IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 1066 of 2014

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COMMISSIONER OF INCOME TAX II....Appellant(s)

Versus

KARNAVATI INFRASTRUCTURE PVT. LTD.....Opponent(s)

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Appearance:

Mrs. MAUNA M BHATT, ADVOCATE for the Appellant(s) No. 1

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CORAM: HONOURABLE Ms. JUSTICE HARSHA DEVANI
and
HONOURABLE Ms. JUSTICE SONIA GOKANI

22nd September 2014

ORAL ORDER (PER : HONOURABLE Ms. JUSTICE HARSHA DEVANI)

This appeal under section 260A of the Income-tax Act, 1961 [hereinafter referred to as, "the Act"] at the instance of the revenue is directed against the order dated 11th April 2014 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench "C" [hereinafter referred to as, "the Tribunal"] by proposing the following three questions stated to be substantial questions of law :

> "{A} "Whether the Appellate Tribunal has substantially erred in upholding the decision of the CIT (A) to delete the disallowance of Rs. 77,67,754/- claimed as "work penalty expenses" which actually was interest expenses liable to provisions of TDS and hence, non compliance thereof was liable to disallowance under section 40 (a)(ia) of the Act ?"
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> {B} "Whether the Appellate Tribunal is right in law and on facts

to ignore the cross account filed by Unitech showing the amount in question as interest?"

{C} "Whether the Appellate Tribunal is right in law and on facts to ignore the fact that the subsequent certificate filed by assessee from Unitech Ltd was not supported by any evidence?"

2. The assessment year is 2005-06 and the relevant accounting period is the financial year 2004-05. In the original assessment proceedings, the Assessing Officer passed an order under section 143 (3) of the Act and made an addition of Rs. 77,67,754/- under section 40 (a)(ia) of the Act on account of non deduction of TDS on interest payment made to M/s. Unitech Limited on the ground that from the record, it had been noticed that during the period under consideration, the assessee was a sub-contractor of M/s. Unitech [the principal contractor] for Kodadara-Bajipura road and the payment was made to M/s. Unitech without deduction of TDS. The Commissioner (Appeals) upheld the addition. In further appeal, the Tribunal remanded the matter to the Assessing Officer to ascertain the basis for working of amount of Rs.64,91,913/- and Rs.12,75,840/- debited by Unitech Ltd. in their books and thereafter re-adjudicate the mater in accordance with law and in the event the amount is found to be in the nature of interest, to sustain such disallowance. In the second round of litigation, the Assessing Officer once again made disallowance. In appeal filed at the instance of the assessee, the Commissioner (Appeals) deleted the disallowance. Revenue's appeal against the order passed by the Commissioner (Appeals) came to be dismissed by the Tribunal.

4. Ms. Mauna Bhatt, learned senior standing counsel for the appellant,

assailed the impugned order by submitting that in the copy of accounts produced during the original assessment proceedings, the amount in question was shown by M/s. Unitech as interest expenses. Subsequently, a contention was raised that the sum represented the amount recovered due to settlement of claim, etc., which was not supported by any evidence. It was submitted that in the original appeal, the assessee had admitted that the amount in question was interest recovered by M/s. Unitech from the amounts payable to it. Moreover, from the record, it is evident that the amount deducted by M/s. Unitech from the bills payable to the assessee was deemed to have been paid by the assessee to M/s. Unitech, and therefore, the assessee was liable to deduct TDS under section 194C of the Act and accordingly, the amount was liable to be disallowed under section 140 (a)(ia) of the Act. It was further submitted that the assessee had itself shown that the payment had been made on account of interest and even if it is assumed that the payment was not made on account of interest, even then, the assessee was required to deduct the tax since payment was made on account of contractual liability.

5. As can be seen from the order passed by the Commissioner (Appeals), he, after appreciating the evidence on record has found that pursuant to the directions issued by the Tribunal, the Assessing Officer had issued notices to the assessee who had stated that they had made queries with M/s. Unitech in order to ascertain the true nature of the deductions made by them, pursuant to which, Unitech had informed them that such amount was recovered from the assessee on account of settlement of claims, extra efforts and miscellaneous expenses by

M/s. Unitech, which emanated on account of delay by the assessee in execution of Kodadara-Saijpura road project. The assessee had also submitted a copy of the memorandum of understanding between M/s. Unitech Limited and the assessee and had also filed before the Assessing Officer, detailed workings of recovery of Rs. 77,67,754/- from the assessee by M/s. Unitech Limited. The Commissioner (Appeals) found that the memorandum of understanding between the assessee and M/s. Unitech Limited did not provide for payment of any interest and as per the terms of the agreement, the entire work had to be completed by the assessee as per the terms of the contract entered into between M/s. Unitech and the main contractee and the assessee was required to indemnify M/s. Unitech Limited for any delay effect or other liability arising from non-performance or non-observance of the stipulation of the main contract. From the record of the case, the Commissioner (Appeals) found as a matter of fact that the amount in question was paid because of the extra costs that M/s. Unitech Limited had to incur on account of appellant having not completed the work taken on sub-contract from M/s. Unitech Limited. According to the Commissioner (Appeals), the Assessing Officer instead of examining the contents of the documents filed by M/s. Unitech Limited has brushed the same aside and held that the payment to M/s. Unitech Limited was interest only because it had been debited as such in the books of account of M/s. Unitech Limited. He further found that no efforts whatsoever had been made by the Assessing Officer to prove that the details filed by M/s. Unitech Limited or that the certificate that the payments made by the assessee were not interest, is wrong. The Commissioner (Appeals) was of the view that the assessee had no control whatsoever over the books of account for the accounting entries passed by M/s. Unitech Limited in its books of account and in the light of the memorandum of understanding between the assessee and M/s. Unitech Limited, which did not provide for levy of any interest, he held that the amount was not in the nature of interest, and hence, the appellant was not required to deduct any TDS on such amount and that there was no question of applying the provisions of section 40 (a)(ia) of the Act. The Tribunal has concurred with the findings recorded by the Commissioner (Appeals).

6. From the facts, as recorded by the Commissioner (Appeals), with which the Tribunal has concurred, it is apparent that the amount in question was paid because of the extra costs that M/s. Unitech had to incur because the assessee could not complete the work taken on sub-contract from M/s. Unitech Limited. Substantial evidence was produced by the assessee in support of its case. The Commissioner (Appeals) has discussed the material on record at length and in great detail. The Tribunal has concurred with the findings of fact recorded by the Commissioner (Appeals). Thus, the conclusion arrived at by the Tribunal, is based upon concurrent findings of fact recorded by it after appreciating the evidence on record. On behalf of the appellant nothing has been pointed out to dislodge the findings of fact recorded by the Tribunal, nor is it the case of the revenue that the Tribunal has taken into consideration any irrelevant material of that any relevant material has been ignored. Under the circumstances, the impugned order being based upon concurrent findings of fact recorded by the Tribunal, in the absence of any perversity being pointed out in the findings

recorded by the Tribunal, no question of law, much less, a substantial question of law can be said to arise therefrom, so as to warrant interference.

7. The appeal, therefore, fails and is, accordingly, summarily dismissed.

{Harsha Devani, J.}

{Ms. Sonia Gokani, J.}

Prakash*