Principal Commissioner Of Income Tax-3 Vs M/S. EIH Ltd.

Court: Calcutta High Court

Date of Decision: Dec. 16, 2021

Acts Referred: Income Tax Rules, 1962 â€" Rule 8D
Income Tax Act, 1961 â€" Section 9(1), 9(1)(vi), 14A, 40(a)(i), 194H, 194J, 195, 260A

Hon'ble Judges: T.S. Sivagnanam, J; Hiranmay Bhattacharyya, J

Bench: Division Bench

Advocate: S. N. Dutta, Soumen Bhattacharjee, J. P. Khaitan, Akhilesh Kumar Gupta, Asim Choudhury, Aesa Dey

Final Decision: Dismissed

Judgement

This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Ã¢â‚¬ËœActÃ¢â‚¬â„¢ in brevity) is directed against the composite order

dated 5th April, 2017 passed by the Income Tax Appellate Tribunal, Ã¢â‚¬Å“AÃ¢â‚¬ Bench, Kolkata (the Ã¢â‚¬ËœTribunalÃ¢â‚¬â„¢ in short) in ITA No.866/Kol/2012

and ITA No.932/2012 for the assessment year 2008-09.

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

(i) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of Rs.1,99,56,281/- being

60% of the aggregate expenditure incurred on running and maintenance of aircrafts without considering that the aircrafts were also used for personal

purposes of the directors?

(ii) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of Rs.1,30,77,646/-

under Section 40(a)(i) on account of professional and consultancy charges to non residents by ignoring the fact that such fees are subject to tax in

India under Section 9(1) read with Section 195 of the act?

(iii) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of Rs.9,27,20,974/-

under Section 40(a)(i) on account of advertisement publicity and sales promotion to non resident by ignoring the fact that such expenses are subject to

tax in India under Section 9(1) read with Section 195 of the Act?

(iv) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of Rs.9,27,20,974/-

under Section 40(a)(i) on account of advertisement publicity and sales which was reasonable considering the fact that the documents in support of

such expenses were not produced by the assessee before the assessing officer?

(v) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance of expenditure of

Rs.1,79,93,426/- in respect of earning dividend income & tax free interest on US 64 tax free bonds without appreciating the finding of the assessing

officer who disallowed 0.5% of average investment by applying rule 8D of income tax rules and made disallowance of expenses under Section 14A ?

(vi) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the addition on account of interest

amounting to Rs.1,71,99,475/- being 12% of interest free advances given to subsidiary companies for non business purpose based on the presumption

that those advances were made by the assessee out of its own funds and not out of the borrowed funds bearing interest?

(vii) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance under Section 40(a)(i)

of Rs.18,29,94,840/-paid as commission to and sitting fees to directors of the company without deducting tax at source under section 194H of Income

Tax Act?

(viii) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance under Section 40(a)(i)

of Rs.3,37,48,429/-paid as commission to non residents by ignoring the fact that such commission are subject to tax in India under Section 9(1) read

with Section 195 of the Income Tax Act?

(ix) Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in deleting the disallowance under Section 40(a)(i)

of Rs.3,37,48,429/-paid as commission to non residents without considering the facts pertaining to such expenses were not produced by the assessee

before the assessing officer?

We have heard Mr. S. N. Dutta, learned standing counsel assisted by Mr. Soumen Bhattacharjee, learned advocate for the appellant/revenue and Mr.

J. P. Khaitan, learned senior counsel for the respondent/assessee.

We need not labour much to decide the substantial questions of law raised before us as in the assesseeÃ¢â‚¬â„¢s own case for the earlier assessment

year namely, 2006-07, except one substantial question of law, that is, question no.5 before us, all other questions were subject-matter of an appeal filed

by the revenue in ITAT/53/2017 challenging the correctness of the decision of the Tribunal. The HonÃ¢â‚¬â„¢ble Division Bench of this Court by

judgment dated 23rd July, 2018 dismissed the appeal filed by the revenue. Thus, our task has become easier as the said judgment has attained finality

and will bind the revenue.

Substantial question of law no.1 was question no.4 therein and we find from the judgment dated 23rd July, 2018 passed in ITAT/53/2017 that the said

question was not pressed by the revenue and consequently rejected. Therefore, the substantial question of law no.1 raised before us stands rejected.

Substantial question of law no.2 was also question no.2 in ITAT/53/2017. The Division Bench in its judgement dated 23rd July, 2018 found that the

Tribunal held the addition to be erroneous and has considered in detail the nature and expenses in respect of which the assessee was sought to be

penalized for not deducting the tax deducted at sources, holding that these expenses were in respect of the income accrued outside the territory for

services rendered. With this finding the said question was rejected.

