

ORDER SHEET

ITA 191 OF 2009
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PIU GHOSH

Versus

DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE-52 & ORS.

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 12th July, 2016.

For Appellant/Petitioner : Mr.R.Bharadwaj,Advocate
Mr.B.Sengupta,Advocate

For Revenue/Respondent : Mr.M.P.Agarwal,Advocate
Mr.P.Dhudhoria,Advocate

The Court : The subject matter of challenge in the appeal is a judgement and order dated 24th April, 2009 passed by the learned Income Tax Appellate Tribunal, "B" Bench, Kolkata in ITA NO.1586/Kol/2008 pertaining to the assessment year 2005-06, by which an appeal preferred by the assessee was dismissed.

The question formulated on 12th August, 2009 when the appeal was admitted reads as follows :

“Whether the Tribunal below substantially erred in law in applying provision of Section 40(a)(ia) of the Income Tax Act, 1961 in the present case pertaining to Assessment Year 2005-06 when the provisions were substituted by the Finance Act, 2004 with effect from April 1,2005 ?”

The Finance (No.2) Act,2004, No.23 of 2004 got Presidential assent on 10th September, 2004. Sub-section 2 of Section 1 of the aforesaid Act provides as follows :

- (2) *Save as otherwise provided in this Act, sections 2 to 65 shall be deemed to have come into force on the 1st day of April, 2004.”*

By section 11 of the aforesaid Act, Clause (ia) was added to Section 40 of the Income Tax Act. Section 40 provides for the amounts not deductible. To the long list of “not deductible amounts”, an addition was made by Clause (ia) which reads as follows:

(ia) any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200:”

The question for consideration is whether, a sum of Rs.4,30,386/- paid by the assessee to a contractor, during the previous year ended on 31st March, 2005 is deductible ? The learned Tribunal has answered the question in the negative. It is against this order of the learned Tribunal, the assessee has come up in appeal.

Mr.Bharadwaj, learned advocate appearing for the assessee/appellant submitted that sub-section 2 of section 1 of the Amendment Act provides that the law shall be deemed to have come into force on 1st April, 2004 except as otherwise provided. Clause (ia) was added to Section 40 by Section 11 of the aforesaid Finance Act of 2004. Section 11 provides that the law shall be deemed to come into effect on 1st April, 2005. He contended that the authorities below were wrong in not allowing deduction for the sum of Rs.4,30,386/-, paid by the assessee to a contractor, due to omission on the part of the assessee to deduct tax. The omission to deduct tax became subject to the penal consequence under section 40 only with effect from 1st April, 2005. Therefore, any omission prior to 1st April, 2005 could not have visited the assessee with any penal consequences. He relied on a judgement in the case of *CIT v. Hindustan Electro Graphites Ltd* , reported in (2000) 243 ITR 48 (SC). What had happened in that case was that the return for the assessment year 1989-90 was filed by the assessee in December, 1989. The Finance Bill, 1990 got presidential assent on 31st May, 1990 and was made applicable retrospectively with effect from 1st April, 1967. By the amendment cash assistance was made taxable. Since the assessee who had received cash assistance from the Government and had not offered the amount for taxation, the assessing officer treated the amount of cash assistance as an additional income under section 143(1)(A) and levied the amount of tax at a higher rate and also charged consequential interest. The

Tribunal reversed that order. The High Court upheld that order. In an appeal, the Supreme Court held as follows :

“If additional tax could be levied in such circumstances, it will be punishing the assessee for no fault of his. That cannot ever be the legislative intent. It shocks the very conscience if in the circumstances section 143(1A) could be invoked to levy the additional tax. The following observations by the Constitution Bench of this court in Pannalal Binjraj v. Union of India [1957] 31 ITR 565 are apt. (page 597):

“ A humane and considerate administration of the relevant provisions of the Income-tax Act would go a long way in allaying the apprehensions of the assesseees and if that is done in the true spirit, no assessee will be in a position to charge the Revenue with administering the provisions of the Act with an evil eye and unequal hand’.”

Mr.Agarwal, learned advocate appearing for the revenue submitted that the judgement cited by Mr.Bharadwaj has no manner of application, nor does the judgement, he contended, help the assessee. It has been laid down in the aforesaid judgement that the law applicable is the law on the date of filing of the return. He submitted that on the date of filing of the return, the law had already come into force. Therefore, as regards applicability of the law there can be no doubt. He also drew our attention to section 4 of the Income Tax Act which provides as follows :

4. *(1) 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.*
- (2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.”*

Mr. Agarwal's criticism is not without force but he has not been able to point out as to how could the assessee have come to know that the omission to deduct tax from any payment made to a contractor shall become not deductible under section 40 before the Finance Act 2004 got presidential assent on 10th September, 2004. This question he has not answered because he has no answer to offer.

Admittedly, the Finance Act, 2004 got presidential assent on 10th September, 2004. The assessee could not have foreseen prior to 10th September, 2004 that any amount paid to a contractor without deducting tax at source was likely to become not deductible under Section 40. It is difficult to assume that the legislature was not aware or did not foresee the aforesaid predicament. The legislature therefore provided that the act shall become operative on 1st April, 2005. Any other interpretation shall amount to “punishing

the assessee for no fault of his” following the judgment in the case of Hindusthan Elector Graphites Ltd. [supra].

On the top of that, Section 4 relied upon by Mr. Agarwal merely provides for an enactment as regards rate of tax to be charged in any particular assessment year which has no application to the case before us. Section 11 of the Finance Act by which Clause (ia) was added to Section 40 of the Income Tax Act does not provide that the same was to become effective from the assessment year 2005-06. It merely says it shall become effective on 1st April, 2005 which for reasons already discussed should mean to refer to the financial year. There is, as such, no scope for any ambiguity nor is there any scope for confusion. Even in a case where there is any ambiguity, law in that regard was noticed by the Supreme court in the case of *CIT (Central)-I vs. Vatika Township Pvt.Ltd., reported in (2014) 367 ITR 466 (SC)*, as follows :

“Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax. In *Billings v. U.S.* (232 U.S. 261, S.Ct. 421 (1914)), the Supreme Court clearly acknowledged this basic and longstanding rule of statutory construction :

“ *Tax Statutes ... should be strictly construed, and, if any ambiguity be found to exist, it must be resolved in favor of the citizen. Eidman v. Martinez, 184 U.S. 578, 583; United States v. Wigglesworth, 2 Story, 369, 374; Mutual Benefit Life Ins. Co.*

v. Herod, 198 F. 199, 201, *aff'd* 201 F. 918; *Parkview Bldg. Assn. v. Herod*, 203 F. 876, 880; *Mutual Trust Co. v. Miller*, 177 N.Y. 51, 57.”

Again, in *United States v. Merriam* (263 U.S. 179, 44 S. Ct.69 (1923), the Supreme Court clearly stated at pp. 187-88:

“ On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. *Gould v. Gould*, 245 U.S. 151, 153.”

We are of the opinion that the learned Tribunal erred in applying provision of section 40(a)(ia) in disallowing payment of a sum of Rs.4,30,386/- to a contractor without deducting TDS during the financial year 2004-05, corresponding to assessment year 2005-06.

In that view of the matter, the question formulated is answered in the affirmative and in favour of the assessee.

The appeal is, thus, allowed.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)