

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF FEBRUARY 2016

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA

ITA No.551/2015

BETWEEN

1. COMMISSIONER OF INCOME
TAX, C.R.BUILDING, QUEENS ROAD,
BANGALORE
2. DEPUTY COMMISSIONER OF
INCOME -TAX,
CIRCLE-12 (3),
BANGALORE

... APPELLANTS

(BY SRI.E I.SANMATHI, ADVOCATE)

AND

SRI SCORPIO ENGINEERING P.LTD.,
NO.132, 3RD FLOOR, WHEELER
ROAD, COX TOWN,
BANGALORE-560005,
PAN:AABCS8783N

... RESPONDENT

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:15/05/2014 PASSED IN ITA NO.711/BANG/2014, FOR THE ASSESSMENT YEAR 2005-2006 PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND/OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE APPELLATE ORDER DATED: 15/05/2014 PASSED BY THE ITAT, 'C', BENCH, BENGALURU, IN APPEAL PROCEEDINGS NO. ITA NO. 711/BANG/2014 FOR ASSESSMENT YEAR 2005-06 AS SOUGHT IN THIS APPEAL.

THIS APPEAL COMING ON FOR ADMISSION THIS DAY, **JAYANT PATEL J.**, DELIVERED THE FOLLOWING:

JUDGMENT

The appellant-revenue has preferred the present appeal by raising following substantial questions of law:

“Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the amendment to the provisions of section 40(a)(ia) of the Act, by the Finance Act, 2010, is retrospective from 01.04.2005, by relying on its earlier decision which has not reached finality and when it is expressly stated in the

Finance Act 2010 that the amendment is with effect from 01.04.2010?”

2. We have heard Mr.Sanmathi E.I, learned counsel appearing for the appellant-Revenue. It appears that the Tribunal while considering the contention of the appellant, at paragraph-6, 7 and 8 it has observed thus:

“6. We have perused the orders and heard the Ld. DR. Hon’ble jurisdictional High Court in the case of CIT v. Shri. Santhosh Kumar Shetty [(2014) 89 CCH 199] held as under at para 5 to 8 of its order:

5. The argument of the Revenue is, when the Finance Act, 2010, expressly states that the said provision would come into effect from 01.04.2010, it is not permissible for the Tribunals or the Courts to give it a retrospective effect prior to the date and therefore, it is submitted that the order passed by the Tribunal holding it as retrospective notwithstanding the fact that the parliament made its intention clear by declaring that it comes into effect from 01.04.2010. Therefore, the impugned orders are liable to be set aside.

6. The question came up for consideration before the Gujarat High Court in the case of **Commissioner of Income Tax, Ahmedabad IV Vs. Om Prakash R Chaudhary** in Tax Appeal Nos.412/2013 and connected matter, which came to be decided on 22.11.2013, **after referring to the judgments of** Alide Motors (P.) Ltd. Vs. CIT reported in AIR 1997 SC 1361 **and** CIT Vs. Alom Extrusions Limited reported in (2009) 319 ITR 306, **has held as under:**

“15.4: Thus, considering relevant legislative changes made by the Parliament from time to time and some of the decisions relevant to consider the question of retrospectivity raised in these present appeals, the focal question, therefore, would be whether the amendment brought about by way of Finance Act 2010 in Section 40 [a](ia) with effect from 1st April 2010 could be said to be clarificatory in nature for attending to unintended consequences, and therefore, is having retrospective effect from 1st April 2005.

16: A closer examination needs to be done as to whether the amended provision aims to expand the prevailing position and whether the same being in the nature of curative, retrospectivity of the same is permissible as is being contended for and on behalf of the assessee. At this stage, therefore, the true

effect of such amendment needs to be discerned.

16.1:It is demonstrated before us that the TDS provision caused unintended inexplicable situation whereby the assessee who deducted the tax at source from the payments made by it for and on behalf of the Government and then if misses out the time limit of depositing the same with the Treasury within the time prescribed, the amount spent for its business purposes on account of the late deposit of such tax would result into disallowance of entire expenditure under Section 40[a](ia). The said proviso thereby caused immense hardship. The amendment under consideration made by the Finance Act 2010 relaxes the rigors of such provision by permitting payment of Tax till the filing of return as provided under sub-section (1) of Section 139 of the Act.

16.2:One can notice that the object of bringing about provision of Section 40(a)(ia) in the year 2005-06 was to augment compliance of TDS provision. TDS either not deducted or deducted but not paid in respect of payment of interest, commission or brokerage etc., before the expiry of time prescribed under sub-section (1) of Section 200 and in accordance with the other provisions of Chapter XVII, such amount shall not be deducted in computing the 'income' chargeable under the head 'Profit &

Gains' of business or profession. Such provision starts with non obstante clause which states that notwithstanding anything contained in Section 30 to 38 of the Income-tax Act, if the tax deducted at source is not paid within prescribed time [under Section 200 (1)], no amount could be deducted while computing the income, under Chapter IV of the 'computation of business income'.

16.3:Therefore, by way of amendment of Finance Act, 2008, further amendment was made whereby TDS deductible and deducted in the last month of previous year if was not paid till the due date of filing of return under sub-section (1) of Section 139 and in any other case, on or before the last day of the previous year, Section 40(a)(ia) provided for the disallowance of expenses like interest, commission, brokerage, etc.

