आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

श्री डी. करुणाकर राव, लेखा सदस्य, एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 1689/Mum./2011
(निर्धारण वर्ष / Assessment Year : 2007–08)

Income Tax Officer
Ward–4(2)(1), Aayakar Bhavan
101, M.K. Road, Mumbai 400 020
.... अपीलार्थी / Appellant

बनाम v/s

M/s. Pratibhuti Viniyog Ltd.
15–B, 3rd Floor, 28, Rajabahdur Mansion
Bombay Samachar Marg, Fort
Mumbai 400 023
.... प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AAACP7334B

राजस्व की ओर से / Revenue by : Smt. Parminder
निर्धारिती की ओर से / Assessee by : Shri Pradip Kedia

सुनवाई की तारीख / Date of Hearing – 13.08.2014

आदेश घोषणा की तारीख / Date of Order – 22.08.2014

आदेश / ORDER

अमित शुक्ला, न्यायिक सदस्य के द्वारा / PER AMIT SHUKLA, J.M.

The present appeal has been preferred by the Revenue challenging the impugned order dated 30th December 2010, passed by the learned Commissioner (Appeals)–VIII, Mumbai, for the quantum of assessment passed under section 143(3) of the Income Tax Act, 1961

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(for short *"the Act"*), for the assessment year 2007-08, on the following grounds:-

> *"1(i). On the facts and in the circumstances of the case and in law the learned CIT(A) erred in deleting the disallowance of ₹ 3,00,009 made under section 40(a)(ia) in respect of VSAT charges and transaction charges paid to stock exchange, without appreciating the facts that these were composite charges for professional and technical services rendered by the stock exchange to its members and the assessee has failed to deduct TDS thereon.*
>
> *(ii). On the facts and in the circumstances of the case and in law the learned CIT(A) erred in in ignoring the fact that these services are essential in nature as they can only be availed by members of stock exchange.*
>
> *(iii) On the facts and in the circumstances of the case and in law the learned CIT(A) erred in ignoring the facts that use of technology and algorithmic based programs have converted an erstwhile physical market into a digitally operated market.*
>
> *(iv) On the facts and in the circumstances of the case and in law the learned CIT(A) erred in ignoring the fact that the services rendered by the brokers are not standard services but services that has been developed to cater to the needs of the broker community to facilitate trading.*
>
> *(v) On the facts and in the circumstances of the case and in law the learned CIT(A) has overlooked the fact that the brokers have in subsequent years themselves started deducting the TDS on such payments and that there is no reason to give a different treatment in this year.*
>
> *2. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in deleting the addition of ₹ 4,41,221 made under section 14A r/w Rule 8D by the Assessing Officer.*
>
> *3. On the facts and in the circumstances of the case and in law the impugned order of the learned CIT(A) is contrary to law and consequently merits to be set aside and that of the Assessing Officer be restored."*

2. Facts in brief:- The assessee company is engaged in the business of share broking and apart from that it has been receiving income from

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interest and dividend. The Assessing Officer noted that the assessee has debited V–SAT charges of ₹ 1,10,000 and transaction charges of ₹ 2,90,009, in the Profit & Loss account, which he was of the opinion that were in the nature of technical services, therefore, the assessee was liable to deduct tax on such payment. In response to the show cause notice, as to why disallowance under section 40(a)(ia) should not be made, the assessee submitted that the TDS has not been deducted, because there is no rendering of professional or technical services on such charges. Reliance was placed on the decision of the Tribunal, Mumbai Bench, in Kotak Securities Ltd. The Assessing Officer held that the decision of the Tribunal has not been accepted by the Department and the matter is pending before the High Court. Therefore, analysing the nature of services in detail, he held that such a payment is to be disallowed under section 40(a)(ia) as the assessee was liable to deduct tax under section 194J.

3. Before us, it has been admitted by both the parties that insofar as the disallowance of ₹ 2,90,009, on account of transaction charges is concerned, the same has been decided against the assessee by the Hon'ble Jurisdictional High Court in CIT v/s Kotak Securities Ltd. [2012] 340 ITR 333 (Bom.) However, the learned counsel pointed out that in another decision, the Hon'ble Jurisdictional High Court in CIT v/s The Stock and Bond Trading Company, vide order dated 14th

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October 2011, has held that even the transaction charges are not covered under section 194J. He though admitted that this decision of the High Court was delivered few days prior to the decision of Kotak Securities Ltd. Insofar as the V–SAT charges are concerned, the learned counsel submitted that this issue is covered infavour of the assessee by the decision of the Hon'ble Jurisdictional High Court in CIT v/s Angel Capital and Debit Market Ltd., ITA no.475 of 2011, order dated 28th July 2011. The learned Departmental Representative also admitted that the issue of V–SAT charges is covered by the said decision of the High Court.

