

ORDER SHEET

GA NO.1555 OF 2016
ITAT NO.245 OF 2016
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME-TAX)
ORIGINAL SIDE

M/S.SREI INFRASTRUCTURE FINANCE LTD.
Versus
DY.COMMISSIONER OF INCOME TAX, CIRCLE -11(2), KOLKATA

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA
The Hon'ble JUSTICE ARINDAM SINHA

Date : 12th August, 2016.

MR. J.P.KHAITAN, SR. ADVOCATE, MR. SOMAK BASU, ADVOCATE
FOR APPELLANT

MRS. SMITA DAS DE, ADVOCATE
FOR RESPONDENT

The Court : The subject matter of challenge is a judgment and order dated 4th January, 2016 passed by the learned Income Tax Appellate Tribunal, Kolkata, "A" Bench, Kolkata in ITA No.3838/Del/2013 pertaining to the assessment year 2008-09 by which the learned Tribunal dismissed an appeal preferred by the assessee.

The assessee has come up in appeal. The appeal is at the admission stage. The following question of law has been suggested by the assessee.

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in confirming the set-off of MAT Credit under Section 115JAA brought forward from earlier years against tax on total income including surcharge and education cess instead of adjusting the same from tax on total income before charging such surcharge and education cess."

From the judgment of the learned Tribunal itself it is evident that the Allahabad High Court had answered the issue in favour of the assessee. But the learned Tribunal took a different view. We, therefore, thought it fit to admit the appeal and to hear it out on merits.

The question raised by the assessee has its route in the form of Income Tax Return. In other words, the assessee, we are inclined to think, was probably inspired to raise the issue by the form of income tax return for the assessment year 2008-09, the relevant portion whereof reads as follows:-

Computation of tax liability on total income

Computation of tax liability on total income						
1	Tax Payable on deemed total Income under section 115JB (7 of Schedule MAT)				1	
2	Tax Payable on total income in item 11 of Part B-TI					
	a	Tax at normal rates	2a			
	b	Tax at special rates (11 of Schedule-SI)	2b			
	c	Tax Payable on Total Income in item 11 of Part B-TI (2a + 2b)			2c	
3	Gross tax payable (enter higher of 2c and 1)				3	
4	Credit under section 115JAA of tax paid in earlier years (if 1 is more than 2c) (7 of Schedule MATC)				4	
5	Tax payable after credit under section 115JAA [(3 – 4)]				5	
6	Rebate under section 88E (4 of Schedule-STTR)				6	
7	Balance Tax Payable (5-6)				7	
8	Surcharge on 7				8	
9	Education cess, including secondary and higher education cess on (7+8)				9	
10	Gross tax liability (7+8+9)				10	

Portion of the form set out herein above suggest that the credit under section 115JAA has to be allowed before addition is made on account of surcharge and cess. The assessee wants that it should be allowed to do so. The learned Tribunal, however, has held that:-

"we find no merit in the contention of the assessee that MAT credit should first be reduced from the tax payable and thereafter on the residual amount the surcharge and educational cess be levied."

Mr. Khaitan, learned senior advocate submitted that the form of Income Tax Return prescribed for the year 2008-09, quoted above, continued to hold the field up to the assessment year 2011-12. It is only for the year 2012-13 that the form was changed, which reads as follows:-

Computation of tax liability on total income						
1	1 a	Tax Payable on deemed total Income under section 115JB (7 of Schedule MAT)			1 a	
	1 b	Surcharge on (a) above			1 b	
	1 c	Education Cess on (1a + 1b) above			1 c	
	1 d	Total Tax Payable u/s 115JB (1a+1b+1c)			1 d	
2	Tax payable on total income in item 11 of Part B-TI					
	a	Tax at normal rates	2 a			
	b	Tax at special rates (11 of Schedule-SI)	2 b			
	c	Tax Payable on Total Income in item 11 of Part B-TI (2a + 2b)		2c		
3	Surcharge on 2c				3	
4	Education cess, including secondary and higher education cess on (2c+3)				4	
5	Gross tax liability (2c+3+47)				5	
6	Gross tax payable (higher of 5 and 1d)				6	
7	Credit under section 115JAA of tax paid in earlier years (if 5 is more than 1d) (7 of Schedule MATC)				6	
8	Tax payable after credit under section 115JAA [(6-7)]				8	

