SUPREME COURT OF INDIA

Commissioner of Income Tax Kolkata XII

Vs.

Calcutta Export Company

C.A.No.4339-4340 of 2018

(R.K.Agrawal and Abhay Manohar Sapre,JJ.,)

24.04.2018

JUDGMENT

R.K.Agrawal,J.,

SLP(C)No.24362-24363 of 2013

1. Leave granted.

2. The present appeal has been filed against the impugned final judgment and order dated 03.09.2012 passed by the High Court at Calcutta in GA No. 2029 of 2012 ITAT No. 175 of 2012 whereby a Division Bench of the High Court dismissed the appeal filed by the Appellant against the order dated 29.02.2012 passed by the Income Tax Appellate Tribunal (in short "the Tribunal") in ITA No. 1487/Kol/2011.

3. Brief facts:-

(a) M/s. Calcutta Export Company - the Respondent is a partnership firm and is a manufacturer and exporter of casting materials having its principal place of business at Kolkata. The Respondent filed its return of income for the Assessment Year 2005-06 for Rs. 4,18,17,910/-. The case was selected for scrutiny and the assessment under Section 143(3) of the Income Tax Act, 1961 (in short 'the IT Act') was completed on 28.12.2007. The Assessing Officer, vide order dated 12.10.2009, disallowed the export commission charges paid by the assessee to M/s. Steel Crackers Pvt. Ltd. amounting to Rs. 40,82,089/- while stating that the tax deducted at source (TDS) on such commission amount on 07.07.2004, 07.09.2004 and 07.10.2004 ought to have been deposited by the Respondent before the end of the previous year i.e. 31.03.2005 to get the commission amount deducted from the total income in terms of the provisions of Section 40(a)(ia) of the IT Act as it stood then. But the same was deposited on 01.08.2005, hence, the Respondent cannot be allowed to claim deduction of the commission amount from the total income. The Assessing Officer

revised the total income to Rs. 4,58,99,999/- with the requirement to pay the additional tax amount of Rs. 23,88,832/- by the Respondent.

(b)Being aggrieved by the order dated 12.10.2009, the Respondent preferred an appeal before the Commissioner of Income tax (Appeals). Learned CIT (Appeals), vide order dated 01.08.2011, allowed the appeal while holding that the commission amount is eligible for deduction under the said Assessment Year.

(c) Being aggrieved, the Revenue preferred an appeal being ITA No. 1487/Kol/2011 before the Tribunal which came to be dismissed on 29.02.2012.

(d) Being aggrieved by the order dated 29.02.2012, the Revenue preferred an appeal before the High Court. The High Court, vide judgment and order dated 03.09.2012, had dismissed the appeal.

(e) Aggrieved by the judgment and order dated 03.09.2012, the Revenue has preferred this appeal before this Court.

4. Heard learned senior counsel for the parties and perused the factual matrix of the case.
Point(s) for consideration:-

5. Whether the amendment made by the Finance Act, 2010 in Section 40(a)(ia) of the IT Act is retrospective in nature to apply to the present facts and circumstances of the case.
Rival contentions:-

6. Learned senior counsel appearing on behalf of the Revenue contended that the impugned judgment passed by the High Court is bad in law and is liable to be set aside by this Court.

7. Learned senior counsel further contended that the courts below have erred in extending the meaning of the amendment made in Section 40(a) (ia) and in not accepting the plain meaning of the Section as being prohibitory in nature which makes the Respondent to deduct the TDS and remit it in government account within the time limit prescribed under the Section. He further contended that the amendment made under Section 40 (a) (ia) by the Finance Act, 2010, clearly states that the amendment has the retrospective effect from the Assessment Year 2010-11 and it cannot be held to be retrospective from the Assessment Year 2005-2006.

8. Learned senior counsel further contended that the High Court erred in relying on the decision given by the jurisdictional High Court in ITAT No. 302/2011 (G.A. No. 3200/2011) considering the fact that no appeal was preferred against the said judgment considering the low tax effect in the said matter.

9. Learned senior counsel finally contended that though the tax effect is low in the present case also and the High Court has decided the issue in favour of the tax payer but in similar situation in the case of *Bharati Shipyard Ltd. vs. Deputy CIT*[1] the Special Bench of the ITAT has decided the issue in favour of the Revenue on 09.09.2011. Learned senior counsel finally

contended that in view of the conflicting opinions by the coordinate Benches, correct interpretation of law is required by this Court.

10. Per contra, learned senior counsel appearing on behalf of the Respondent submitted that the purpose of insertion of provisions of Section 40(a)(ia) of the IT Act was to ensure the compliance of TDS provisions and not to punish those assessees who have deducted and paid the TDS to the government sooner or later. The said purpose is also very much clear from the amendment made in 2008 and further by the amendment in 2010 to the existing provisions of Section 40(a)(ia). In support of this argument, learned senior counsel placed reliance on a decision of the Division Bench of the Delhi High Court in *CIT v. Ansal Land Mark Township Pvt Ltd*[2]*. in.*

11. Learned senior counsel further submitted that the amendments of curative nature have to be applied retrospectively and hence the amendment made in 2010 to the existing provisions of Section 40(a)(ia) should be given retrospective effect from the date of insertion and in support of this contention learned senior counsel relied on a decision of this Court in *Allied Motors (P.) Ltd etc. vs. CIT, Delhi*[3] -

12. Learned counsel for the Respondent finally submitted that the decision of the High Court is well within the parameters of law and requires no interference.