While on this issue, it would be beneficial to take note of the decision of the HonÃ¢â‚¬â„¢ble Supreme Court in Engineering Analysis Centre of Excellence

P. Ltd. vs. Commissioner of Income Tax & Anr. reported in [2021] 432 ITR 471 (SC). The question before the HonÃ¢â‚¬â„¢ble Supreme Court was

whether persons liable to deduct TDS under Section 195 of the Act can be held liable to deduct such sums, at a time when Explanation 4 was

factually not on the statute book, all deductions liable to be made and the assessment years in question (in the said case) being prior to 2012. The

HonÃ¢â‚¬â„¢ble Supreme Court took note of the decision in the case of Arjun Panditrao Khotar vs. Kailash Kushanrao Gorantyal reported in (2020)7

SCC 1 wherein the HonÃ¢â‚¬â„¢ble Supreme Court applying two latin maxims namely, the law does not demand the impossible and when there is a

disability that makes it impossible to obey the law, the alleged disobedience of law is excused.

After noting the said decision which was a case arising under the provisions of the Evidence Act, 1872, the HonÃ¢â‚¬â„¢ble Supreme Court took note of

the decision arising under the Income Tax Act, in the case of CIT vs. NGC Network (India) Pvt. Ltd. reported in [2021] 432 ITR 326 (Bombay) and

CIT vs. Western Coalfields Ltd. passed in ITA/93/2008, the High Court of Bombay held that the Ã¢â‚¬Å“personÃ¢â‚¬ mentioned in Section 195 of the Act

cannot be expected to do the impossible, namely, to apply the expanded definition of Ã¢â‚¬Å“royaltyÃ¢â‚¬ inserted by Explanation 4 to Section 9(1)(vi) of the

Act for the assessment years in question, at a time when such Explanation was not actually and factually in the statute. Therefore, question no.2

stands rejected.

Question nos.3 and 4 are identical to question no.1 framed in ITAT/53/2017, which was rejected. That apart, the decision in the case of Engineering

Analysis Centre of Excellence P. Ltd. (supra) would come to the aid and assistance of the assessee. Therefore, question nos. 3 and 4 are rejected. So

far as question no.5 is concerned, the same did not arise for the assessment year 2006-07. The issue was whether the disallowance made by the

assessing officer under Section 14A of the Act read with Rule 8D of the Rules was justified. On perusing paragraph 7 of the order passed by the

assessing officer, we find that the assessee offered an explanation and the said explanation was rejected without assigning any reasons and

mechanically the assessing officer proceeded to apply Rule 8D and make the computation and did the disallowance. The same was affirmed by the

CIT(A) with slight reworking on the disallowance. The Tribunal considered the correctness of the same and held that the assessing officer neither

examined the assesseeÃ¢â‚¬â„¢s account nor recorded satisfaction about the correctness of the claim and that it is incumbent upon the assessing officer

to indicate reasons for rejecting the assesseeÃ¢â‚¬â„¢s claim.

An alternate contention was also raised before the Tribunal contending that investment made for acquiring controlling interest in their Group concerns

and not for income. In support of such contention, the assessee placed reliance on DCIT vs. Selvel Advertising reported in (2015)58 taxmann.com 196

(Kolkata ITAT). Before we examine as to whether the alternate contention was required to be considered, we are satisfied that the Tribunal rightly

followed the earlier decision of the Tribunal and the disallowance was deleted. That apart, we note that identical issue was raised before this Court in

the case of Commissioner of Income Tax vs. REI Agro passed in ITAT/161/2013, which was dismissed by judgment dated 23rd December, 2013.

Thus, we find that the question no.5 has to be decided against the revenue and in favour of the assessee.

With regard to question no.6, the same is identical to question no.5 in ITAT/53/2017 and the said question was not pressed by the revenue and the

same was rejected. Therefore, question no.6 before us stands rejected. So far as question no.7 is concerned, the Tribunal rightly held the amendment

to Section 194J was with effect from 1st July, 2012 and the assessment year under consideration being 2008-09, the same cannot be made applicable.

Furthermore, the observations contained in Engineering Analysis Centre of Excellence P. Ltd. (supra) would also come in aid of the case of the

assessee. Therefore, question no.7 stands rejected.

Question nos.8 and 9 before us are identical to question no.3 in ITAT/53/2017 and the said question was rejected by this Court by judgment dated 23rd

July, 2018 and the finding of the Tribunal holding that commissions paid to the foreign agents outside India does not accrue or arise in India had

become final.

Therefore, question nos.8 and 9 stand rejected. In the result, the appeal filed by the revenue is dismissed and the substantial questions of law are

answered against the revenue.

With the dismissal of the appeal, the connected application for stay (IA No.GA/2/2020) also stands dismissed.