OD-5

ITAT/376/2016
IA No.GA/1/2016 (Old No.GA/3344/2016)

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX (TDS) KOLKATA

-Versus-

NIRMAL KUMAR KEJRIWAL

Appearance:
Mr. Soumen Bhattacharyya, Adv.
...for the appellant.

Mr. J. P. Khaitan, Sr. Adv.
Mr. Ananda Sen, Adv.
...for the respondent.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE BIVAS PATTANAYAK

Date : 22nd July, 2022.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 6th April, 2016 and the corrigendum dated 12th May, 2016 passed by the Income Tax Appellate Tribunal, B" Bench, Kolkata in ITA Nos.249 to 253/Kol/2013 for the assessment years 2005-06 to 2009-10 and CO No.39/Kol/2013 for the assessment year 2005-06.

The revenue has raised the following substantial question of law for consideration:

i) Whether on the facts and in the circumstances of the case the Learned Tribunal erred in facts as well as in law in deleting the additions made by the Assessing officer under Section 206C(6)/206C(7) of the Income Tax Act, 1961 ?

ii) Whether on the facts and in the circumstances of the case the Learned Tribunal erred in law in holding that Swan timber is different from timber when there is no distinction drawn under Section 206C of the Income Tax Act, except in the case of timber obtained under forest lease ?

iii) Whether on the facts and in the circumstances of the case the Learned Tribunal erred in law and in facts in giving relief to the assessee for no collecting TCS from the buyers without making any enquiry about the no filing of the required declaration in Form no.27C from the buyers which is mandatory for getting exemption under Section 206C of the Income Tax Act ?

iv) Whether on the facts and in the circumstances of the case the Learned Tribunal erred in law and in facts in holding that liability under Section 206C of the Act does not arise in case of traders in Sawn timber ?

We have heard Mr. Soumen Bhattacharyya, learned standing counsel for the appellant/revenue and Mr. J. P. Khaitan, learned

senior counsel assisted by Mr. Ananda Sen, learned Advocate appearing for the respondent/assessee.

An order dated 28th March, 2011 was passed against the respondent/assessee under Section 206C(6)/206C(7)of the Act on the ground that the assessee did not collect any tax on the sale of timber obtained by any other mode other than forest lease in terms of Section 206C(1) of the Act. Before issuance of such order, show cause notice was issued calling upon the assessee to state as to why he should not be deemed to be an assessee in default for non-collection of tax on sale of timber as per provision of Section 206C(1). The assessee submitted their reply and the case was discussed.

The first objection raised by the assessee was that the tax collected at source is applicable on raw timber which mean timber logs that is obtained from the forest produce. Apart from that they had stated that they were trading in processed wood which are imported from countries like Indonesia, Malaysia and Burma. Further it was stated that 'sawn timber' or in other words 'processed timber' is derived from timber logs which are cut in different sizes and then planned by a process involving labour and power and the saw mills which undertake such exercise are recognised by the Government of India and they are extended various concessions from various Governmental departments. The reply given by the assessee was not accepted by the assessing

officer primarily for the ground that swan timber continues to remain as timber for all purposes and tax should have been collected at the post of sale. Aggrieved by such order, the assessee preferred appeal before the Commissioner of Income Tax (Appeals)-I, Kolkata, (CIT(A). By order dated 19th November, 2012, the appeal was allowed and the order passed by the assessing officer was set aside. Aggrieved by such order, the revenue preferred appeal before the tribunal which has been dismissed by the impugned order.

After elaborately hearing the learned Advocates appearing for the parties, we are of the view that the tribunal as well as CIT(A) rightly granted relief in favour of the assessee. In other words, we agree with the ultimate conclusion arrived at by the CIT(A) and the learned tribunal, but we would like to assign our own reasons as how such a conclusion was correct.

The argument on behalf of the revenue is based upon the decision of the High Court of Karnataka in the case of *Y. Moideen Kunhi & Ors. vs. Collector of Central Excise,* reported in 1986 (23) ELT 293, Kar. which decision was affirmed by the Hon'ble Division Bench in the case of *Collector of Central Excise, Bangalore-I vs. Y. Moideen Kunhi & Co.* reported in (2004) 163 ELT 299, Kar.-DB. In the said decision, the decision of the Hon'ble Supreme Court in the case of *State of Orissa & Ors. vs. Titaghur Paper Mills Co. Ltd. &b Anr.* reported in AIR 1985 SC 1293 was

referred to. This decision was pressed into service by the learned standing counsel for the department to state that the timber and sized or dressed logs are one and the same commercial commodity and, therefore, the assessee though stated to have dealt with sawn timber, it continues to remain as a timber and the assessing officer rightly treated the assessee as the assessee in default. On going through the decision in *Y. Moideen Kunhi & Ors. (supra)*, we find that the facts in the said case are quite different and distinct from the facts before us. To justify our decision, we are required to refer to Section 206C of the Act. Since there has been amendments to the said provision, we are required to take note of the said amendments. The provision as it stood as on 1990 is as follows:

> ***"Profits and gains from the business of trading in alcoholic liquor, forest produce scrap, etc.***
>
> ***206C (1)*** *Every person, being a seller referred to in section 44AC, shall at*
>
> *the time of debiting of the amount payable by the buyer referred to in that section to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table below, a sum equal to the percentage, specified in the corresponding entry in column (3) of the said Table, of such amount as income tax on income comprised therein.*

T A B L E

S. No.	Nature of goods	percentage
(1)	(2)	(3)
(i)	Alcoholic liquor for human consumption (other than Indian made foreign liquor)	Fifteen per cent
(ii)	Timber obtained under a forest lease	Fifteen per cent
(iii)	Timber obtained by any mode other than under a forest lease	[Five] per cent
(iv)	Any other forest produce not being timber	Fifteen per cent

Provided *that where the Assessing Officer, on an application made by the buyer, gives a certificate in the prescribed form that to the best of his belief any of the goods referred to in the aforesaid Table are to be utilised for the purposes of manufacturing processing or producing articles or things and not for trading purposes, the provisions of this sub-section shall not apply so long as the certificate is in force."*

In 1992, the provision stood substituted by Finance Act, 1992 w.e.f. 1.4.1992. In 1996, the change which was brought about in the provision was to add the product "tendu leaves" in table under Section 206(1) of the Act. In 2003, the provision stood substituted by Finance Act, 2003 w.e.f. 1.6.2003. In 2005, there was a radical change made to the proviso and also insertion of sub-Section 1(A) to Section 206C. The proviso and inserted sub-Section (1A) to Section 206C are as follows:

Provided *that every person, being a seller shall at the time, during the period beginning on the 1st day of June, 2003 and ending on the day immediately preceding the date on which the Taxation Laws (Amendment) Act, 2003 comes into force of debiting of the amount payable by the buyer to the account of the buyer or of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table as it stood immediately before the 1st day of June, 2003 , a sum equal to the percentage, specified in the corresponding entry in column (3) of the said Table, of such amount as income-tax in accordance with the provisions of this section as they stood immediately before the 1st day of June, 2003.*

"[(1A) Notwithstanding anything contained in sub-section (1), no collection of tax shall be made in the case of a buyer, who is resident in India, if such buyer furnishes to the person responsible for collecting tax, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the goods referred to in column (2) of the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things and not for trading purposes."

Thereafter, the provision remained as such. The object for introducing the said provision namely, Section 206 of the Act by Finance Act, 1988 was intended to levy and collect presumptive tax in the case of trading in certain goods to remove hardship and to remove the lacuna. The trades mentioned therein are alcoholic liquor for human consumption; timber obtained under a forest

lease; timber obtained by any mode other than under forest lease and any other forest produce not being timber, at different rates. The object of introduction of the new provisions for working out the profits on presumptive basis was to get over the problems faced in assessing the income and recovering the tax in the case of persons trading in the above mentioned items. Further, it was found that large number of persons who are engaged in these activities do not maintain any books of accounts and locating such persons after the contract or agreement becomes impossible in many cases and even in cases where assessment had been completed by the department, it became extremely difficult to collect taxes from them. Therefore, the provisions were brought into the statute not only to estimate the profits on presumptive basis but also to collect the tax on such transactions at specified rates mentioned in Section 206C of the Act. Thus, we are to bear in mind the object behind insertion of the provision by Finance Act, 1988 as the provision clearly states that Section 206C falls in Chapter-XVII of the Act which deals with collection and recovery of tax. Sub-Chapter BB deals with collection at source. Section 206C deals with profits and gains from business of trading in alcoholic liquor, forest produce, scrap etc. In the instant case, we are not concerned with the alcoholic liquor or scrap or tendu leaves or other products but concerned only about timber. The table under Section 206(1) of the Act leased out four products as of

1990 of which serial No.(ii) deals with timber obtained under a forest lease for which percentage of tax is 15%. Serial no.(iii) deals with timber obtained by any mode other than under a forest lease for which the percentage of tax is 5%. Serial No.(iv) deals with any other forest produce not being timber and the rate of tax is 15%. Thus, what has to be borne in mind is that, the presumptive tax is collectible on a forest produce. This special provision was inserted by Finance Act, 1988 on account of difficulties experienced by the department for levying and collecting taxes on such transactions. Therefore, the test is whether the respondent/assessee had dealt with a forest produce and the test is not whether the timber and sawn timber are one and the same. In fact, such a test is not required to be applied in the case on hand as the same is not the subject-matter. In fact, the assessee, while submitting their reply to the show cause notice at the first instance, pointed out that collection of tax in terms of Section 206C would be applicable only in respect of timber obtained from forests. In effect, the assessee meant to say that they had not dealt with forest produce. Our view is duly supported by the decision of the Hon'ble Division Bench of the Andhra Pradesh High Court in the case of *Andhra Pradesh Forest Development Corporation Ltd. vs. Assistant Commissioner of Income Tax & Anr.* reported in 2005(2) ITR 245. The facts in the said case was also more or less identical and the only difference being