4. Thus, in view of the above submissions, we hold that insofar as the transaction charges are concerned, the assessee was liable to deduct TDS under section 194J in view of the decision of Hon'ble Jurisdictional High Court in Kotak Securities Ltd., which is a later decision and, therefore, the disallowance under section 40(a)(ia), has rightly been made by the Assessing Officer. As regards V–SAT charges are concerned for sum amounting to ₹ 1.10 lakhs, following the decision of Angel Capital &Debit Market Ltd. (supra), we hold that these are not in the nature of technical services, therefore, no TDS was required and consequently, no disallowance under section 40(a)(ia) is called for.

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5. However, regarding ground no.1, before us, the learned counsel has raised an alternative plea that all the payments remained paid up to 31st March 2007 and, therefore, no disallowance under section 40(a)(ia) should be made even with regard to transaction charges in view of the decision of Allahabad High Court in Vector Shipping Services Pvt. Ltd. He submitted that though there are two High Court decision, one of Calcutta High Court and other of Gujarat High Court against the assessee, however, the Hon'ble Allahabad High Court in case of CIT v/s Vector Shipping Service Pvt. Ltd., ITA no.122 of 2013, order dated 9th July 2013, has held that the amount should be deducted on the amount which is payable and not which has been paid by the end of the year. He pointed out that this decision of the Allahabad High Court stands approved in the sense that the SLP against the said decision has been dismissed by the Hon'ble Supreme Court, vide order dated 2nd July 2014. Thus, he submitted that this decision being favourable to the assessee, should be followed.

6. The learned Departmental Representative, on the other hand, submitted that this issue was not raised before the authorities below, therefore, the same should not be entertained and secondly the decision of Calcutta High Court and Gujarat High Court should be followed which are more elaborate and detail judgments.

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7. We have heard the rival contentions. On a perusal of the order of the Hon'ble Allahabad High Court in Vector Shipping Services Pvt. Ltd., ITA no.122 of 2013, judgment dated 9th July 2013, it is seen that only question of law which was formulated by the Hon'ble High Court was as under:–

> *"Whether on the facts and in the circumstances of the case, the Hon'ble ITAT has rightly confirmed the order of the CIT(A) and thereby deleting the disallowance of ₹ 1,17,68,621 made by the Assessing Officer under section 40(a)(ia) of the I.T. Act, 1961, by ignoring the fact that the company M/s. Mercator Lines Ltd. had performed ship management work on behalf of the assessee. M/s. Vector Shipping Services Pvt. Ltd. and there was a Memorandum of Understanding signed between both the companies as per the definition of memorandum of understanding, it includes contract also."*

8. Thus issue of paid and payable was not subject of reference before the Hon'ble High Court. Further, from the facts which has been incorporated by the Hon'ble High Court, was that M/s. Mercator Lines Ltd. had deducted tax at source on the salaries paid by it on behalf of the assessee in respect of which the disallowance was made by the Assessing Officer under section 40(a)(ia). While answering the aforesaid question of law, the Hon'ble High Court held in the present case, tax was duly deducted as the TDS has been deducted from the salary of the employees paid by M/s. Mercator Lines Ltd. on behalf of Vector Shipping Service (the assessee) and the circumstances in which such salaries were paid by M/s. Mercator Lines Ltd., for M/. Vector Shipping Services, where sufficiently explained by the assessee. Thus,

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the issue was decided on the ground that the tax has already been deducted, therefore, no disallowance under section 40(a)(ia) should be made. After having answered the question in the aforesaid manner, the Hon'ble High Court further observed as under:–

> *"It is to be noted that for disallowing expenses from business and profession on the ground that TDS has not been deducted, the amount should be payable and not which has been paid by the end of the year."*

9. Such an observation of the Hon'ble High Court sans the issue in question of law formulated is in the form of *obiter dicta.* This observation was made by the Court because the Tribunal while dealing with the said disallowance has referred to the decision of the Special Bench in M/s. Merilyn Shipping and Transport Ltd., 136 ITD 23 (SB). It is not the case where the Hon'ble High Court has categorically affirmed the reasoning and interpretation given by the Special Bench. On the contrary, we find that the Hon'ble Calcutta High Court in CIT v/s Crescent Exports Syndicate, [2013] 262 CTR (Cal.) 525, has specifically examined the correctness of the majority view of Marilyn Shipping and disapproved the view taken by the Special Bench in the following manner:-

