IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.06.2012

CORAM:

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN
and
THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Tax Case (Appeal) Nos.1409 to 1412 of 2005

Chennai Port Trust
Rajaji Salai
Chennai-600 001. .. Appellant in all these TCs

versus

The Income Tax Officer
T.D.S. VIII
Shafikha Building
No.7, Kodambakkam High Road
Chennai-600 034. .. Respondent in all these TCs

PRAYER: Tax Case (Appeal) Nos.1409 to 1412 of 2005 are filed under Section 201(A) of the Income Tax Act against the order of the Income Tax Appellate Tribunal dated 23.01.2003 made in I.T.A.Nos.816 to 819/Mds/2002.

For appellant in all these TC(A)s : Dr.Anita Sumanth

For respondent in all these TC(A)s : Mr.K.R.Ravikumar
Standing Counsel for Income Tax

JUDGMENT

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J.)

The following is the substantial question of law raised by the assessee in the Tax Case Appeals filed against the order of the Tribunal:

" Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that the joint venture of H.C.C. Ltd and Van Oord ACZ (VOACZ) is not an Association of Persons and the payment made to the joint venture should be treated as a payment made to the foreign company and tax deducted at source on that basis?

2. The assessee - Chennai Port Trust floated a tender for the breakwater construction project at Ennore Port. The contract was awarded to a joint venture of Hindustan Construction Company Ltd., a company registered under the Companies Act in India and Van Oord ACZ BV (VOACZ) of Netherlands. In respect of the execution of the work, the assessee deducted tax under Section 195C of the Income Tax Act at the rate of 2%, treating the joint venture as an Association of Persons. The deduction in the above manner was made for the assessment years 1998-99, 1999-2000 and 2000-2001.

3. It is seen from the documents placed before this Court that the foreign company Van Oord ACZ BV moved the Advance Ruling Authority under Section 245D for a decision as to its status in the context of the joint venture agreement vis-a-vis the agreement granted to the joint venture by Chennai Port Trust. The contract by the Port Trust was awarded on 22.08.1997. The foreign company Van Oord ACZ BV sought for a ruling as to whether the joint venture would constitute Association of Persons (AOP) within the meaning of Section 2(31)(v) so as to become liable for tax under the Income Tax Act, 1961 or each party of the joint venture is liable to tax on its own profits. By order dated 14.09.2000, the Advance Ruling Authority held that the status of the joint venture was not that of AOP and that the foreign company was liable to be assessed on its own profits.

4. Pursuant to the said order, the said foreign company made an application before the Deputy Commissioner of Income Tax dated 16th October 2000 and pointed out to the order of the Advance Ruling Authority that in view of the said decision, 10% of the receipt, payable as per Section 44BBB of the Act was offered as taxable income and that flat rate of 15% was chargeable on the interest earned on the Fixed Deposit as per Article 11 of the DTA between India and Netherlands. They also pointed out that the Chennai Port Trust had withheld the income tax under Section 194C from all the payments made, which included the portion of work carried out by the foreign company. Hence, it was entitled to claim credit of the proportionate share of the TDS made in the status of consortium. The original certificates, hence, would be filed along with the return of Hindustan Construction Company Limited who was entitled to 80% of the TDS. After claiming credit, the company had also remitted the balance tax.

5. While the matter stood thus, the assessee was stated to have been served with a show cause notice on 10.10.2000, taking the view that the deduction of tax under Section 194C on the payment made to the joint venture as though it was an AOP was incorrect. Hindustan Construction Company Ltd. being an Indian company, tax was to be deducted at the rate of 2% as per Section 194C. Considering the decision of the Advance Ruling Authority holding that the joint venture is not AOP, Chennai Port Trust was liable to deduct tax at source on the payment made to the foreign company as per Section 195(1); thus in respect of the clear terms of the joint venture agreement between the two companies, Chennai Port Trust had failed to deduct

tax as per Section 195(1); applying the decision of the Advance Ruling Authority that the joint venture was not AOP, there was a shortfall of deduction for the assessment years 1998-99, 1999-2000 and 2000-2001. Thus, the assessee was treated as one in default and hence, interest was levied under Section 201(1)(a) of the Income Tax Act.

