

SUPREME COURT OF INDIA

C.I.T.-4, Mumbai

Vs.

Kotak Securities Ltd.

C.A.No.3141 of 2016

(Ranjan Gogoi and Prafulla C.Pant,JJ.)

29.03.2016

JUDGMENT

Ranjan Gogoi,J.

S.L.P.(C) No.19907 of 2012

1. Leave granted in all the Special Leave Petitions.
2. Civil Appeal arising out of Special Leave Petition (Civil) No.37694 of 2012 (*M/s Kotak Securities Ltd. Vs. C.I.T.4(3), Mumbai*) is taken as the lead case as a decision on the issue(s) arising therein would determine the questions arising in all the other appeals under consideration.
3. By the impugned order dated 21st October, 2011 passed in the aforesaid appeal, the High Court of Bombay has held that the transaction charges paid by a member of the Bombay Stock Exchange to transact business of sale and purchase of shares amounts to payment of a fee for 'technical services' rendered by the Bombay Stock Exchange. Therefore, under the provisions of Section 194J of the Income Tax Act, 1961 (for short "the Act"), on such payments TDS was deductible at source. The said deductions not having been made by the appellant - assessee, the entire amount paid to the Bombay Stock Exchange on account of transaction charges was not deducted in computing the income chargeable under the head "profits and gains of business or profession" of the appellant - assessee for the Assessment Year in question i.e. 2005-2006. This is on account of the provisions of Section 40(a)(ia) of the Act. Notwithstanding the above, the Bombay High Court held that in view of the apparent understanding of both the assessee and the Revenue with regard to the liability to deduct TDS on transaction charges paid to the Bombay Stock Exchange right from the year 1995 i.e. coming into effect of Section 194J till the Assessment Year in question, benefit, in the facts of the case, should be granted to the appellant - assessee and the disallowance made by the Assessing Officer under Section 40(a)(ia) of the Act must be held to be not correct.

4. Aggrieved by the finding that transaction charges paid to the Stock Exchange are fees for “technical services”, the assessee - Kotak Securities Ltd. is in appeal before us whereas the Revenue seeks to challenge the later part of the order of the High Court set out above. The assessee is also in appeal against similar orders passed in respect of subsequent assessment orders in the case of the assessee itself. As the order of the High Court, with regard to transaction charges being in the nature of fee for technical services, has been made applicable to the assessments in case of other assessees, such of the assessees who are aggrieved thereby have filed the other appeals before us.

5. The relevant provisions of the Act which have a material bearing to the issues arising for determination in the present appeals may now be noticed. Section 194J; Section 40(a)(ia) of the Act introduced by Finance (No.2) Act, 2004 with effect from 1st April, 2005; and Explanation 2 of Section 9(1)(vii) which are relevant for the purpose of the present case reads as under:

“194J. Fees for professional or technical services.

(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of—

(a) fees for professional services, or

(b) fees for technical services or

(c) royalty, or

(d) any sum referred to in clause (va) of section 28 shall at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to five per cent of such sum as income-tax on income comprised therein:

Explanation.—For the purposes of this section,—

(b) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

40. Amounts not deductible. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head “Profits and gains of business or profession”

(a) in the case of any assessee-

(i)

(ia) any interest, commission or brokerage, rent, royalty, fees for 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 the time prescribed under sub-section (1) of section 200: Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200 such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.-

9. Income deemed to accrue or arise in India

- (1) The following incomes shall be deemed to accrue or arise in India:- (i)
(vii) income by way of fees for technical services payable by—
(a)
(b)
(c)

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

6. What meaning should be ascribed to the word "technical services" appearing in Explanation 2 to clause (vii) to Section 9(1) of the Act is the moot question. In *Commissioner of Income-Tax Vs. Bharti Cellular Ltd*¹. this Court has observed as follows:

“Right from 1979, various judgments of the High Courts and Tribunals have taken the view that the words “technical services” have got to be read in the narrower sense by applying the rule of *noscitur a sociis*, particularly, because the words “technical services” in section 9(1)(vii) read with Explanation 2 comes in between the words “managerial and consultancy services”.

7. “Managerial and consultancy services” and, therefore, necessarily “technical services”, would obviously involve services rendered by human efforts. This has been the consistent view taken by the courts including this Court in *Bharti Cellular Ltd.* (supra). However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made.

8. A reading of the very elaborate order of the Assessing Officer containing a lengthy discourse on the services made available by the Stock Exchange would go to show that apart

from facilities of a faceless screen based transaction, a constant upgradation of the services made available and surveillance of the essential parameters connected with the trade including those of a particular/ single transaction that would lead credence to its authenticity is provided for by the Stock Exchange. All such services, fully automated, are available to all members of the stock exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customised service that is rendered by the Stock Exchange. “Technical services” like “Managerial and Consultancy service” would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would therefore stand out in distinction to the former. The service provided by the Stock Exchange for which transaction charges are paid fails to satisfy the aforesaid test of specialized, exclusive and individual requirement of the user or consumer who may approach the service provider for such assistance/service. It is only service of the above kind that, according to us, should come within the ambit of the expression “technical services” appearing in Explanation 2 of Section 9(1)(vii) of the Act. In the absence of the above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by the aforesaid provision of the Act.

9. There is yet another aspect of the matter which, in our considered view, would require a specific notice. The service made available by the Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which the charges in question had been paid by the appellant - assessee are common services that every member of the Stock Exchange is necessarily required to avail of to carry out trading in securities in the Stock Exchange. The view taken by the High Court that a member of the Stock Exchange has an option of trading through an alternative mode is not correct. A member who wants to conduct his daily business in the Stock Exchange has no option but to avail of such services. Each and every transaction by a member involves the use of the services provided by the Stock Exchange for which a member is compulsorily required to pay an additional charge (based on the transaction value) over and above the charges for the membership in the Stock Exchange. The above features of the services provided by the Stock Exchange would make the same a kind of a facility provided by the Stock Exchange for transacting business rather than a technical service provided to one or a section of the members of the Stock Exchange to deal with special situations faced by such a member(s) or the special needs of such member(s) in the conduct of business in the Stock Exchange. In other words, there is no exclusivity to the services rendered by the Stock Exchange and each and every member has to necessarily avail of such services in the normal course of trading in securities in the Stock Exchange. Such services, therefore, would undoubtedly be appropriate to be termed as facilities provided by the Stock Exchange on payment and does not amount to “technical services” provided by the Stock Exchange, not being services specifically sought for by the user or the consumer. It is the aforesaid latter feature of a service rendered which is the essential hallmark of the expression “technical services” as appearing in Explanation 2 to Section 9(1)(vii) of the Act.

10. For the aforesaid reasons, we hold that the view taken by the Bombay High court that the transaction charges paid to the Bombay Stock Exchange by its members are for 'technical services' rendered is not an appropriate view. Such charges, really, are in the nature of payments made for facilities provided by the Stock Exchange. No TDS on such payments would, therefore, be deductible under Section 194J of the Act.

11. In view of above conclusions, it will not be necessary for us to examine the correctness of the view taken by the Bombay High Court with regard to the issue of the disallowance under Section 40(a)(ia) of the Act. All the appeals, therefore, shall stand disposed in the light of our views and observations as indicated above.

Judgment Referred.

¹(2014) 6 SCC 0401