Discussion:-

13. The dispute in the present case revolves around the fact that whether the amendment made by the Finance Act, 2010 to the provisions of Section 40 (a) (ia) of the IT Act is retrospective in nature so as to apply to the present case or not. If it is so, then the tax duly paid by the assessee on 01.08.2005 is well in accordance with law and the assessee is allowed to claim deduction for the tax deducted and paid to the government, in the previous year in which the tax was deducted.

14. For deciding as to the retrospective effect of the amendment made by Finance Act, 2010, it is required to see the Section as it stands before and after the amendment made through the Finance Act, 2010 and the purpose of such insertion or amendment to the said provisions. The provisions of Section 40(a)(ia) came into force in the year 2005 which stood as under:-

> "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 XVIIB 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 during 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."

15. The purpose of bringing the said amendment to the existing provision of Section has been highlighted in the memorandum explaining the provision which reads as under:-

> "With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of the section 40(a)(ia) to payments of interest, commission or brokerage, fee for professional services or fee for technical services to the residents and payments to a residential contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section(1) of section 200 and in accordance with the provisions of other provisions of Chapter XVII-B."

16. The purpose is very much clear from the above referred explanation by the memorandum that it came with a purpose to ensure tax compliance. The fact that the intention of the legislature was not to punish the assessee is further reflected from a bare reading of the provisions of Section 40(a)(ia) of the IT Act. It only results in shifting of the year in which the expenditure can be claimed as deduction. In a case where the tax deducted at source was duly deposited with the government within the prescribed time, the said amount can be claimed as a deduction from the income in the previous year in which the TDS was deducted. However, when the amount deducted in the form of TDS was deposited with the government after the expiry of period allowed for such deposit then the deductions can be claimed for such deposited TDS amount only in the previous year in which such payment was made to the government.

17. However, it has caused some genuine and apparent hardship to the assesses especially in respect of tax deducted at source in the last month of the previous year, the due date for payment of which as per the time specified in Section 200 (1) of IT Act was only on 7 th of April in the next year. The assessee in such case, thus, had a period of only seven days to pay the tax deducted at source from the expenditure incurred in the month of March so as to avoid disallowance of the said expenditure under Section 40(a)(ia) of IT Act.

18. With a view to mitigate this hardship, Section 40(a)(ia) was amended by the Finance Act, 2008 and the provision so amended read as under:-

> "40. 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 "profit and gains of business or profession

(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resi-dent, or amounts payable to a contactor 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-

(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139; or

(B) in any other case, on or before the last day of the previous year; Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted

(A) during the last month of the previous year but paid after the said due date; or

(B) during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

19. The above amendments made by the Finance Act, 2008 thus provided that no disallowance under Section 40 (a) (ia) of the IT Act shall be made in respect of the expenditure incurred in the month of March if the tax deducted at source on such expenditure has been paid before the due date of filing of the return. It is important to mention here that the amendment was given retrospective operation from the date of 01.04.2005 i.e., from the very date of substitution of the provision.

20. Therefore, the assesses were, after the said amendment in 2008, classified in two categories namely; one; those who have deducted that tax during the last month of the previous year and two; those who have deducted the tax in the remaining eleven months of the previous year. It was provided that in case of assessees falling under the first category, no disallowance under Section 40(a) (ia) of the IT Act shall be made if the tax deducted by them during the last month of the previous year has been paid on or before the last day of filing of return in accordance with the provisions of Section 139(1) of the IT Act for the said previous year. In case, the assessees are falling under the second category, no disallowance under Section 40(a)(ia) of IT Act where the tax was deducted before the last month of the previous year and the same was credited to the government before the expiry of the previous year. The net effect is that the assessee could not claim deduction for the TDS amount in the previous year in which the tax was deducted and the benefit of such deductions can be claimed in the next year only.

21. The amendment though has addressed the concerns of the assesses falling in the first category but with regard to the case falling in the second category, it was still resulting into unintended consequences and causing grave and genuine hardships to the assesses who had substantially complied with the relevant TDS provisions by deducting the tax at source and

by paying the same to the credit of the Government before the due date of filing of their returns under Section 139(1) of the IT Act. The disability to claim deductions on account of such lately credited sum of TDS in assessment of the previous year in which it was deducted, was detrimental to the small traders who may not be in a position to bear the burden of such disallowance in the present Assessment Year.

22. In order to remedy this position and to remove hardships which were being caused to the assessees belonging to such second category, amendments have been made in the provisions of Section 40(a) (ia) by the Finance Act, 2010.

