

IN THE HIGH COURT OF BOMBAY AT GOA**TAX APPEAL No. 11 OF 2016**

M/s. Sesa Resources Ltd.)
 Earlier known as)
 V.S.Dempo & Co. Pvt. Ltd.)
 Dempo House, Campal,)
 Panaji, Goa – 403 001) Appellant

V/s

1. Deputy Commissioner of Income)
 Tax, Circle-1(1), having office at)
 'Aayakar Bhavan', Patto Plaza,)
 Panaji – Goa)

 2. Union of India,)
 Through the Secretary (Revenue),)
 Ministry of Finance,)
 North Block, New Delhi) ...Respondents

Shri. Mihir Naniwadekar, Advocate with Ms. Vinita Vishram Palyekar,
 Advocate for the Appellant.
 Ms. Asha Desai, Advocate for the Respondents.

**CORAM : F.M. REIS &
 K. L. WADANE, JJ.**

DATE : 07th MARCH, 2016

ORAL JUDGMENT : (Per F.M. REIS, J.)

Heard Shri Mihir Naniwadekar, learned Counsel appearing for the
 Appellant and Ms. Asha Desai, learned Counsel appearing for the
 Respondents.

2. Admit on the following substantial question of law:

Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in upholding disallowance u/s 40(a)(ia) in respect of non-deduction of tax at source on payments of commission to non-resident sales agents, when it was clear from the provisions of the Act as also Circulars issued by the CBDT that the relevant amounts were not chargeable to tax under the Income Tax Act, 1961, in the hands of the non-resident recipients?

3. Learned Counsel for the Appellant has pointed that the learned Tribunal has misconstrued the Explanation 2 to Section 195 of the Finance Act, 2012 inter alia, while coming to the conclusion that even in case in which the income of the non- resident is not chargeable to tax in India, the deduction at source would have to be made by the Appellant. Learned Counsel further points out that the explanation was not itself relevant to the facts of the case as it is not the case of the appellant that the commission paid to the non-resident was not chargeable to tax in India. Learned Counsel further points out that the CIT(A) has rightly come to the conclusion that such commission was not to be deducted at source. However, learned Tribunal has relied on the explanation to hold that such deduction has to be made. Learned Counsel has thereafter taken us through the impugned order to point out that the learned Tribunal was not justified to come to the conclusion that tax deducted at

source had to be effected and in default the Appellants were liable to pay penalty.

4. Learned Counsel, in support to his contention, has relied upon the Judgment of Division Bench of this Court passed in Income Tax Appeal No.169/2014 dated 08.12.2015 in the case of Commissioner of Income Tax-10 v/s. Gujarat Reclaim & Rubber Products Ltd.. Learned Counsel further pointed out that as far as interest, the grievance is that, though the learned Tribunal has remanded the matter to the Assessing Officer to examine whether the subject transaction is speculative or not, the contentions of the Appellant on all counts had to be kept open. Learned Counsel further points out that in any event this issue stands concluded by the judgment of the CIT(A) and as such according to him, there was no case for remanding the matter to the Assessing Officer.

5. On the other hand, Ms. Asha Desai, learned Counsel for the Respondents pointed out that the impugned order passed by the learned Tribunal is based on the decision passed by the co-ordinate Bench of the Tribunal and as such, according to her, there was no error committed by the Tribunal in remanding the matter to the Assessing Officer. Learned Counsel further pointed out that in view of the judgment of the Division Bench of this Court, no fault can be found in the impugned order as

contended by the learned Counsel appearing for the Appellant. Learned Counsel further submits that the learned Tribunal has rightly come to the conclusion that irrespective of the fact that a non-resident is not liable to tax, such deduction has to be effected in respect of payments of commission in terms of Section 195 of the Income Tax Act. Learned Counsel, as such, submits that there is no error committed while coming to this conclusion. Learned Counsel appearing for the Respondents submits that as the matter has been remanded to the Assessing Officer and the Appellant can always have liberty to raise this contention, on this count there is no substantial question of law.

6. We have considered the submissions of the learned Counsel appearing for both the parties.

7. With regard to the second grievance raised by the learned Counsel appearing for the Appellant with regard to the directions to the Assessing Officer to examine whether the subject transaction is speculative, we accept the contention of the learned Counsel for the Respondents that on this count there can be no substantial question of law. All contentions of the Appellant on merits on that count are kept open.

8. With regard to substantial question of law referred to above, we

find that in the Judgment of the learned Division Bench in the case of Gujarat Reclaim & Rubber Products Ltd (supra) it has been, inter alia, held that before effecting deduction at source one of the aspects to be examined is whether such income is taxable in terms of the Income Tax Act. This aspect has not been considered by learned Tribunal while concluding that the Appellant has committed a default in not deducting the tax at source. As the said learned Division Bench Judgment was not available while passing the impugned order by the learned Tribunal, we find it appropriate, in the interest of justice, to quash and set aside the impugned order of the learned Tribunal to the extent it holds that the Appellant has defaulted in not deducting tax at source and remand the matter to the learned Tribunal to examine the said aspect afresh in the light of the judgment of this Court after hearing the parties in accordance with law. All contentions on that count are kept open.

9. In view of above, we pass the following order:

ORDER

- (i) The Appeal is partly allowed.
- (ii) The impugned order dated 20.08.2015 passed by the learned Tribunal in Appeal No. ITA/267/PNJ/2015(Revenue) only to the extent it holds that the Appellant has committed default

under section 40(a)(ia) of the Income Tax Act, 1961 is quashed and set aside.

(iii) Appeal preferred by the Respondent is restored to the file of the learned Tribunal so as to examine the said aspect only afresh after hearing the parties in accordance with law.

10. Appeal stands disposed of accordingly.

K.L. WADANE, J.

F.M. REIS, J.

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