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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION CIVIL) No. 4089/2017**

Reserved on: 15th November, 2018
Date of decision: 17th January, 2019

RAJAN BHATIA ..... Petitioner

In person.

versus

CENTRAL BOARD OF DIRECT TAXES & ANR. .... Respondents

Through: Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Piyush Goyal, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J.:

Rajan Bhatia, who appears in person, has filed the present writ petition for issue of writ or any appropriate order or direction for quashing the proviso to Section 10(34) of the Income Tax Act, 1961 ('Act' for short) read and along-with with the provisions of Section 115BBDA of the Act. Another prayer made in the writ petition is for staying operation of the aforesaid provisions generally and in particular in relation to the Assessment Year 2017-2018. It is submitted that the provisions under challenge are arbitrary, *ultra vires* and violative of Article 14 of the Constitution of India.

2. Section 10(34) of the Act reads as under:-

> "10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-
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> XXXX
>
> 34. any income by way of dividends referred to in section115-O:
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> Provided that nothing in this clause shall apply to any income by way of dividend chargeable to tax in accordance with the provisions of section 115BBDA."

Section 10(34) grants exemption to income by way of dividend referred to in Section 115-O of the Act. The proviso to sub-section (34) of Section 10 states that nothing contained in the main clause shall apply to income by way of dividend chargeable to tax in accordance with the provisions of Section 115BBDA of the Act. The proviso gives primacy to Section 115BBDA over Section 10(34) of the Act.

3. Section 115BBDA of the Act reads as under:-

> "(1) Notwithstanding anything contained in this Act, where the total income of a specified assessee, resident in India, includes any income in aggregate exceeding ten lakh rupees, by way of dividends declared, distributed or paid by a domestic company or companies, the income-tax payable shall to be aggregate of -
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> (a) The amount of income-tax calculated on the *income* by way of such dividends *in aggregate exceeding ten lakh rupees,* at the rate of ten percent; and

(b) the amount of income-tax with which the assessee would have been chargeable had the total income of the assessee been reduced by the amount of income by way of dividends."

Explanation.— For the purposes of this section—

(a) "dividend" shall have the meaning assigned to it in clause (22) of Section 2 but shall not include sub-clause (e) thereof;

(b) "specified assessee" means a person other than,—

(i) a domestic company; or

(ii) a fund or institution or trust or any university or other educational institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of Section 10; or

(iii) a trust or institution registered under Section 12A or Section 12AA."

Section 115 BBDA is a non-obstante provision that would apply and prevail over Section 10(34) of the Act. Section 115 BBDA states that notwithstanding anything contained in the Act, where the total income of a specified resident assessee, includes income by way of dividend declared, distributed or paid by domestic companies exceeding Rs. 10 lacs, income tax payable by such assessee shall be the aggregate of clauses (a) and (b). As per clause (a), the specified assessee would be liable to pay tax at the rate of 10% on the amount of income by way of dividend in aggregate of exceeding Rs. 10 lacs. Clause (b) states that the specified assessee would be liable to pay income tax chargeable on his/her total income reduced by the amount of

income by way of dividends. The tax payable is aggregate of clauses (a) and (b).

Explanation to Section 115BBDA of the Act defines different expressions used in the section including the expression 'specified assessee' to mean a person other than a domestic company, a fund or institution or trust or any university or educational institution or any hospital etc, under the specified different sub clauses of Clause 23C of Section 10 of the Act or a trust or an institution registered under Section 12A and 12AA of the Act. The Explanation prior to its amendment by Finance Act, 2017 with effect from 01.04.2018 had specified that the provisions of Section 115BBDA, if applicable, would apply only to an individual, Hindu Undivided Family or a firm. Thus, amendment to the Explanation with effect from 01.04.2018 has expanded the persons who would be covered by the expression "specified assessee" for purpose of Section 115 BBDA of the Act.

4. Challenge to the constitutional validity of the aforesaid provisions is primarily on two grounds. The first ground is that Section 115BBDA of the Act does not have any 'base', an argument we shall elaborate subsequently. The second ground is that the provision makes hostile discrimination between a resident assessee and a non-resident assessee, as the provision only applies to a resident assessee. It is also pointed-out that the provision excludes from its ambit any domestic company. Prior to 14.09.2018, the provision was not applicable to association of persons.

5. The contention that the provision lacks 'base' is founded on a misrepresentation and misreading of clause (a) of the sub-section (1) of Section 115 BBDA of the Act. The argument proceeds on the premise that

clause (a) of sub-section (1) of Section 115 BBDA is ambiguous and vague, as the provision lacks certainty and does not specify whether tax at the rate of 10% would be applicable on the *entire* dividend income, if it exceeds Rs. 10 lacs or would be applicable *only* to the dividend over and above i.e. in excess of Rs. 10 lacs.

6. We do not find any merit in the said contention as, according to us, clause (a) of sub-section (1) of Section 115BBDA of the Act is clear and categoric. It stipulates that where a specified assessee, who is a resident of India, has income in aggregate exceeding Rs. 10 lacs by way of dividends declared, distributed or paid by a domestic company or companies, then he/she would be liable to pay tax @ of 10% on such dividend income i.e. dividend income exceeding Rs.10 lacs. The respondents have in fact relied upon and explained the legal position in the memorandum in the form of Explanatory Notes to the provisions of the Finance Act, 2016 in which it was observed that:-

> "14.1 The provisions contained in clause (34) of Section 10 of the Income-tax Act, before its amendment by the Act, provided that dividend which suffers dividend DDT under Section 115-0 is exempt in the hands of the shareholder. Section 115-0 specifies that dividends are taxed only at the rate of fifteen per cent. at the time of distribution in the hands of company declaring dividends. This created vertical inequity amongst the tax payers as those who have high dividend income are subjected to tax only at the rate of 15% whereas such income in their hands would have been chargeable to tax at the rate of 30%.