23. Section 40(a)(ia), as amended by Finance Act, 2010, with effect from 01.04.2010 and now reads as under:

> "4(a)(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 paid on or before the due date specified in sub-section (1) of Section 139: Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deducted in computing the income of the previous year in which such tax has been paid."

24. Thus, the Finance Act, 2010 further relaxed the rigors of Section 40(a)(ia) of the IT Act to provide that all TDS made during the previous year can be deposited with the Government by the due date of filing the return of income. The idea was to allow additional time to the deductors to deposit the TDS so made. However, the Memorandum explaining the provisions of the Finance Bill, 2010 expressly mentioned as follows:

> "This amendment is proposed to take effect retrospectively from 1st April, 2010 and will, accordingly, apply in relation to the Assessment Year 2010-11 and subsequent years."

25. The controversy surrounding the above amendment was whether the amendment being curative in nature should be applied retrospectively i.e., from the date of insertion of the provisions of Section 40(a)(ia) or to be applicable from the date of enforcement.

26. TDS results in collection of tax and the deductor discharges dual responsibility of collection of tax and its deposition to the government. Strict compliance of Section 40(a)(ia) may be justified keeping in view the legislative object and purpose behind the provision but a provision of such nature, the purpose of which is to ensure tax compliance and not to punish the tax payer, should not be allowed to be converted into an iron rod provision which metes out stern punishment and results in malevolent results, disproportionate to the offending act and aim of the legislation. Legislature can and do experiment and intervene from time to time

when they feel and notice that the existing provision is causing and creating unintended and excessive hardships to citizens and subject or have resulted in great inconvenience and uncomfortable results. Obedience to law is mandatory and has to be enforced but the magnitude of punishment must not be disproportionate by what is required and necessary. The consequences and the injury caused, if disproportionate do and can result in amendments which have the effect of streamlining and correcting anomalies. As discussed above, the amendments made in 2008 and 2010 were steps in the said direction only. Legislative purpose and the object of the said amendments were to ensure payment and deposit of TDS with the Government.

27. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the Section, is required to be read into the Section to give the Section a reasonable interpretation and requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the Section as a whole.

28. The purpose of the amendment made by the Finance Act, 2010 is to solve the anomalies that the insertion of section 40(a)(ia) was causing to the bona fide tax payer. The amendment, even if not given operation retrospectively, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assessees having substantial turnover and equally huge expenses and necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low gross product rate and when expenditure which becomes subject matter of an order under Section 40(a)(ia) is substantial, can suffer severe adverse consequences if the amendment made in 2010 is not given retrospective operation i.e., from the date of substitution of the provision. Transferring or shifting expenses to a subsequent year, in such cases, will not wipe off the adverse effect and the financial stress. Such could not be the intention of the legislature. Hence, the amendment made by the Finance Act, 2010 being curative in nature required to be given retrospective operation i.e., from the date of insertion of the said provision.

29. Further, in Allied Motors (P) Limited (supra), this Court while dealing with a similar question with regard to the retrospective effect of the amendment made in section 43-B of the Income Tax Act,1961 has held that the new proviso to Section 43B should be given retrospective effect from the inception on the ground that the proviso was added to remedy unintended consequences and supply an obvious omission. The proviso ensured reasonable interpretation and retrospective effect would serve the object behind the enactment. The aforesaid view has consistently been followed by this Court in the following cases, viz., *Whirlpool of India Ltd., vs. CIT, New Delhi*[4], *CIT vs. Amrit Banaspati*[5] *and CIT vs. Alom Enterprises Ltd*[6]..

30. Hence, in light of the forgoing discussion and the binding effect of the judgment given in Allied Moters (supra), we are of the view that the amended provision of Sec 40(a)(ia) of the IT Act should be interpreted liberally and equitable and applies retrospectively from the date when Section 40(a)(ia) was inserted i.e., with effect from the Assessment Year 2005-2006 so that an assessee should not suffer unintended and deleterious consequences beyond what the

object and purpose of the provision mandates. As the developments with regard to the Section recorded above shows that the amendment was curative in nature, it should be given retrospective operation as if the amended provision existed even at the time of its insertion. Since the assessee has filed its returns on 01.08.2005 i.e., in accordance with the due date under the provisions of Section 139 IT Act, hence, is allowed to claim the benefit of the amendment made by Finance Act, 2010 to the provisions of Section 40(a)(ia) of the IT Act.

31. In light of the forgoing discussion, we are of the view that judgment of the High Court does not call for any interference and, hence, the appeals are accordingly dismissed. In view of the above, all the connecting appeals, interlocutory applications, if any, transferred cases as well as diary numbers are disposed off accordingly. Parties to bear cost on their own.

Judgment Referred.

[1] *ITA No. 404/Mumb/2009*
[2] *ITA No. 160/2015*
[3] *(1997) 224 ITR 677(SC)*
[4] *(2000) 245 ITR 0003*
[5] *(2002) 255 ITR 0117*
[6] *(2009) 319 ITR 0306*