Mr. Khaitan relied upon the judgment of the Allahabad High Court in the case of CIT Vs Vacment India reported in [2014] 369 ITR 304 (All), the Division Bench, in that case, solely on the basis of the form of the Income Tax Return prescribed for the year 2008-09 which continued to hold the field up to the year 2011-12, answered the issue as follows:-

"The aforesaid entries leave no manner of ambiguity in regard to the method of computation of tax liability. Entry 3 requires computation

of the gross tax payable. Under entry 4, credit is required to be given under section 115JAA of the Act of the tax paid in earlier years. Entry 5 requires a computation of the tax payable after credit under section 115JAA of the Act. The matter is placed beyond doubt by the parenthesis, which indicates that tax payable under entry 5 is to be arrived at by deducting the credit under section 115JAA of the Act (under entry 3) from the gross tax payable (under entry 4). The surcharge is computed on the amount reflected in entry 5."

Mr. Khaitan drew our attention to Sub-section 1 of Section 4 of the Income Tax Act as it was at the relevant period of time which reads as follows:-

"Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and [subject to the provisions (including provisions for the levy of additional income-tax) of, this Act] in respect of the total income of the previous year [***] of every person: **Provided** that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly."

On the basis of Sub-section 1 of Section 4, Mr. Khaitan contended, that the Central Act can only provide the rate or rates of applicable income tax. It cannot also provide for payment of surcharge and cess which is not contemplated by the Income Tax Act. The surcharge and cess have been imposed by the Finance Act and, therefore do not amount to income tax.

He then drew our attention to section 115JAA. He relied upon Sub-sections 1A, 2A, 4, 5 and 6.

"(1A) Where any amount of tax is paid under sub-section (1) of section 115JB by an assessee, being a company for the assessment year commencing on the 1st day of April, 2006 and any subsequent assessment year, then, credit in respect of tax so paid shall be allowed to him in accordance with the provisions of this section.

(2A) The tax credit to be allowed under sub-section (1A) shall be the difference of the tax paid for any assessment year under sub-section (1) of section 115JB and the amount of tax payable by the assessee on his total income computed in accordance with the other provisions of this Act:

Provided that no interest shall be payable on the tax credit allowed under sub-section (1A)

(4) The tax credit shall be allowed set-off in a year when tax becomes payable on the total income computed in accordance with the provisions of this Act other than section 115JA [or section 115JB, as the case may be].

(5) Set off in respect of brought forward tax credit shall be allowed for any assessment year to the extent of the difference between the tax on his total income and the tax which would have been payable under the provisions of sub-section (1) of section 115JA [or section 115JB, as the case may be] for that assessment year.

(6) Where as a result of an order under sub-section (1) of sub-section (3) of section 143, section 144, section 147, section 154, section 155, sub-section (4) of section 245D, section 250, section 254, section 260, section 262, section 263 or section 264, the amount of tax payable under this Act is reduced or increased, as the case may be, the amount of tax credit allowed under this section shall also be increased or reduced accordingly.]”

He wanted us to compare the aforesaid provisions of section 115JAA with sub-section 1 of section 115JB, which is as follows:-

"Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, [2007], is less than [ten per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of [ten per cent]]"

He submitted that section 115JB provides for payment of income tax at the rate of 10%. The sub-section 1 does not provide for any payment on account of surcharge or cess. Similarly, section 115JAA, in particular, the sub-sections quoted above provide for tax credit to be allowed to the extent of the difference of the tax paid for any assessment year under section 115JB and the amount of tax payable by the assessee on his total income computed in accordance with the other provisions of the Act. By the expression *"computed in accordance with the other provisions of the Act"* what is meant is the normal computation.

Mr. Khaitan, on the basis of the aforesaid provisions contended that section 115JB provides for payment of income tax at the rate of 10% and section 115JAA provides for credit computed on the basis of tax paid and tax payable. He contended that

tax paid has to be the tax calculated under Sub-section 1 of Section 115JB and payable has to be assessed on the basis of normal computation without taking into account any surcharge because surcharge is not chargeable under the provisions of the Income Tax Act.

