IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

MONDAY, THE 20TH DAY OF JULY 2015/29TH ASHADHA, 1937

ITA.No. 16 of 2014

AGAINST THE ORDER IN ITA 572/2011 of I.T.A.TRIBUNAL,COCHIN BENCH, DATED 16-08-2013

APPELLANT:

THE COMMISSIONER OF INCOME TAX-1,
KOCHI.

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

RESPONDENT/APPELLANT:

M/S. P V S MEMORIAL HOSPITAL LTD
KALOOR, KOCHI-682017.

R1 BY ADV. SRI.P.BALAKRISHNAN (E)
R1 BY ADV. SRI.MOHAN PULIKKAL
R1 BY ADV. SRI.P.P.NARAYANAN
R1 BY ADV. SRI.R.ANAS MUHAMMED SHAMNAD

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 20-07-2015, ALONG WITH ITA. 2/2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A: COPY OF THE ASSESSMENT ORDER UNDER SECTION 143(3) DATED 4.12.2008 PASSED BY THE ASSESSING OFFICER FOR AY 2006-2007.

ANNEXURE B: COPY OF THE CIT(A)'S ORDER NO.ITA/86/R-11/E/CIT (A)-II/08-09 DATED 25.7.2011.

ANNEXURE C: CERTIFIED COPY OF THE ITAT'S ORDER ITA NO.572/COCH/2011 DATED 16-8-2013 FOR ASSESSMENT YEAR 2006-2007.

ANNEXURE D: TRUE COPY OF THE ORDER OF THE HON'BLE HIGH COURT OF CALCUTTA IN THE CASE OF THE DY. CIT VS. SK TEKRIWAL DATED 3.12.2012 (ITA NO.183 OF 2012).

// TRUE COPY //

P.A. TO JUDGE

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

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I.T.A.Nos.2 of 2012 & 16 of 2014

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Dated this the 20th day of July, 2015

JUDGMENT

Antony Dominic, J.

ITA 2/12 is filed by the assessee challenging the order of the Tribunal in ITA 874/08 concerning the assessment year 2005-2006. The assessee, a hospital, had entered into Annexure D agreement dated 19th August 2002 with M/S Lakeshore Hospital and Research Centre Limited by which, the latter had undertaken to perform various professional services in the assessee's hospital. On the payments made during the assessment years 2005-2006, the assessee deducted tax at the rate of 2% under Section 194C. However, assessment was completed on the basis that tax deductible was at 5% as prescribed under Section 194J and the entire tax in this regard was disallowed under Section 40(a)(ia)of Act. First Appellate Authority confirmed the assessment and the Tribunal also rejected the appeal filed by the assessee concerning the assessment year 2005-2006.

2. In ITA 572/11 filed against the order of assessment for the assessment year 2006-2007, the assessment order applying tax at the rate

of 5% prescribed under Section 194J was upheld. Thereafter, following the Calcutta High Court judgment in *Commissioner of Income Tax v. S.K.Tekriwal [2014] 361 ITR 432 (Cal)*, the Tribunal held that the conditions laid down under Section 40(a)(ia) of the Act for making addition is that tax is deductible at source and such tax has not been deducted. According to the Tribunal, if both the conditions are satisfied, then such payment can be disallowed under Section 40(a)(ia) of the Act. It was also held that where tax is deducted by the assessee, even if it is under a wrong provision of law, as in this case, the provisions of Section 40(a)(ia) of the Act cannot be invoked. According to the Tribunal, in such a case, the recourse available to the Revenue is to declare the assessee as an assessee in default under Section 201 of the Act and proceed accordingly. Applying the Culcutta High Court judgment, Tribunal held the issue regarding the application of Section 40(a)(ia) of the Act in favour of the assessee. It is challenging this order of the Tribunal that the Revenue has filed ITA 16/14.

3. The first question that arises for consideration is regarding the appropriate Section under which TDS has to be deducted.