6. The assessee objected to these proceedings, contending that going by the terms of the joint venture agreement between the companies and the award of contract under the agreement between the assessee company and the joint venture, the status of the joint venture was that of an AOP; hence, tax was also deducted on that basis. The Assessing Officer, however, rejected the proceedings and confirmed the levy of interest under Section 201(1)(a) of the Income Tax Act.

7. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who confirmed the order of the Assessing Officer. The assessee went on further appeal before the Tribunal, which, once again, confirmed the lower authorities' view. Hence, the present appeals.

8. A perusal of the order of the Tribunal shows that the assessee was responsible for the state of affairs in taking a decision that the status of the joint venture was to be taken in as an AOP for deduction at source as per Section 194C of the Income Tax Act. Even though the assessee was asked to deduct tax at the rate of 7.1%, it should have pursued the matter further before the same authority or before the higher administrative authority seeking clarification as to the correct rate at which tax had to be deducted at source. The Tribunal pointed out that the assessee was well aware that the contract work was awarded to a joint venture consisting of an Indian company and a foreign company and that the foreign company was a non-resident. Thus even though the contract payments were made through a joint venture account, it could not be said that no payment was made to the foreign company. Considering the terms of the agreement and the nature of work allotted, the Tribunal held that it was the responsibility of the assessee to have deducted the correct tax at source; consequently, it held that the Assessing Officer was justified in his action initiated under Section 201(1) and Section 201(1A) of the Income Tax Act.

9. It is seen from the records placed before this Court that the assessee moved an application before the Advance Ruling Authority under Section 245T of the Income Tax Act read with Rule 23 of the AAR (Procedure Rules), seeking recalling of the ruling given by the Authority, which was the basis for the proceedings under Section 201 and Section 201(1A).

10. The Advance Ruling Authority pointed out that the contention of the assessee that Van Oord ACZ BV, being a foreign company, was aware of the ruling of the AAR only when the Revenue relied on the decision of AAR 469/1999 dated 14.9.2000. Further, the Revenue filed before the Tribunal the copies of the returns filed by the foreign company in the letter addressed by the foreign company to ITO, TDS-VIII, Chennai, along with the return of the joint venture and the status of the joint venture was shown as AOP and a refund of Rs.3.24 crores was claimed. Form No.30 was signed by an authorised representative of the joint venture and the declaration

was dated 08.12.1999. Since these facts were not there before the AAR at the time of passing of the original order, the present assessee sought for recalling of the order that there was a misrepresentation. The Advance Ruling Authority passed an order on 29.04.2009 and rejected the assessee's petition that the order passed by the Advance Ruling Authority could not be said to have been obtained by fraud or misrepresentation. It observed that the document brought on record by the Port Trust showed its stand that the joint venture consisting of HCC and VOA was an AOP, resident in India. It also pointed out that the foreign company filed a return of income for 1998-99 on 25.11.1998 as a non-resident company and for 1999-2000, on 29.12.2000. It also filed a return showing the status of the joint venture as an AOP on 02.11.1998 before the Income Tax Officer, Ward-34, Mumbai, along with a return for claim of refund. The Authorised Representative for the foreign company also clarified that such application had to be filed to avoid the practical difficulty involved in the foreign company obtaining refund as a separate entity. The Advance Ruling Authority further pointed out that the return filed in the name of the joint venture as Association of Persons was invalid, it not being in the Saral form and it was wrongly filed in the status of Association of Persons. In order to clear the conflicts thus arising from the positions taken by the assessee on the one hand and the Department's stand on the other, the foreign company thus went before the Advance Ruling Authority for a decision. In the background of these facts, the Advance Ruling Authority held that there was no deliberate suppression of material facts as regards the non-filing of the return before the Department. In that context, the Advance Ruling Authority held that the order of the Advance Ruling Authority was not obtained by the foreign company by misrepresentation or fraud.

