Meena

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 68 OF 2016

THE PRINCIPAL COMMISSIONER OF INCOME TAX,
"Aayakar Bhavan", Patto Plaza, Panaji, Goa ...**APPELLANT**

~ **VERSUS** ~

SESA GOA LTD
Sesa Ghor, 20 EDC Complex, Patto, Panaji, Goa
PAN No.AAACCS7101B ...**RESPONDENT**

APPEARANCES

FOR THE APPELLANT	**Ms Susan Linhares,** *Advocate*
FOR THE RESPONDENT	**Mr RG Ramani,** *Advocate*

CORAM : G.S.Patel & Nutan D. Sardessai, JJ.

DATED : 16th August 2017.

ORAL JUDGMENT (per G.S. Patel J)

1. This is an appeal by the Principal Commissioner of Income Tax ("**PCIT**") assailing an order dated 10th September 2015 of the Income Tax Appellate Tribunal ("**ITAT**"), Panaji Bench, Panaji, Goa in ITA No 92/PNJ/2015.

2. We have today delivered judgment dismissing Tax Appeal No. 57 of 2016 (*Principal Commissioner of Income Tax v Sesa Resources Ltd*). In the present case, three substantial questions of law are proposed. Our decision in Sesa Resources Ltd will cover the third of these questions, numbered 'C'.

3. The assessee in this case, Sesa Goa Ltd ("**SGL**") is, like Sesa Resources Ltd, also engaged in mining, ore exports, shipping, ship-building and sales of certain qualities of ash and coke. The relevant assessment period is 2010–1011. SGL filed an e-return on 14th October 2015 declaring a total income of Rs 15,54,29,26,836/-. This was processed under Section 143(1) of the Income Tax Act, 1961 ("**the Act**") and followed by a notice under section 143(2). The Assessing Officer ("**AO**") by an order dated 11th January 2013 (i) disallowed Rs.54,14,54,962 under Section 14(A); (ii) disallowed commission paid to non-residents in the amount of Rs.5,07,06,761; (iii) disallowed demurrage over despatch to the extent of Rs.34,85,71,032/-; (iv) disallowed a claim for deduction under Section 10(B) of Rs.818,76,45,096/- and (v) disallowed additional depreciation of Rs 17,19,74,078/-.

4. SGL appealed. The Commissioner of Income Tax (Appeals) ("**CIT**") allowed that appeal in part. The Revenue and SGL both went up in appeal to the ITAT. By its order dated 10th September 2015, the ITAT partly allowed the Revenue's appeal. The present appeal is presented against that portion of the ITAT which disallowed the Revenue's appeal.

5. These three questions are proposed as substantial questions of law:

> A. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in deleting the addition of Rs.5,07,06,761 u/s. 40(a)(ia) towards payment of commission of foreign agents where TDS was not deducted ignoring the decision of AAR in the case of Rajiv Malhotra INRE (AAR) 284 ITR 564 and SKF Boilers and Driers Pvt Ltd, wherein it was held that commission paid to export agents is taxable in India in view of sec.5(2)(b) r.w.s. 9(1)(i) of IT Act?
>
> B. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in deleting the addition of Rs.34,85,71,032/- made u/s.40(a)(ia) r.w.s. 195(1) of IT Act towards payment of demurrage paid to non-resident buyer of iron ore on which TDS was not deducted by ignoring the binding decision of jurisdiction of High Court of Bombay at Goa in the case of *CIT v Orient Goa Pvt Ltd* (BOM) 325 ITR 554?
>
> C. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in deleting the addition made by the AO on account of disallowance of additional depreciation amounting to Rs.17,19,74,078/- by ignoring the decision of the Hon'ble Supreme Court in the case of *CIT v Gem India Manufacturing Co.* (2001) 249 ITR 307 (SC) and *Lucky Minmat (P) Ltd. v. CIT* (2001) 116 Taxman 1 (SC) and also the fact that the activities crried out by the assessee do not amount to manufacture or production as defined in section 2(29BA) of IT Act?

6. Our decision today in *Sesa Resources Ltd* fully covers item 'C'. That question therefore does not arise.

7. As regards proposed question A, this appears to us to be on a finding of fact. The question would not arise because the finding of the fact remained unchallenged. The question of TDS on commission income paid to foreign agents and the non-deduction of TDS is an issue fully covered by the decision of the Supreme Court in *GE India Technology Centre Private Limited v Commissioner of Income Tax & Anr*.[1] There is, in addition, the decision of a Division Bench of this Court in *CIT v Gujarat Reclaim & Rubber Products Ltd*,[2] where, following the Supreme Court decision in *CIT v Toshoku Ltd*,[3] the Court held that commission earned by a non-resident (that is to say, foreign) agent who carried on the business of selling Indian goods outside India cannot be said to be deemed income accrued or arising in India.

8. We also note the observations in paragraph 6(c) of *Gujarat Reclaim* regarding the manner in which such Income Tax Appeals are filed by the revenue.

9. The second question sought to be framed is about the ITAT's deletion of the addition of Rs 34,85,71,032/- under Section 40(a)(ia) r/w. Section 195(1) as demurrage paid to a non-resident buyer of iron ore without deducting TDS. This is also fully covered by the decision in *GE India* and the assessee's reliance on the decision of the Bombay High Court in *Commissioner of Income-Tax v Orient*

---

1 (2010) 10 SCC 29.

2 ITA No. 2116 of 2013, decided on 8th December 2015, per MS Sanklecha & GS Kulkarni JJ.

3 125 ITR 525.

(Goa) Private Limited[4] is misplaced for that judgment was expressly overruled by the Full Bench of the Bombay High Court in *Commissioner of Income Tax v VS Dempo and Company Pvt Ltd.*[5]

10. As we have noted, again there is no substantial question of law that arises. We are unable to agree with Ms Linhares for the appellant that the appeal deserves admission. We must agree with Mr Ramani that there is no issue here that is not either a question of fact or fully covered by binding decision. The appeal is accordingly dismissed. No costs.

NUTAN D. SARDESSAI J. **G. S. PATEL J.**

---

4 325 ITR 554.

5 [2016] 381 ITR 303 (Bom) (FB).