> *The High Court examined the correctness of the majority views in the case of Merilyn Shipping. The main thrust of the majority view was based on the fact "that the Legislature has replaced the expression "amounts credited or paid" with the expression 'payable' in the final enactment.*
>
> *Comparison between the pre-amendment and post amendment law is permissible for the purpose of ascertaining*

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the mischief sought to be remedied or the object sought to be achieved by an amendment. But the same comparison between the draft and the enacted law is not permissible. Nor can the draft or the bill be used for the purpose of regulating the meaning and purport of the enacted law. It is the finally enacted law which is the will of the legislature. CIT vs. Kelvinator reported in 2010(2) SCC 723, relied on.

The Tribunal fell into an error in not realizing this aspect of the matter. The Tribunal held "that where language is clear the intention of the legislature is to be gathered from the language used". Having held so, it was not open to seek to interpret the section on the basis of any comparison between the draft and the section actually enacted nor was it open to speculate as to the effect of the so-called representations made by the professional bodies. The Tribunal held that "Section 40(a)(ia) of the Act creates a legal fiction by virtue of which even the genuine and admissible expenses claimed by an assessee under the head "income from business and profession" if the assessee does not deduct TDS on such expenses are disallowed".

Having held so was it open to the Tribunal to seek to justify that "this fiction cannot be extended any further and, therefore, cannot be invoked by AO to disallow the genuine and reasonable expenditure on the amounts of expenditure already paid"? Does this not amount to deliberately reading something in the law which is not there?

The Tribunal realized the meaning and purport of Sec. 40(a)(ia) correctly when it held that in case of omission to deduct tax even the genuine and admissible expenses are to be disallowed. But they sought to remove the rigour of the law by holding that the disallowance shall be restricted to the money which is yet to be paid. What the Tribunal by majority did was to supply the casus omissus which was not permissible and could only have been done by the Supreme Court in an appropriate case. Bhuwalka Steel Industries vs. Bombay Iron & Steel Labour Board reported in 2010 (2) SCC 273, relied on.

The key words used in Sec. 40(a)(ia), are "on which tax is deductible at source under Chapter XVII–B". If the question is "which expenses are sought to be disallowed?" The answer is bound to be "those expenses on which tax is deductible at source under Chapter XVII -B. Once this is realized nothing turns on the basis of the fact that the legislature used the word 'payable' and not 'paid or credited'. Unless any amount is payable, it can neither be paid nor credited. If an amount has neither been paid nor credited, there can be no occasion for claiming any deduction.

The language used in the draft was unclear and susceptible to giving more than one meaning. By looking at the draft it could be said that the legislature wanted to treat the payments made or credited in favour of a contractor or sub-contractor differently than the payments on account of interest, commission or brokerage, fees for professional services or fees for technical services because the words

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"amounts credited or paid" were used only in relation to a contractor or sub-contractor. This differential treatment was not intended. Therefore, the legislature provided that the amounts, on which tax is deductible at source under Chapter XVII-B payable on account of interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services or to a contractor or sub-contractor shall not be deducted in computing the income of an assessee in case he has not deduced, or after deduction has not paid within the specified time. The language used by the legislature in the finally enacted law is clear and unambiguous whereas the language used in the bill was ambiguous.

There can be no denial that the provision in question is harsh. But that was no ground to read the same in a manner which was not intended by the legislature. The contention that the second proviso sought to become effective from 1st April, 2013 should be held to have already become operative prior to the appointed date cannot also be acceded to. The law was deliberately made harsh to secure compliance of the provisions requiring deductions of tax at source. It is not the case of an inadvertent error.

Thus the majority views expressed in the case of Merilyn Shipping & Transports was held to be not acceptable. The appeal was thus, allowed in favour of the revenue. Merilyn Shipping & Transports (ITA 477/Viz./2008, dated March 29, 2012), overruled."