11. A reading of this order thus brings out two things very clear. The assessee had taken a consistent stand that the joint venture was to be assessed only as Association of Persons. For some reason, the foreign company filed its return originally as a non-resident company, which was followed subsequently by yet another return, which, no doubt, was in a form not conforming to Saral, making the status of the joint venture as Association of Persons. The claim for refund was made in the status of joint venture only and this was sought to be explained by the foreign company that it was done to avoid delay in getting its refund. The order of the Advance Ruling Authority thus clearly shows the conflicting and confused claims then persisting and absolutely, there was no action either from the foreign company, or for that matter, for the assessee herein, to approach the concerned authority for a ruling as to whether there should have been a TDS at all either under Section 194C or under Section 195 of the Income Tax Act. It was submitted that going by the understanding of the terms of the joint venture agreement between the companies and the contract awarded to the joint venture, the assessee entertained a bona fide belief that it was only a joint venture; hence, to be assessed as an Association of Persons, a course of action which could not be taken exception to. Even going by the order of the Tribunal, we see that much of a discussion was as to whether the joint venture could be taken as an Association of Persons or not. The assessee pointed out that at least till the Advance Ruling Authority passed an order, the Department itself did not deem it fit to reject the assessee's claim that the payments were made under Section 194C, treating the joint venture as Association of Persons. In the background of these circumstances, we hold that the reliance placed on the decision of the Apex Court reported in (2010) 232 CTR 317 (Commissioner of

Income Tax Vs. British Airways) in almost similar circumstances, comes to the aid of the assessee herein.

12. The Supreme Court observed that till the decision of the Apex Court reported in (2009) 312 ITR 225 (CIT Vs. Eli Lilly & Company (India) (P) Ltd.), there was a debate on the question as to whether TDS was deductible on foreign salary payment as a component of total salary paid to an expartriate working in India. In the face of such debatable issue, the assessee could not be declared as an assessee in default under Section 192 read with Section 201 of the Income Tax Act. Further, the Apex Court pointed out that since the foreign company-assessees therein had paid the differential tax and the interest and had further undertook not to claim refund for the amount paid, the Supreme Court held that the orders passed under Section 201(1) and 201(1A) could not be upheld. Applying the decision of the Apex Court to the case on hand, which we had already narrated in the preceding paragraph, with the debate on the status of the assessee existing at least till 2000 and the assessee not having any information as regards the order passed by the Advance Ruling Authority, we have no hesitation in accepting the plea of the assessee that the assessee herein could not be declared as an assessee in default for the purpose of interest under Section 201(1A) of the Income Tax Act. It may be of relevance to note herein that the assessee had deducted tax at 2%. The foreign company had paid tax under Section 44BBB at 4.8% and sought for a refund. Taking note of the decision of the Apex Court reported in (2009) 312 ITR 225 (CIT Vs. Eli Lilly & Company (India) (P) Ltd.) and the object underlying Section 201 to recover the taxes where there is a shortfall, it is but necessary to find out whether the foreign company had already remitted the tax as per Section 44BBB.

13. It is a matter of record that the foreign company had remitted tax as per Section 44BBB at 4.8% and had also sought for refund therein. In the light of the said decision, we hold that the assessee cannot be mulcted with any liability by way of interest to be charged under Section 201(1A). Thus, applying the decision reported in (2010) 232 CTR 317 (Commissioner of Income Tax Vs. British Airways), considering the consistent stand taken by the assessee and the parties to the agreement that the status of the joint venture was only Association of Persons, we hold that there could be no case for levying interest under Section 201(1A).

14. Even though the question of law raised before this Court reads as to whether the Income Tax Appellate Tribunal is right in law in holding that the joint venture of H.C.C. Ltd and Van Oord ACZ (VOACZ) is not an Association of Persons and the payment made to the joint venture should be treated as a payment made to the foreign company and tax deducted at source on that basis, yet, considering the above decision, we hold that with the decision of the Advance Ruling Authority available as to the status of the foreign company and the debate persisting on the said issue between the Department and the assessee, the assessee could not be declared as an assessee in default under Section 192 read with Section 201 of the Income Tax Act, to attract interest under Section 201(1A).

In the result, the Tax Case Appeals stand allowed. No costs.

Index: Yes / No (C.V.,J.) (K.R.C.B.,J.)

Internet: Yes / No 28.06.2012

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To

1. The Income Tax Appellate Tribunal, Chennai Bench 'B'.
2. The Commissioner of Income Tax Appeals, Chennai-34.
3. The Income Tax Officer TDS VIII, Chennai-34.

CHITRA VENKATARAMAN,J.

and

K.RAVICHANDRABAABU,J.

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1412 of 2005

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