IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 71 OF 2015

The Commissioner of Income Tax
"Aaykar Bhavan",
Patto, Panaji Goa. .. Appellant

V e r s u s

M/s Goa State Infrastructure,
Development Corporation Ltd.,
7th Floor, EDC House,
Dr. A. B. Road,
Panaji Goa.
PAN : AACCGO256F .. Respondent

Ms. Asha A. Desai, Advocate for the appellant.

Coram :- F. M. REIS &
K. L. WADANE, JJ

Date : 19th October, 2015

ORAL ORDER :

Heard Ms. Asha Dessai, learned counsel appearing for the appellant.

2. The above appeal challenges the order passed by the Income Tax Appellate Tribunal, Panaji, dated 14.08.2014. It is the case of the appellant that the subject Assessment Year is 2009-2010 and that the AO by an order dated 21.11.2011 completed the assessment inter-alia by making a disallowance under Section 40(a)(ia) of a sum of Rs.3,73,07,240/-. Being aggrieved by the said order, an appeal was preferred by the respondent before CIT (Appeals) which was

dismissed by an order dated 20.11.2012. But thereafter on 13.02.2013, CIT (Appeals) rectified the order dated 20.11.2012 thereby granting relief to the respondent. Aggrieved by the said order, the appellant/revenue filed an appeal before the learned Tribunal whereby the order of CIT (Appeals) was set aside and the matter was remanded back to the Commissioner of Income Tax for reconsideration. Upon remand by an order dated 14.02.2014, the Commissioner of Income Tax allowed the appeal of the Assessee directing the AO to delete the disallowance under Section 40(a)(ia) amounting to Rs.3,73,07,240/-. Aggrieved by the said order, the appellant preferred an appeal before the learned Tribunal which came to be dismissed by order dated 14.08.2014. Aggrieved by the said order, the appellant preferred the present appeal.

3. Ms. Asha Dessai, learned counsel appearing for the appellant has pointed out that the Assessee had electronically filed the return of income for the Assessment Year 2009-2010 on 29.09.2009 declaring a total income of Rs.1,26,21,720/-. The learned counsel has further pointed out that upon scrutiny of the said return, a disallowance under Section 40(a)(ia) was made by the AO to the tune of Rs.3,73,07,240/-. The learned counsel has further pointed out that the learned Tribunal has erred in deleting the disallowance though the Assessee had failed to deposit the tax in the Government Account within the due date on the ground that the provisions of Section are

amended by the Finance Act, 2010 with retrospective effect when in fact the amendment is with effect from 01.04.2010 and not from the date of insertion of the provisions i.e. 01.04.2005, as held by the learned Tribunal. The learned counsel as such submits that there is a substantial question of law to that effect to be examined by this Court.

4. On perusal of the impugned order passed by the learned Tribunal, we find that the learned Tribunal has observed at para 5.1 thus.

> "5.1 The ld. DR vehemently contended that since the amendment was made w.e.f. 1.4.2010, therefore, CIT(A) was not correct in allowing the relief to the Assessee. We noted the interpretation of this provision as given by the Hon'ble Gujarat High Court in the case of Commissioner of Income Tax, Ahmedabad IV Vs. Om Prakash R Chaudhary in Tax Appeal Nos.412/2013 and connected matter, which came to be decided on 22.11.2013, after referring to the judgments of Alied Motors (P.) Ltd. Vs. CIT reported in AIR 1997 SC 1361 and CIT Vs. Alom Extrusions Limited reported in (2009) 319 ITR 306, has held as under:
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> > *"15.4: Thus, considering relevant legislative changes made by the Parliament from time to time and some of the decisions relevant to consider the question of retrospectivity raised in these present appeals, the focal question, therefore, would be whether the amendment brought about by way of Finance Act 2010 in Section 40*

[a](ia) with effect from 1st April 2010 could be said to be clarificatory in nature for attending to unintended consequences, and therefore, is having retrospective effect from 1st April 2005.

16: A closer examination needs to be done as to whether the amended provision aims to expand the prevailing position and whether the same being in the nature of curative, retrospectivity of the same is permissible as is being contended for and on behalf of the assessee. At this stage, therefore, the true effect of such amendment needs to be discerned.

16.1: It is demonstrated before us that the TDS provision caused unintended inexplicable situation whereby the assessee who deducted the tax at source from the payments made by it for and on behalf of the Government and then if misses out the time limit of depositing the same with the Treasury within the time prescribed, the amount spent for its business purposes on account of the late deposit of such tax would result into disallowance of entire expenditure under Section 40[a](ia). The said proviso thereby caused immense hardship. The amendment under consideration made by the Finance Act 2010 relaxes the rigors of such provision by permitting payment of Tax till the filing of return as provided under sub-section (1) of Section 139 of the Act.

