IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

ITA.No. 78 of 2015 ()

AGAINST THE ORDER IN ITA 262/COCH/2014 of I.T.A.TRIBUNAL,COCHIN BENCH
DATED 30.10.2014

APPELLANT(S)/APPELLANT/RESPONDENT/REVENUE:

THE COMMISSIONER OF INCOME TAX,
KOZHIKODE.

BY ADVS.SRI.CHRISTOPHER ABRAHAM, INCOME TAX DEP
SRI.K.M.V.PANDALAI, INCOME TAX DEPARTMENT

RESPONDENT(S)/RESPONDENT/APPELLANT/ASSESSEE:

M/S.KERALA TRANSPORT COMPANY,
KTC BUILDING, YMCA ROAD, KOZHIKODE-673002.

R1 BY ADV. SRI.T.M.SREEDHARAN (SR.)
R1 BY ADV. SRI.V.P.NARAYANAN
R1 BY ADV. SMT.DIVYA RAVINDRAN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 19-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN ITA.78/15

APPELLANT'S EXHIBITS:

ANNEXURE A: COPY OF ASST.ORDER DATED 30.3.2013.

ANNEXURE B: COPY OF CIT(A)'S ORDER DATED 5.3.2014.

ANNEXURE C: ORDER OF THE ITAT, KOCHI DATED 30.12.2014.

/TRUE COPY/

PS TO JUDGE

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

I.T.A.No.78 of 2015

Dated this the 19th day of August, 2015

JUDGMENT

Antony Dominic, J.

1. This appeal is filed by the Revenue challenging the order passed by the Income Tax Appellate Tribunal, Cochin Bench in ITA.262/14.

2. By Annexure A, the Assessing Officer completed the assessment for the year 2007-08, disallowing ₹61,32,54,820/- under section 40(a)(ia)of the Income Tax Act. The assessee filed an appeal, which was disposed of by the first appellate authority as per Annexure B order, in which, after making reference to the remand report, the first appellate authority held that the assessee could furnish 15-I forms in respect of lorry hire charges paid to the extent of ₹28,28,38,187/- out of the total amount of ₹28,89,12,411/-, leaving a balance of ₹60,74,224/-. A perusal of this order shows that the figure ₹28,89,12,411/- is taken by the first appellate authority from the remand report of the Assessing

Officer dated 17.2.2014, which is also extracted in that order. Proceeding further, the first appellate authority disposed of the appeal deleting the disallowance except for the amount of ₹60,74,224/-.

3. The Revenue filed appeal before the Tribunal as ITA.262/14 against the order of the first appellate authority. The appeal was heard along with ITA.261/14 filed by the assessee and both the appeals were disposed of by Annexure C order, where, in so far as it is relevant, the Tribunal held thus:

> "12. We have considered the rival submissions on either side and also perused the material available on record. The total disallowance was Rs.61,32,54,820 out of which the assessing officer himself admitted that the claim of the assessee to the extent of Rs.30,71,97,689. The only dispute is with regard to Rs.28,28,38,187. It is an admitted fact that the assessee has filed form 15-I to the extent of Rs.27,67,63,963. Section 40(a)(ia) provides for disallowance of the expenditure which is otherwise allowable in case tax which is deductible at source under Chapter XVIIB was deducted or after deduction it was not paid. Therefore, it is for the revenue to show

that the amount to the extent of Rs. 28,28,38,187 is liable for taxation and hence the assessee is liable to deduct tax. When the assessee received form 15-I/15-J from the recipient saying that their taxable income is below the taxable limit, then the liability to deduct tax would not arise. Therefore, to that extent the assessee is justified in not deducting tax. It is for the Commissioner before whom form 15-I/15-J was filed to verify the same and inform the assessee that the claim made in form 15-I or 15-J is not correct. Simply receiving the form 15-I and 15-J and keeping the same on file without acting upon, the assessing officer cannot blame the assessee for non deduction of tax. Therefore, this Tribunal is of the considered opinion that to the extent of Rs.27,67,63,963/- for which the assessee has filed form 15-I, there cannot be any disallowance u/s 40(a)(ia) of the Act.

13. Now what remains is only disallowance of Rs.60,74,224. Admittedly, the assessee has not filed form 15-I. The ld. Senior counsel now claims that the assessee could not collect form 15-I for lapse of time. It is not for the assessee to collect from 15-I; it is for the receipt of the amount to furnish form 15-I to the assessee if the amount received is not taxable in their hands. Therefore, form 15-I has to be furnished before making the payment. The assessee now cannot collect form 15-I from the recipients of the amounts. Therefore, the claim of the assessee that due to

> lapse of time they could not collect form 15-I is not justified. Unless and until it is shown to the satisfaction of the assessing officer that the amounts in the hands of the recipients are not taxable, this Tribunal is of the considered opinion that the assessee is liable to deduct tax. Therefore, failure to deduct tax would attract disallowance u/s 40(a)(ia) of the Act. Hence, the CIT(A) has rightly restricted the disallowance to the extent of Rs.60,74,224. This Tribunal do not find any infirmity in the order of the lower authority. Accordingly, the same is confirmed. "

The Tribunal thus dismissed the appeal filed by the Revenue.

4.In this appeal, the Revenue challenges the order passed by the Tribunal and the question of law framed is whether, in the facts and circumstances of the case, the Tribunal was right in law in confirming the decision of the Commissioner of Income Tax (Appeals) deleting disallowance except to the extent of ₹60,74,224/-.

5.We heard learned standing counsel for the Revenue and the learned senior counsel appearing for the assessee and considered the submissions made. We have also gone through the assessment order, the first appellate order and the order of the Tribunal.

6.Reading of paragraph 12 of the order of the Tribunal shows that the Tribunal has proceeded on the basis that the total disallowance was ₹61,32,54,820/-. It thereafter states that out of this amount, the Assessing Officer himself admitted the claim of the assessee to the extent of ₹30,71,97,689/-. This itself is factually erroneous because paragraph 7 of the first appellate authority's order states that in the report dated 13.11.2013, what is stated by the Assessing Officer was that, out of the total disallowance of ₹61,32,54,820/-, only an amount of ₹30,71,97,689/- is sustainable, as the assessee could satisfactorily explain with evidence the balance amount. This does not mean that by making such observation, the Assessing Officer had admitted the claim of the assessee to the extent as mentioned by the Tribunal. Thereafter, the Tribunal, without any explanation, proceeded to hold that the dispute was only with regard to ₹28,28,38,187/-. Even if the last two figures are added, the total amount would not be the amount of total disallowance as mentioned by the Tribunal. This itself shows that there is error in the figures shown. Secondly, the Tribunal says that it is an admitted fact that the assessee has filed form 15-I to the extent of ₹27,67,63,963/- and it is on that basis, the Tribunal confirmed the finding of the first appellate authority sustaining the disallowance of ₹60,74,224/-.

7.Having seen the figures in the Tribunal's order and also on comparison of the same with the figures as available in the remand report extracted in the first appellate authority's order, we are inclined to think that there are factual mistakes committed by the Tribunal, requiring re-examination of the issues raised by the Revenue in its appeal. For that reason, we set aside the order in ITA.262/14 and remit the matter back to the Tribunal with direction to dispose of the same afresh with notice and after hearing both sides.

Appeal is disposed of accordingly.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
SHAJI P. CHALY, Judge.

kkb.