> 14.2 With a view to rationalise the tax treatment provided to income by way of dividend, Section l15BBDA has been inserted in the Income-tax Act to provide that any income by way of dividend in excess of ten lakh rupees shall be chargeable to tax in the case of an individual, HUF or a firm who is resident in India, at the rate of ten per cent The taxation of dividend income shall be on gross basis and no deduction of any expenditure or allowance or set off of loss shall be allowed in computing said income.
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> 14.3 The taxation of dividend income shall be on gross basis and no deduction for any expenditure or allowance or set off of loss shall be allowed in computing the income by way of dividend.
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> 14.4 Applicability: This amendment takes effect from 1st of April, 2017 and will, accordingly, apply in relation to assessment year 2017-18 and subsequent assessment years."

7. In the context of clause (a) to Section 115 BBDA(1), we have no doubt in our mind that the legislation, as framed, stipulates that tax at the rate of 10% would only be payable in case the specified assessee has earned dividend income exceeding Rs. 10 lacs. Further, tax at the rate of 10% would be payable only on the dividend income beyond Rs. 10 lacs. In other words, dividend income upto Rs. 10 lacs is not to be charged to tax @ 10 % under Section 115 BBDA of the Act. Dividend income of less than Rs.10 lacs continues to remain exempt under Section 10(34) of the Act.

8. In view of the aforesaid interpretation, we need not refer to the argument of the petitioner that circular or explanatory notes cannot substitute the statutory provisions as we are of the firm view that the

interpretation given above is the only reasonable and plausible interpretation to be given to clause (a) to sub-section (1) of Section 115 BBDA of the Act. On being questioned, in fact the petitioner had candidly accepted that while filing a return of income tax, he had paid tax only on the dividend income above and more than Rs. 10 lacs and not on the entire dividend income i.e., dividend income from Re. 1 to Rs. 10 lacs.

9. Plea of hostile discrimination is again without merit and is predicated on the wrong notion that in tax legislation in order to tax one group the legislation must tax all. In a taxation legislation, the Legislature and Executive have the right to identify the persons who have to be taxed. The concept of equality enshrined in Article 14 of the Constitution, as elucidated in ***Pannalal Bansilal Pitti v. State of A.P*** (1996) 2 SCC 498, does not not require that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, as varying needs of different classes of persons often require separate treatment. It is inexpedient and incorrect to think that all laws are uniformly applicable to all people in one go. Earlier in ***State of W.B. v. Anwar Ali Sarkar*** AIR 1952 SC 75, it was observed that if the legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a well-defined class, it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons.

10. Contention of the petitioner that the companies have been left out would be an argument predicated on under-classification, i.e., certain classes which could have been included, have been excluded from taxation. This argument does not carry weight, since under-classification *per se* is not

sufficient ground and justification to strike down a provision. In ***Amrendra Kumar Mohapatra v. State of Orissa*** (2014) 4 SCC 583, the question of 'under-inclusion' was decided by relying upon ***State of Gujarat v. Shri Ambica Mills Ltd.,*** AIR 1974 SC 1300 wherein the Constitution Bench had dealt with the question of a classification that was under-inclusive and it was held that having regard to the real difficulties under which legislatures operate, the Courts have refused to strike down legislations on the ground that they are under-inclusive.

11. In taxation matters, the Government has the right to identify the persons who have to be taxed. Legislature and executive enjoy greater latitude in the field of tax and economic legislation because of the complexities involved as compared to laws touching civil rights such as freedom of speech, religion etc. Taxation invariably is a matter of policy and the court is not to examine and comment on the wisdom of such decisions. Further, there is a presumption in favour of constitutional validity of law made by the Parliament or State Legislature. Taxation statutes are normally not struck down on the ground of under-classification (*see* ***Sekhawant Ali Vs. State of Orissa****, AIR 1955 SC 116,* ***State of U.P. Vs. Deoman Upadhaya****, AIR 1960 SC 1125,* ***The State of Jammu and Kashmir Vs. Trilok Nath Khosa & Ors****, (1974) 1 SCC 19,* ***R.K. Garg & Ors Vs. Union of India & Ors.****, (1981) 4 SCC 675,* ***State of M.P Vs. Rakesh Kohli & Ors.****,* (*2012) 6 SCC 312 and* ***Namit Sharma Vs. Union of India,*** (2013) 1 SCC 745).

12. Pertinently, we may note that companies have to pay dividend tax whenever they pay dividend to the shareholders. This would explain and justify the reason why companies have been left out from the purview of

Section 115BBDA. If companies were liable to pay tax under this section, it would have led to cascading effect when dividend is finally paid to the shareholders, be it, an individual, HUF or a firm i.e. the 'specified assessee' who are liable to pay tax under Clause (a) to Section 115BBDA of the Act.

13. Similarly, the argument that non-residents have been left-out is an argument of under-classification. Non-residents who invest in India contribute and help in growth of industrialization, job creation and economic progress. Non-residents have options to invest in different countries. Consequently, the Legislature/Executive as a matter of policy decide how and in what manner non-residents should be taxed. Non-residents can be treated differently for the reason that they are residents of foreign states and not residents of India. Taxation at source principle may not be applied to non-residents. Non-residents are liable to pay tax in the country of their residence. Taxation regime applicable to non-residents need not identical to that applicable to residents.

14. In view of the above, we do not find any merit in the present writ petition; and accordingly the same is dismissed.

(SANJIV KHANNA)
JUDGE

(ANUP JAIRAM BHAMBHANI)
JUDGE

JANUARY 17th , 2019
uj/VKR