16.2: One can notice that the object of bringing about provision of Section 40(a)(ia) in the year 2005 – 06 was to augment compliance of TDS provision. TDS either not deducted or deducted but not paid in respect of payment of interest, commission or brokerage etc., before the expiry of time prescribed under sub-section (1) of Section 200 and in accordance with the other provisions of Chapter XVII, such amount shall not be deducted in computing the 'income' chargeable under the head 'Profit & Gains' of business or profession. Such provision starts *with non obstante clause which states that notwithstanding anything contained in Section 30 to 38 of the Income-tax Act, if the tax deducted at source is not paid within prescribed time [under Section 200 (1)], no amount could be deducted while computing the income, under Chapter IV of the 'computation of business income'.*

16.3: Thereafter, by way of amendment of Finance Act, 2008, further amendment was made whereby TDS deductible and deducted in the last month of previous year if was not paid till the due date of filing of return under sub-section (1) of Section 139 and in any other case, on or before the last day of the previous year, Section 40(a)(ia) provided for the disallowance of expenses like interest, commission, brokerage, etc.

16.4: Since, this had created anomaly, whereby tax deducted in the last month was permitted payment till filing of return as per sub-section (1) of Section 139 whereas for the TDS deducted during the rest of the months, period was provided only till 31st March of the previous year, Finance Act, 2010 was brought. To bring parity, to remedy unintended consequences and to make the provision workable, it proposed to amend the said provision and provided inter alia that no disallowance would be made if after deduction of tax during the previous year, the same has been paid on or before the due date of filing of return of income as specified in sub-section (1) of Section 139. This has been given retrospective effect from 1st April 2010.

16.5: Of course, the Legislature has given the effect from a specified date and applied the same to A.Y.2010-11 and subsequent years, this provision being curative in nature, its effect needs to be read retrospectively in operation. Its very purpose would not be sub-served, if the effect is limited to A.Y.2010-11 and subsequent years only. Strict construction if leads to a result not intended to be fulfilled *by the object of legislation and another construction is possible apart from literal construction, then that construction needs to be preferred as held in a decision in case of CIT V. Alom Extrusion Limited [Supra].*

16.6: We also cannot be oblivious of submissions not denied by the other side that various representations were made to the Finance Minister to bring about suitable amendment as the assessee otherwise was losing genuine deduction of expenditure on this count as also reflected in the speech of Finance Minister so also in the memorandum explaining the provision of the Finance Bill.

16.7: Giving plain or natural meaning to the amendment as contended by the Department, if is likely to create a situation enhancing the hardship and advance discrimination, purposive and reasonable interpretation is required to be given by the Court. When plain interpretation frustrates the very legislative intent, the Court is expected to bear in mind the legislative intent from the language used in the statue with the help of permissible tools of interpretation of statute.

17: The core issue as to whether the amendment made by the Finance Act 2010 to Section 40[a](ia) of the Act is retrospective from the date of insertion of the provision i.e., 1st April 2005 therefore needs to be answered in affirmation. It can be seen that the amendment made by the Finance Act 2010 allows additional time upto the due date of filing of the return in respect of even those instances where TDS has been deducted during the first eleven months of the previous year. The additional time till the due date of filing of the return, in case of TDS made during the last month of the previous year was already available by the amendment made by Finance Act 2008. Thus, it is apparent that the relaxation made by the amendment made under the Finance Act, 2010 brings the law in parity with the aforementioned situation and *accordingly, for the TDS deducted all throughout the year, time is extended from payment till the filing of return. It is thus apparent that when the amendment introduced by the Finance Act, 2008 of relaxing the time for deposit of TDS was made retrospective from the year 2005 [1st April 2005], the amendment by Finance Act 2010 with regard to other limb of time limit for payment of TDS has to be held retrospective not from 1st April 2010 only. If we recall at this stage the speech of Finance Minister while introducing this provision by way of Finance Act, 2010, this amendment essentially has been brought for relaxing the current provision on disallowance of expenditure. The tax, if is deducted at any time during the financial year and paid before the date of filing of the return, the Legislature intended to allow deduction on such expenditure with an intention to permit additional time for most deductors upto September of the next financial year.*

17.1: We draw further support from the fact that the rigor of payment of interest is also enhanced by increasing the interest charged on tax deducted, if any deposit by the specified date i.e., up to the filing of the return is not made, from 12% to 18% per annum in the provision of Section 201 (1A). Prior to the said amendment of Finance Act, 2010 under Section 201 (1A), assessee was liable to pay simple interest at one per cent for every month or part of month, in case of failure to deduct tax on payment of deducted tax, increase is made correspondingly from one per cent to one and half per cent for every month or part of month for discouraging delay in deposit. As rightly contended by the respondents arithmetical discrepancy can be well judged from the fact that the rates of TDS may vary between 1% to 10%, whereas, legitimate business expenditure denied is 100% - resulting into taxation of gross receipts coupled with levy of interest and penalty, which would mean that the possibility cannot be ruled out

> *of business of the tax payer getting closed down permanently, if there is absence of any scope of claiming any expenses in the next year.”*

5. Taking note of the observations and well settled by the Delhi High Court as well as Gujarat High Court relying upon the judgment of the Apex Court, we find that there is no substantial question of law which arises in the present appeal for consideration. Amendment which has been introduced is curative in nature. In case the view proposed by the learned counsel appearing for the appellant is accepted, than the amendment would apply only for Assessment Year 2010-11 and subsequent years. The very purpose would not be sub-served. We respectfully accept the view taken by the Gujarat High Court and other High Courts referred to herein above. Hence, we find no merits in the above appeal which stands accordingly rejected.

K. L. WADANE, J **F. M. REIS, J**

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