IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.VASHA

THURSDAY, THE 30TH DAY OF JUNE 2016/9TH ASHADHA, 1938

ITA.No. 58 of 2013
AGAINST THE ORDER IN ITA 325/2010 of I.T.A.TRIBUNAL, COCHIN BENCH, DATED 20-07-2012

APPELLANT/RESPONDENT:-:

THE COMMISSIONER OF INCOME TAX,
KOTTAYAM.

BY ADVS.SRI.P.K.R.MENON,SR.COUNSEL, GOI (TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/APPELLANT:-:

SHRI.T.TKURUVILLA,
ALLEPPEY PARCEL SERVICE,
VAZHICHERRY JUNCTION,
ALAPPUZHA.

R1 BY ADV. SRI.T.M.SREEDHARAN (SR.)
R1 BY ADV. SRI.V.P.NARAYANAN
R1 BY ADV. SMT.BOBY M.SEKHAR
R1 BY ADV. SMT.DIVYA RAVINDRAN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 30-06-2016 ALONG WITH I.T.A.NOS.77 & 109 OF 2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ITA.No. 58 of 2013

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A: ASSESSMENT ORDER U/S 143(3) DATED 26-12-2008.

ANNEXURE B: CIT (APPEALS) ORDER NO.ITA-34/APY/CIT(A)-IV/KTM/08-09 DT.30-4-2010.

ANNEXURE C: ITAT'S ORDER NO.325/COCH/2010 DT.20-7-2012.

ANNEXURE D1: ORDER OF THE SPECIAL BENCH OF VISHAKAPATANAM TRIBUNAL.

ANNEXURE D2: ORDER OF THE CALCUTTA BENCH OF THE TRIBUNAL.

// TRUE COPY //

P.A. TO JUDGE

ANTONY DOMINIC & P.V.ASHA, JJ.

- -

I.T.A.Nos.58, 77 & 109 of 2013

- -

Dated this the 30th day of June, 2016

JUDGMENT

Antony Dominic, J.

These appeals are filed by the Revenue challenging the orders of the Income Tax Appellate Tribunal, Cochin Bench in ITA Nos.325/10, 400/11 and 401/11. The assessment year relevant for these cases is 2006-2007.

2. The common facts of the case are that the assessees filed the appeals aggrieved by the order passed by the Commissioner of Income Tax (Appeals) upholding the additions made by the Assessing Officer on freight payments, under Section 40a(ia) of the Income Tax Act. This was on the ground that the assessee did not deduct tax at source on the freight charges paid by them. Accepting the contention of the assessees that the payment in question were made in the previous year and that, therefore, Section 40a(ia) was inapplicable, the Tribunal allowed the appeals. The acceptance of

the aforesaid contention of the assessees was on the basis that the Special Bench of the Tribunal itself in the case of *Merilyn Shipping & Transport v. Addl. Commissioner of Income Tax (2012) 70 DTR 81* had accepted the said contention. It is aggrieved by these orders of the Tribunal, the Revenue has filed these appeals.

3. We heard the Senior Counsel for the Revenue, learned Senior Counsel appearing for the assessee in ITA 58/13 and the learned counsel for the assessee in the other two cases.

4. The question of law raised in these appeals is whether the Tribunal was correct in holding that Section 40a(ia) was inapplicable since the payments were made by the assessees in the previous year. Insofar as this question raised is concerned, as we have already stated, the only basis on which the Tribunal has allowed the appeals is the order passed by the Special Bench of the Tribunal in *Merilyn Shipping & Transport case (supra)*. This order

passed by the Tribunal has already been held to be incorrect by the Gujarat High Court in the judgment *Commissioner of Income Tax v. Sikandarkhan N. Tunvar [2013] 357 ITR 312 (Guj).* Considering an almost similar case, this court has followed the Gujarat High Court judgment in the judgment in the I.T.A.No.278/14, where this court held thus:

> *"Another contention that was pressed into service was that the appellants had already paid the amount and therefore, the provisions of Section 40(a)(ia), applicable only in respect of the amount which remains to be payable on the last day of the financial year, is not attracted. Therefore, according to the appellants, disallowance cannot be sustained. This contention was sought to be substantiated by relying on the judgment of the Allahabad High Court in* ***Commissioner of Income Tax*** *v.* ***Vector Shipping Services (P)*** *[(2013) 357 ITR 642 (All)]. Primarily, this contention should be answered with reference to the language used in the statutory provision. Section 40(a)(ia) makes it clear that the consequence of disallowance is attracted when an individual, who is liable to deduct tax on any interest payable to a resident on which tax is deductible at source, commits default. The language of the Section does not warrant an interpretation that it is*

> *attracted only if the interest remains payable on the last day of the financial year. If this contention is to be accepted, this Court will have to alter the language of Section 40(a) (ia) and such an interpretation is not permissible. This view that we have taken is supported by judgments of the Calcutta High Court in* ***Crescent Exports Syndicate and another*** *[**ITAT 20 of 2013**] and the Gujarat High Court in the case of* ***Commissioner of Income Tax*** *v.* ***Sikandadarkhan N Tunvar*** *[ITA Nos.905 of 2012 & connected cases], which have been relied on by the Tribunal.*

5. This itself shows that the order passed by the Tribunal placing reliance entirely on the judgment in the *Merilyn Shipping & Transport case (supra)* is unsustainable and has to be reversed.

6. The assessees placed reliance on Section 194(C)(3) as it stood prior to its substitution by Finance Act 2 of 2009 and according to the assessees, going by the said provision they had no liability to deduct tax. However, we find that such a contention was

not raised or considered by the Tribunal and, therefore, we are not inclined to consider the contention now urged before us.

7. According to us, having regard to the judgment of the Gujarat High Court in *Merilyn Shipping & Transport case (supra)* and the judgment of this court in I.T.A.No.278/14, the orders of the Tribunal has to be set aside and the matter has to be remitted to the Tribunal for fresh consideration. It is also clarified that if the assessees so desire, it would be open to them to claim the benefit of Section 194(C)(3) as it stood prior to its substitution by Finance Act 2009 before the Tribunal, if necessary by producing additional materials also. It is also ordered that on consideration of the said contention, if the Tribunal finds that factual adjudication is necessary, it would be open to the Tribunal to remit the matter to the Assessing Officer for reconsideration.

8. Accordingly, setting aside the orders passed by the Tribunal in ITA Nos.325/10, 400/11 and 401/11 and answering the question of law raised in favour of the Revenue, these appeals are disposed of remitting the matter to the Tribunal for fresh consideration. The Tribunal shall consider the matter in the light of the aforesaid observations and pass fresh orders.

Appeals are disposed of.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
P.V.ASHA
JUDGE

jes