16.4:Since, this had created anomaly whereby tax deducted in the last month was permitted payment till filing of return as per sub-section (1) of Section 139 whereas for the TDS deducted during the rest of the months, period was provided only till 31st March of the previous year, Finance Act, 2010 was brought. To bring parity, to remedy unintended consequences and to make the provision workable, it proposed to amend the said provision and provided inter alia that no disallowance would be made if after deduction of tax during the previous

year, the same has been paid on or before the due date of filing of return of income as specified in sub-section (1) of Section 139. This has been given retrospective effect from 1st April 2010.

16.5:Of course. the Legislature has given the effect from a specified date and applied the same to A.Y. 2010-11 and subsequent years, this provision being curative in nature, its effect needs to be read retrospectively in operation. Its very purpose would not be sub-served, if the effect is limited to A.Y.2010.11 and subsequent years only. Strict construction if leads to a result not intended to be fulfilled by the object of legislation and another construction is possible apart from literal construction, then that construction needs to be preferred as held in a decision in case of CIT V. Alom Extrusion Limited [Supra].

16.6:We also cannot be oblivious of submissions not denied by the other side that various representations were made to the Finance Minister to bring about suitable amendment as the assessee otherwise was losing genuine deduction of expenditure on this count as also reflected in the speech of Finance Minister so also in the memorandum explaining the provision of the Finance Bill.

16.7: Giving plain or natural meaning to the amendment as contended by the Department, if it is likely to create a situation enhancing the hardship and advance discrimination, purposive and reasonable interpretation is required to be given by the Court. When plain interpretation frustrates the very legislative intent, the Court is expected to bear in mind the legislative intent from the language used in the statute with the help of permissible tools of interpretation of statute.

17: The core issue as to whether the amendment made by the Finance Act 2010 of Section 40[a](ia) of the Act is retrospective from the date of insertion of the provision i.e., 1st April 2005 therefore needs to be answered in affirmation. It can be seen that the amendment made by the Finance Act 2010 allows additional time upto the due date of filing of the return in respect of even those instances where TDS has been deducted during the first eleven months of the previous year. The additional time till the due date of filing of the return, in case of TDS made during the last month of the previous year was already available by the amendment made by Finance Act 2008. Thus, it is apparent that the relaxation made by the amendment made under the Finance Act, 2010 brings the law in parity with the aforementioned situation and accordingly, for the TDS deducted all throughout the

year, time is extended from payment till the filing of return. It is thus apparent that when the amendment introduced by the Finance Act, 2008 of relaxing the time for deposit of TDS was made retrospective from the year 2005 [1st April 2005], the amendment by Finance Act 2010 with regard to other limb of time limit for payment of TDS has to be held, retrospective not from 1st April 2010 only. If we recall at this stage the speech of Finance Minister while introducing this provision by way of Finance Act, 2010, this amendment essentially has been brought for relaxing the current provision on disallowance of expenditure. The tax, if it is deducted at any time during the financial year and paid before the date of filing of the return, the Legislature intended to allow deduction on such expenditure with an intention to permit additional time for most deductors upto September of the next financial year.

17.1: We draw further support from the fact that the rigor of payment of interest is also enhanced by increasing the interest charged on tax deducted, if any deposit by the specified date i.e., up to the filing of the return is not made from 12% to 18% per annum in the provision of Section 201 (1A). Prior to the said amendment of Finance Act, 2010 under Section 201 (1A), assessee was liable to pay simple interest at one per cent for every month or part of month, in case of

failure to deduct tax on payment of deducted tax, increase is made correspondingly from one per cent to one and half per cent for every month or part of month for discouraging delay in deposit.

As rightly contended by the respondents arithmetical discrepancy can be well judged from the face that the rates of TDS may vary between 1% to 10%, whereas, legitimate business expenditure denied is 100% - resulting into taxation of gross receipts coupled with levy of interest and penalty, which would mean that the possibility cannot be ruled out of business of the tax payer getting closed down permanently, if there is absence of any scope of claiming any expenses in the next year.

7. Similar is the view expressed by the Delhi High Court in the cases of CIT Vs. Oracle Software India Limited reported in 293 ITR page 253, H.S.Mohindra Traders Vs. I.T.O., Ward 39 (2), New Delhi and Calcutta High Court in the case of CIT Vs. Virgin Creations.

8. We are in the respectful agreement with the view expressed by the Gujarat High Court in giving retrospective operation to the said amendment notwithstanding that the parliament has expressly stated that it comes into effect from 01.04.2010. The said amendment is curative in nature. The

tribunal committed an error in holding it as prospective. The substantial questions of law is answered in favour of the assessee and against the revenue.

3. The aforesaid shows that, the question was already covered by the decision of this Court in case of CIT Vs. Shri Santosh Kumar Shetty (2014) 89 CCH 199.

4. Once the Tribunal has followed the decision of this Court, we do not see any substantial question of law which would arise for consideration. However, learned counsel for the appellant-revenue did contend that, subsequently, similar view taken by this Court in case of Uday Kumar ITA 590/13 is carried before the Apex Court and therefore, the issue has not yet been concluded.

5. In our view, as on today, the decision of this Court operates and therefore, it cannot be said that

substantial questions of law would arise for consideration in the present appeal. However, if the Apex Court takes a different view, the appellant may be in a position to take appropriate proceedings in accordance with law and at that stage, rights and contentions of both sides shall remain open.

Subject to the abovesaid observation, the present appeal need not be entertained. Hence, it is dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

Sk/-