4. Annexure D in ITA 2/12 is the agreement dated 19th August 2002 entered into between the assessee and M/S Lakeshore Hospital and Research Centre. Clauses 1, 4 and 5 of the agreement, being relevant, reads thus:

> *1. The second party hereby undertakes to run the Gastroenterology, Gastrointestinal Surgery, Urology, Nephrology and Anaesthesiology departments of the First Party as provided herein below for a period of three (3) years from the date of starting the Second Party's Hospital which is expected to be on 1st September, 2002.*
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> *4. Gastroenterology and G1 Surgery team headed by Dr.Philip Augustine and Dr.H.Ramesh respectively together with the Consultants in the said Departments i.e., Dr.Mathew Philip. Dr.G.N.Ramesh, Dr.Roy J. Mukkada, Dr.Deepak Varma, Dr.A.Venugopal, Dr.Lekha, Dr.George Jacob etc. the Urology team headed by Dr.George P.Abraham, the Nephrology team headed by Dr.Mohan A Mathew would continue to extent their professional services on behalf of the Second Party to the First Party, for a period of three (3) years from the date of their joining the Second Party or till such time as they are in the services of the Second Party by regular visitations and attending to surgeries, conducting procedures, and other medical services at the Hospital of the First Party as required for maintaining and improving the overall services and facilities of these departments in the First Party.*
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> *5. Who among the various Members of the respective Teams should attend at the First Party's Hospital by turn and the timings of their visit will be as mutually agreed to among the parties hereto.*

5. As per these provisions of the agreement, M/S Lakeshore Hospital and Research Centre had undertaken to render professional services to the assessee and this was not a case where they were undertaking a contract work. If that be so, tax was deductible under Section 194J and not under Section 194C as done by the assessee.

6. The second question is regarding the applicability of Section 40 (a)(ia) of the Act. The Section 40(a)(ia) as it stood at the relevant time reads thus:

> *"(ia) any interest, commission or brokerage, rent, royalty, fees or 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 time prescribed under sub section (1) of Section 200."*

7. Reading of this provision shows that any fees or professional services or fees for technical services payable to a resident '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 Section 200(1) of the Act, this provision is attracted.

8. This provision is attracted in cases where fee for professional services or technical services is 'payable' on which tax is 'deductible at source' and 'such tax' has not been deducted or after deduction not paid. As rightly contended by the Senior Standing Counsel for the Revenue, provision of Section 40(a)(ia) (supra) is not a charging Section but is a machinery Section and such a provision should be understood in such a manner that the provision is workable. It has been so held by the Apex Court in its judgment in *Gurusahai Saigal v. Commissioner of Income Tax, Punjab [ITR (XLVIII - 1963)]* which reads thus:

> *Now it is well recognised that the rule of construction on which the assessee relies applies only to a taxing provision and has no application to all provisions in a taxing statute. It does not, for example, apply to a provision not creating a charge for the tax but laying down the machinery for its calculation or procedure for its collection. The provisions in a taxing statute dealing with machinery for assessment have to be construed by the ordinary rules of construction, that is to say, in accordance with the clear intention of the legislature which is to make a charge levied effective. Reference may be made to a few cases laying down this distinction. In Commissioner of Income tax v. Mahaliram Ramjidas it was said:*

"The section, although it is part of a taxing Act, imposes no charge on the subject, and deals merely with the machinery of assessment. In interpreting provisions of this kind the rule is that that construction should be preferred which makes the machinery workable, ut res valeat potius quam pereat."

In India United Mills Ltd. v. Commissioner of Excess Profits Tax this court observed:

"That section is, it should be emphasised, not a charging section, but a machinery section and a machinery section should be so construed as to effectuate the charging sections."

9. If Section 40(a)(ia) is understood in the manner as laid down by the Apex Court, it can be seen that the expression "tax deductible at source under Chapter XVII-B" occurring in the Section has to be understood as tax deductible at source under the appropriate provision of Chapter XVII-B. Therefore, as in this case, if tax is deductible under Section 194J but is deducted under Section 194C, such a deduction would not satisfy the requirements of Section 40(a)(ia). The latter part of this Section that such tax has not been deducted, again refers to the tax deducted under the appropriate provision of Chapter XVII-B. Thus, a cumulative reading of this provision, therefore, shows that deduction under a wrong provision of law will not save an assessee from Section

40(a)(ia).

10. In so far as the judgment of the Calcutta High Court in *Commissioner of Income Tax v. S.K.Tekriwal [2014] 361 ITR 432 (Cal),* which was relied on by the Tribunal is concerned, with great respect, for the aforesaid reasons, we are unable to agree with the views that if tax is deducted even under a wrong provision of law, Section 40(a)(ia) cannot be invoked.

11. Therefore, we confirm the order passed by the Tribunal, which is challenged by the assessee in ITA 2/12 concerning the assessment order 2005-2006, and set aside the order of the Tribunal, which is challenged by the Revenue in ITA 16/14 concerning the assessment year 2006-27, answering the questions of law in favour of the Revenue.

ITA 2/12 is dismissed and ITA 16/14 is allowed.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

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