the appellant/assessee, which was Forest Development Corporation of the State of Andhra Pradesh, took a stand that the product was an agricultural produce. Therefore, Section 206(1) of the Act would have no application to the case. The submission made on behalf of the assessee was accepted and it was held as follows:

> *"The provisions of section 206C of the Act would apply only with reference to the timber obtained under a forest lease ; or timber obtained by any mode other than under a forest lease ; and any other forest produce not being timber. From the above provision, it is clear that the Legislature intends to apply this provision in respect of timber and other produce obtained from the forest and it is not intended to apply to any produce. Therefore, in order to attract the provisions of section 206C of the Act, one has to examine whether the items sold by the petitioner-corporation are forest produce or not. In fact, the contention advanced by learned standing counsel for the Department would not reflect from the impugned order. On the other hand, the stand of the second respondent is that the provisions of section 206C of the Act are applicable only with reference to the forest produce. But, according to him, the items of produce sold by the petitioner-corporation would fall under items (ii) and (iii) specified in the Table in section 206C of the Act. Therefore, there is absolutely no merit in the contention of learned standing counsel that even if the produce is not forest produce, still the petitioner-corporation is under obligation to collect the tax at the time of effecting the sale.*
>
> * * * * * * * * *
>
> *Basically, forest produce is the produce grown spontaneously, may be at the subsequent stages some human*

> *effort and skill may be applied in order to protect and extract the resultant produce which could be considered as a forest produce. As is evident from the relevant provisions, the tax collection at the time of sale is intended only to be applied in respect of forest produce and not with reference to agricultural produce. Therefore, in order to hold that the assessee is liable to collect the tax at source, the authorities have to give a finding that it is forest produce."*

The above decision would squarely apply to the facts and circumstances of the present case and we respectfully agree with the reasoning given by the Hon'ble Division Bench. While on this issue, it would be relevant to take note of the decision of this Court in *Andaman and Nicobar Islands Forest and Plantation Development Corporation Ltd. vs. Commissioner of Income Tax* reported in (2006) 280 ITR 118 (Cal) wherein it was held that de-embarking and seasoning tree trunks and converting them into logs would amount to production of a new commercial article or thing within the meaning of Sections 32AB, 80HH and 80J of the Act. This decision would be of relevance on account of the proviso as contained under Section 206C(1) which states that where the assessing officer, on an application made by the buyer, gives a certificate in the prescribed form that to the best of his belief any of the goods referred to in the table are to be utilised for the purpose of manufacturing, processing or producing articles or things and not for trading purposes, the provision of sub-Section

(1) of Section 206 shall not apply so long as the certificate is in force. The effect of the said provision continue to remain the same even after the amendment in the year 2003 wherein the proviso stood substituted. However, this condition was inserted by way of sub-Section (1A) of the Act which states that notwithstanding anything contained in sub-Section (1) of Section 206C(1), no collection of tax shall be made in the case of a buyer who is a resident in India and if such buyer furnishes to the person responsible for collecting tax, a declaration in writing to the effect that goods referred to in Column 2 of the table contained under Section 206C(1) are to be utilized for the purposes of manufacturing, processing or producing articles or things and not for trading. Thus, if the timber is being sized, sawn into logs of different dimensions and shapes in activities carried on saw mills authorised by the Government, it would amount to a different produce. Even in respect of timbers which are procured as described in table, if it is used in the process of manufacturing, the provision of Section 206C(1) of the Act would not be applicable due to the fact that the product ceased to be a forest produce.

As mentioned earlier, the facts in the case of *Y. Moideen Kunhi & Ors. (supra)* are different from the case on hand as the question in the said case was whether sawing of timber logs into different sizes, planks, beams would amount to manufacture within

the meaning of Section 2(f) of the Central Excise and Salt Act, 1944. In the instant case, we are considering the effect of a special provision namely, Section 206(C) of the Act and the said decision cannot be applied to the case on hand.

For all the above reasons, we agree with the ultimate conclusion arrived at by the tribunal in dismissing the appeal filed by the revenue but for the reasons assigned by us in the earlier paragraphs. In the result, the appeal filed by the revenue (ITAT/376/2016) is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the connected application for stay (GA/1/2016) also stands closed.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)

S.Das/A.Sadhukhan
AR(CR)