In support of his submission he relied upon Clause 43 of section 2 which provides a definition of the word “tax” and does not contain any reference to any surcharge or cess. Finally, he submitted that the surcharge or the cess does not alter the rate of tax.

His submissions may be summarized as follows:-

- a) Surcharge and cess do not fall within the category of income tax. They are payable in addition to income tax.
- b) In calculating the amount of tax payable under Section 115JB the element of surcharge and cess cannot be taken into account.
- c) Similarly in calculating the amount of credit the amount of surcharge and cess paid by the assessee are to be excluded.

We have not been impressed by the submissions advanced by Mr. Khaitan for the following reasons:-

- (a) It was not disputed by Mr. Khaitan that the credit in this case under section 115JAA was not claimed by the assessee without taking into account the amount of surcharge and cess. Therefore, the submission, which Mr. Khaitan advanced, does not match with the facts and circumstances of this case.
- (b) We are inclined to think that both surcharge and cess are part of the income tax though payable in addition to the Income Tax calculated at the rate provided in Section 115JB.

We are supported in our view by Sub-section 1, the second proviso to Sub-section 3; Sub-section 11 and Sub-section 12 of Section 2 of the Finance Act, 2008, which provides as follows:-

"(1) Subject to the provisions of sub-section (2) and (3), for the assessment year commencing on the 1st day of April, 2008, income-tax shall be charged at the rates specified in Part I of the First Schedule and such tax as reduced by the rebate of income-tax calculated under Chapter VIII-A of the Income-tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income-tax Act) shall be increased by a surcharge for purposes of the Union calculated in each case in the manner provided therein."

Second proviso to Sub-section (3):-

"**Provided further** that in respect of any income chargeable to tax under sections 115A, 115AB, 115AC, 115ACA, 115AD, 115B, 115BB, 115BBA, 115BBC, 115E and 115JB or fringe benefits chargeable to tax under section 115WA of the Income-tax Act, the amount of income-tax computed under this sub-section shall be increased by a surcharge, for purposes of the Union, calculated."

"Sub-section (11). The amount of income-tax as specified in sub-sections (1) to (10) and as increased by a surcharge, for purposes of the Union, calculated in the manner provided therein, shall be further increased by an additional surcharge, for purposes of the Union, to be called the "Education Cess on income-tax", calculated at the rate of two per cent of such income-tax and surcharge so as to fulfil the commitment of the Government to provide and finance universalised quality basic education."

"Sub-section (12). The amount of income-tax as specified in sub-sections (1) to (10) and as increased by a surcharge, for purposes of the Union, calculated in the manner provided therein, shall also be increased by an additional surcharge, for purposes of the Union, to be called the Secondary and Higher "Education Cess on income-tax", calculated at the rate of one per cent of such income-tax and surcharge so as to fulfil the commitment of the Government to provide and finance secondary and higher education."

The underlined portions of the statute indicated above may be collated as follows:-

(a) Sub-section 1 of Section 2 of the Finance Act, 2008 provides inter alia as follows:-

"..... such tax as reduced by the rebate of income tax calculated under Chapter VIII-A of the Income tax Act, 1961 (43 of 1961) (hereinafter referred to as the Income tax Act) shall be increased by a surcharge..... "

(b) Second proviso to Sub-section 3 of the Finance Act, 2008 provides, inter alia as follows:-

"..... the amount of income tax computed under this Sub-section shall be increased by a surcharge,....."

(c) Sub-section 11 of Section 2 of the Finance Act, 2008 provides, inter alia as follows:-

"The amount of income tax as specified in Sub-sections (1) to (10) and as increased by a surcharge, for purposes of the Union, calculated in the manner provided therein, shall be further increased by an additional surcharge, for purposes of the Union, to be called the "Education Cess on income tax,"

(d) Sub-section 12 of Section 2 of the Finance Act, 2008 provides, inter alia as follows:-

"The amount of income tax as specified in sub-sections (1) to (10) and as increased by a surcharge, for purposes of the Union, calculated in the manner provided therein, shall also be increased by an additional surcharge, for purposes of the Union, to be called the Secondary and Higher "Education Cess on income tax","

All the provisions quoted above speak about income tax being increased by the amount of surcharge and cess. Can it in that case be contended that surcharge is anything other than Income Tax? We think the answer is 'no'.

