would be taxable even if it is paid to the expatriates at their home country in foreign currency. The Honourable Supreme Court had also noticed that therein the recipient of salary was clearly identifiable and in such circumstances, there was a direction issued to the AO to verify whether they had satisfied the tax even with respect to their home salary, in which event, the assessee was found to have been absolved from the liability. We cannot but observe that this decision was on the peculiar facts and cannot apply across the board with respect to all instances of failure to deduct and pay to the Government TDS.

7. We observe so especially looking at the decision of the Honourable Supreme Court in ***Eli Lilly*** *(supra)* and the caveat made, at the outset itself, as herein below :

> "At the outset, we wish to clarify that our judgment is confined strictly to the question of deductibility of tax from the income chargeable under the head "Salaries" under section 192(1). This introduction is important for the reason that unlike other sections in Chapter XVII-B regulating deduction of tax at source out of other payments, section 192 requires such deduction on "estimated income" chargeable under the head "Salary" and at the time of payment of salary." (*sic-para22*)

It is in this context that the Honourable Supreme Court dealt with the scope of Sections 201(1) and 201 (1A) finding the liability to be a vicarious liability especially noticing the master-servant relationship insofar as the assessee company and the recipient of salary. We are unable to find a broad application of the principles laid down therein to every instance of failure to deduct tax at source. The decision on the scope of Section 271C was also rendered on the peculiar facts arising therein, which was stated so:-

> "The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under section 192 was a nascent issue. It has not been considered by this court before. Further, in most of these cases, the tax deductor-assessee has not claimed deduction under section 40(a)(iii) in computation of its business income. This is one more reason for not imposing penalty under section 271C because by not claiming deduction under section 40(a)(iii), in some cases, higher corporate tax has been paid to the extent of Rs.906.52 lakhs."(sic-*para 36*)

The said principle on which the penalty under Section 271C was avoided, would also not apply in the present case. In the circumstances, we are not convinced that there could be any remand, by the Tribunal, as has been made by the Honourable Supreme Court in ***Eli Lilly*** *(supra)*.

8. The further directions in the order of the Tribunal was relying upon ***Bharati Cellular Ltd.*** *(supra)* wherein the Honourable Supreme Court had dealt with the cellular services provided, wherein there was no human intervention involved at all. If there was no such human intervention, there could be no fees for technical services was the specific finding. This also could be looked into by the Tribunal on examination of evidence as adduced by the assessee.

9. On the question of hire and rental charges, the learned Senior Counsel points out that the rent on machinery or plant or equipment was introduced first with the Finance Act, 2007 with effect from 1.6.2007. Hence, we are of the opinion that between financial years 2003-04 to 2006-07, there can be no allegation raised of failure to deduct tax at source. For the hire charges and the rental charges are concerned, the issue assumes relevance only for the financial year 2007-08 which has to be looked at.

10. On the question of TDS, the learned Senior Counsel also has a case that even before the present amendment bringing in the proviso to Section 201(1),

there was a circular issued by the Central Board of Direct Taxes, which was referred to by the Honourable Supreme Court in ***(2007) 293 ITR 226 (SC) [Hindustan Coca Cola Beverage P. Ltd. v. Commissioner of Income Tax]***. The relevant paragraph is quoted hereunder:-

> "Be that as it may, Circular No.275/201/95-IT(B) dated January 29, 1997, issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under section 201(1) of the Income-tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under section 201(IA) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under Section 271C of the Income-tax Act."

11. On the tax deduction from payment of contracts, commission, rent, salary, professional and consultancy charges for the financial years 2003-04 to 2007-08, the assessee shall produce sufficient evidence before the Tribunal as has been laid down in Circular No.275/201/95-IT (B) dated 29.1.1997. The Tribunal shall look into it and after verification, pass appropriate orders as per the directions of the Hon'ble Supreme Court in ***Hindustan Coca Cola Beverage P. Ltd.*** *(supra)*.

12. With respect to the payments of uplink charges and backhaul link usage charges, the Tribunal shall examine an expert as produced by the assessee and the Department shall be permitted to cross examine the expert as also produce any further evidence or witnesses on their behalf. The issue shall be decided on the basis of the decision in ***Bharati Cellular Ltd.*** *(supra)*. It is made clear that there can be no liability on hire charges and camera rental payments for the financial years 2003-04 to 2006-07. The order of the AO as confirmed by the appellate authority is deleted for the said years. The Tribunal shall pass appropriate orders as per the directions issued. The Income Tax Appeals are remanded for fresh consideration as per the directions hereinabove.

13. The rental charges and hire or equipment charges shall be sustained only for the financial year 2007-08, the assessment year of which is 2008-09. However, the assessee shall be given an opportunity to produce sufficient evidence as per the circular aforementioned on which appropriate orders shall be passed on the liability of the assessee.

The Income Tax Appeals are partly allowed and remanded with the above directions. No order as to costs.

Sd/-
K.VINOD CHANDRAN
JUDGE

Sd/-
ASHOK MENON
JUDGE

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