10. Similar interpretation has been reiterated and explained in detail by the Hon'ble Gujarat High Court, in CIT v/s Sikandarkhan N. Tunvar & Ors.[2013] 357 ITR 312 (Guj.). In this decision, again the Hon'ble Gujarat High Court has specifically dealt this issue in a great length and overruled Marilyn Shipping in the following manner:-

"For the purpose of the said section, the terms "payable" and "paid" are not synonymous. Word "paid" has been defined in Section 43(2) of the Act to mean actually paid or incurred according to the method of accounting, upon the basis of which profits and gains are computed under the head "Profits and Gains of Business or Profession". Such definition is applicable for the purpose of Sections 28 to 41 unless the context otherwise requires. In contrast, term "payable" has not been defined. The word "payable" has been described in Webster's Third New International

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Unabridged Dictionary as requiring to be paid: capable of being paid: specifying payment to a particular payee at a specified time or occasion or any specified manner.

In the context of section 40(a)(ia), the word "payable" would not include "paid". In other words, therefore, an amount which is already paid over ceases to be payable and conversely what is payable cannot be one that is already paid. For the purpose of Section 40(a)(ia) of the Act, term "payable" cannot be seen to be including the expression "paid". The term "paid" and "payable" in the context of Section 40(a)(ia) are not used interchangably.

Despite this narrow interpretation of section 40(a)(ia), the question still survives if the Tribunal in case of M/s. Merilyn Shipping & Transports vs. ACIT (supra) was accurate in its opinion. In this context, Court examined two aspects. Firstly, what would be the correct interpretation of the said provision. Secondly, whether our such understanding of the language used by the legislature should waver on the premise that as propounded by the Tribunal, this was a case of conscious omission on part of the Parliament. If one looks closely to the provision, in question, adverse consequences of not being able to claim deduction on certain payments irrespective of the provisions contained in Sections 30 to 38 of the Act would flow if the following requirements are satisfied:- (a) There is interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to resident or amounts payable to a contractor or sub-contractor being resident for carrying out any work. (b) These amounts are such on which tax is deductible at source under Chapter XVII-B. (c) Such tax has not been deducted or after deduction has not been paid on or before due date specified in sub-Section (1) of Section 39."

U/s 40(a)(ia) the term used is interest, commission, brokerage etc. is payable to a resident or amounts payable to a contractor or sub-contractor for carrying out any work. The language used is not that such amount must continue to remain payable till the end of the accounting year. Any such interpretation would require reading words which the legislature has not used. No such interpretation would even otherwise be justified because the legislature could not have intended to bring about any such distinction nor the language used in the section brings about any such meaning. If the interpretation as advanced by the assessees is accepted, it would lead to a situation where the assessee who though was required to deduct the tax at source but no such deduction was made or more flagrantly deduction though

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made is not paid to the Government, would escape the consequence only because the amount was already paid over before the end of the year in contrast to another assessee who would otherwise be in similar situation but in whose case the amount remained payable till the end of the year.

This brings us to the second aspect of this discussion, namely, whether this is a case of conscious omission and therefore, the legislature must be seen to have deliberately brought about a certain situation which does not require any further interpretation. While interpreting a statutory provision the Courts have often applied Hyden's rule or the mischief rule and ascertained what was the position before the amendment, what the amendment sought to remedy and what was the effect of the changes. In such context, the position prevailing prior to the amendment introduced in Section 40(a) would certainly be a relevant factor. However, the proceedings in the Parliament, its debates and even the speeches made by the proposer of a bill are ordinarily not considered as relevant or safe tools for interpretation of a statute. It would all the more be unsafe to refer to or rely upon the drafts, amendments, debates etc for interpretation of a statutory provision when the language used is not capable of several meanings. In the present case the Tribunal in case of M/s. Merilyn Shipping & Transports vs. ACIT fell in a serious error in merely comparing the language used in the draft bill and final enactment to assign a particular meaning to the statutory provision.

The Courts in India have been applying the principle of deliberate or conscious omission. Such principle is applied mainly when an existing provision is amended and a change is brought about. While interpreting such an amended provision, the Courts would immediately inquire what was the statutory provision before and what changes the legislature brought about and compare the effect of the two. The other occasion for applying the principle, has been when the language of the legislature is compared with some other analogous statute or other provisions of the same statute or with expression which could apparently or obviously been used if the legislature had different intention in mind, while framing the provision. Tribunal committed an error in applying the principle of conscious omission in the present case. Firstly, Court have serious doubt whether such principle can be applied by comparing the draft presented in Parliament and ultimate legislation which may be passed. Secondly, the statutory provision is amply clear. Section 40(a)(ia) would cover not only to the amounts which are payable as on 31th March of a particular year but also which