It is true that sub-section 1 of section 4 of the Income Tax Act provides for rate or rates of Income Tax to be stipulated by the Central Act. If the legislature chooses to realise part of the amount by way of tax and part of it by way of surcharge and cess thereon rather than providing for a higher rate to realise the intended amount of tax, can it be said that the rate of income tax is what appears to have been provided without taking into account the surcharge and the cess? The answer we think again is an emphatic 'no'. The reason behind increase of income tax by the amount of surcharge and cess has been spelt out on the basis whereof it can be said that the intention is that

part of the amount realized by way of income tax is earmarked for being spent in education and higher education.

We are, as such, of the opinion that the view taken by the learned Tribunal is a correct view. The learned Tribunal has relied on the judgement of the Apex Court in the case of *CIT vs. Tulsyan Nec Ltd.*, reported in [2011] 330 ITR 226 [SC]. Mr. Khaitan may be right in contending that the point raised in this appeal did not fall for consideration by Their Lordships in that judgement. The question which Their Lordships were considering was whether interest under Section 234A, 234B and 234C has to be added to the amount of tax before granting credit under Sections 115JA and 115JAA? Their Lordships answered that question in the negative. The reason is very obvious. In determining the liability of the assessee the first step has to be determination of tax payable. The Income Tax Act contemplates self-assessment by the assessee and quarterly payment of tax in advance and the rest with the filing of the return. Interest can be realised only for the amount in default. Interest cannot be charged for an amount which has already been paid or for which the assessee is entitled to a credit. Before any question of realising interest may arise the amount of liability on account of income tax has to be ascertained. In ascertaining the liability, necessarily the amounts of surcharge and cess have to be taken into account. Once that is done the amount of tax payable has been ascertained. Then the question arises for giving credit for the amount of tax already paid in advance or credit which is statutorily available to the assessee. Only thereafter the question of any addition on account of interest might arise. This was explained by Their Lordships.

It is also not correct to say that the judgement in the case *Tulsyan Nec Ltd.* [supra] has no application to the facts and circumstances of this case. In the case before us, the assessee has drawn inspiration from a mistake in the form of the income tax

return. Identical mistake was also involved in the case of *Tulsyan Nec Ltd. [supra]*. But that was a mistake with regard to the calculation of interest and it is on this basis that the claim against the assessee was raised far in excess of what was payable by the assessee which was negated by Their Lordships and they proceeded to hold as follows:-

"Lastly, it is immaterial that the relevant form prescribed under the Income-tax Rules, at the relevant time (i.e. before April 1, 2007), provided for set off of the MAT credit balance against the amount of tax plus interest i.e. after the computation of interest under section 234B. This was directly contrary to a plain reading of section 115JAA(4). Further, a form prescribed under the rules can never have any effect on the interpretation or operation of the parent statute."

No elaborate reasoning is, as such required to show why are we unable to follow the judgement of the Allahabad High Court in the case of *Vacment India [supra]*?

Mr. Khaitan also relied upon a judgement of the Apex Court in the case of *CIT vs. Ajanta Electricals, reported in [1995] 215 ITR 114*. He relied upon the following view expressed at page 119:-

"Though the rule cannot affect, control or derogate from the section of the Act, so long as it does not have that effect, it has to be regarded as having the same force as the section of the Act."

There can be no quarrel with the aforesaid view. But the same has no application to this case because the form for the relevant year, which provided inspiration to the assessee to take this point, did in fact seek to control or derogate from the sections quoted above. That form, as a matter of fact, was erroneous. That form has subsequently been corrected. Had it not been a case of a wrong form, the corrected form would in that case be contrary to law. Our attention was not drawn nor was it contended that the corrected form is contrary to law. Both the forms, viz. the one which was prevalent at the relevant period of time and which was corrected for the assessment year

2012-13, could not be the correct forms. If the form of 2012-13 was correct, then the form of 2008-09 was wrong, and naturally contrary to law.

We, as such, answer the question in the affirmative and against the assessee.

The appeal is, therefore, dismissed.

Parties shall, however, bear their own costs.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

sb/sm