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are payable at any time during the year. Of course, as long as the other requirements of the said provision exist. M/s. Merilyn Shipping & Transports v/s ACIT, incorrect law. Bhuwalka Steel Industries Ltd. vs.Bombay Iron and Steel Labour Board 2010 (Suppl.) 122, Agricultural Produce Market Committee, Narela, Delhi vs. Commissioner of Income Tax and anr. AIR 2008 SC (Supplement) 566; Greater Bombay Co-operative Bank Ltd. v/s M/s.United Yarn Tex.Pvt.Ltd & Ors. AIR 2007 SC 1584; National Mineral Development Corporation Ltd. vs. State of M.P and another reported in AIR 2004 SC 2456; Gopal Sardar, vs. Karuna Sardar AIR 2004 SC 3068, relied on."

11. Thus, the decision of the Hon'ble Calcutta High Court and Hon'ble Gujarat High Court constitutes ratio decidendi on this issue which in our humble opinion should prevail. Thus, we do not find any merit in the contention raised by the learned counsel that the decision of the Allahabad High Court in Vector Shipping Services Pvt. Ltd. against which Special Leave Petition has been dismissed by the Hon'ble Supreme Court, lays down a ratio decidendi on the phrase paid and payable by approving the decision of Special Bench in Merlyn Shipping. Thus, ground no.1, of the Revenue is partly allowed.

12. Ground no.2, relates to disallowance of ₹ 4,41,221, made under section 14A, r/w rule 8D.

13. The Assessing Officer has made the disallowance under section 14A, after applying rule 8D of ₹ 4,41,221, as against the dividend income of ₹ 4,76,670, as shown by the assessee. The learned Commissioner (Appeals) has held that rule 8D is not applicable for the

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assessment year 2007–08 as the same is applicable from the assessment year 2008–09, in view of the decision of the Hon'ble Jurisdictional High Court in Godrej & Boyce Mfg. Co. Ltd. v/s DCIT, (2010), 328 ITR 081 (Bom.). Accordingly, he gave a reasonable basis for determining the quantum of disallowance in the following manner:–

> *"I find that it will be reasonable to determine the quantum of the amount of expenditure incurred for earning of exempted income at the ratio of the total expenditure debited to P&L Account in proportion that the value of transaction in shares which has yielded exempt income bears to the value of total transactions in share as under:-*
>
> *Amount of expenditure allowable to earning of exempt income =*
>
> *Total Expenditure debited to P&L Nc (Direct & Indirect) X Value of transaction in share yielding exempt income*
> *Value of Total Transactions in share*
>
> *The amounts so determined shall be disallowed as per the provisions of section 14A, being expenditure incurred for earning of exempt income. The A.O. is directed to determine the quantum of such expenditure by applying the ratio as mentioned above and disallow the same as per the provisions of section 14A. The appeal on this ground is accordingly, disposed off with these directions: The disallowance made by the A.O. by applying Rule 80 at Rs.4,41,221/– is thus, deleted in respectful compliance of the decision of the Hon'ble Bombay High Court in the case of M/s. Godrej & Boyce Manufacturing Co. Ltd.(Supra). The appeal on this ground is treated as partly allowed, for statistical purpose."*

14. After hearing the parties, we do not find any reason to deviate from such a finding of the learned Commissioner (Appeals), because admittedly disallowance cannot be made on the basis of formula laid down by the rule 8D in the assessment year 2007–08 and some reasonable basis has to be adopted. Thus, ground no.2, raised by the Revenue is dismissed.

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15. परिणामतः राजस्व की आंशिक स्वीकृत की जाती है ।

15. In the result, Revenue's appeal is partly allowed.

आदेश की घोषणा खुले न्यायालय में दिनांकः 22nd August 2014 की गई ।
Order pronounced in the open Court on 22nd August 2014

Sd/-	**Sd/-**
डी. करुणाकर राव	**अमित शुक्ला**
लेखा सदस्य	**न्यायिक सदस्य**
D. KARUNAKARA RAO	**AMIT SHUKLA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई MUMBAI, दिनांक DATED: 22nd August 2014

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

(1) निर्धारिती / The Assessee;
(2) राजस्व / The Revenue;
(3) आयकर आयुक्त(अपील)/ The CIT(A);
(4) आयकर आयुक्त / The CIT, Mumbai City concerned;
(5) विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;
(6) गार्ड फाईल / Guard file.

सत्यापित प्रति / True Copy
आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury
वरिष्ठ निजी सचिव / Sr. Private Secretary

उप / सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

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