

***THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY**

AND

THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

+I.T.T.A.Nos. 211, 212, 213 AND 214 OF 2005

+I.T.T.A.No. 211 OF 2005

%DATED 27TH DECEMBER, 2017

#M/s. Sun Outsourcing Solutions Pvt. Limited,
A Private Limited Company,
Registered Office at 203, Lumbini Rockdale,
Somajiguda, Hyderabad,
Rep. by its Director E.Sridhar Kumar ... Appellant

VERSUS

\$The Commissioner of Income Tax (Appeal-V),
Hyderabad, and another ... Respondents

!Counsel for the Appellant : Mr. B.Chandrasen Reddy

^Counsel for the Respondents : Ms. K.Mamata

<GIST:

>HEAD NOTE:

?Cases referred:

1. (1980) 124 ITR 391 (Guj.)
2. 1998 L.S. (A.P.) 672
3. (1986) 161 ITR 477 (Ker.)
4. (2008) 298 ITR 250 (Raj.)
5. (1969) 74 ITR 147
6. (1933) 18 TC 411

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Between:

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Rep. by its Director E.Sridhar Kumar ... Appellant

And

The Commissioner of Income Tax (Appeal-V),
Hyderabad, and another

... Respondents

Counsel for the Appellant : Mr. B.Chandrasen Reddy

Counsel for the Respondents : Ms. K.Mamata

The Court made the following:

COMMON JUDGMENT: *(per Hon'ble Sri Justice C.V.Nagarjuna Reddy)*

The assessee, who is common in all these appeals, raised the following substantial questions of law:

- "1. *On the facts and in the circumstances of the case, whether the Income Tax Appellate Tribunal was correct in law in holding that the boarding and lodging allowances paid to employees sent on deputation to U.K. constituted salaries liable to tax only by reason of the difference between salaries paid while working in U.K. and while working in India and between allowances paid in U.K. while on project work and while not on project work without giving an opportunity to the appellant to explain the said difference in terms of the Agreement.*
2. *Whether on the facts and in the circumstances of the case, the order of the Tribunal was correct in law in so far as it failed to note that these allowances paid to the employees deputed to the U.K. fall within the provisions of Section 10 (14) (i) of the Income Tax Act and that even if they were taxable under the Income Tax Act, there is no provision in the Act under which tax has to be deducted on payments of such allowances.*
3. *Whether on the facts and in the circumstances of the case, the order of the Tribunal is correct in law in confirming the order u/s. 201 (1) read with section 201 (1A) ignoring the fact that, the appellant was under a bona fide impression that it was not liable to deduct tax on the allowances in question?"*

2. The brief facts leading to the filing of these appeals are stated as under:

The appellant is a Private Limited Company, engaged in the business of software development, having its office at Hyderabad and branch office at London, U.K. In the course of execution of software projects in U.K., the appellant has deputed some local persons of Hyderabad to London to work in its branch office and it has also employed local personnel (N.R.Is.) in U.K. The appellant effected Tax Deduction at Source (for short, 'T.D.S.') in respect of salaries paid to its employees in India and reimbursed the same to the department. As regards the allowances paid to the staff deputed to U.K. and the salary payments made to the local personnel engaged in U.K., the appellant did not effect T.D.S. The Assessing Officer (for short, 'A.O.') in exercise of his powers under Section 201 (1) of the Income Tax Act, 1961 (for short, 'the Act'), charged tax on the amounts paid to the staff deputed to U.K. and on the salaries paid to the personnel engaged in U.K. apart from levying interest thereon by separate orders passed by him on 13-02-2004 for the assessment years 2000-01, 2001-02, 2002-03 and 2003-04. Assailing the said orders, the appellant filed four separate appeals before the Commissioner of Income Tax, Hyderabad (for short, 'the 1st appellate authority'). The 1st appellate authority set aside the demand raised under Sections 201 (1) and 201 (1A) of the Act to the extent it pertains to the tax charged and interest levied on the payments made

to the non-resident consultants working abroad. With regard to the allowances paid to the residents of India deputed to work in U.K., the orders of the A.O. were upheld with a direction to him to consider the particulars furnished/to be furnished and apply appropriate rate of tax as applicable to different employees. Accordingly, demand of Rs.2,77,35,727/- made earlier was reduced to Rs.76,33,575/-. The orders of the 1st appellate authority were challenged before the Income Tax Appellate Tribunal, Hyderabad Bench 'B', Hyderabad (for short, 'the Tribunal') in I.T.A.Nos. 1035 to 1038 of 2004. By its common order dated 03-08-2005, the Tribunal dismissed all the appeals. The present appeals have been filed against the said common order of the Tribunal.

3. At the hearing, Mr. B.Chandrasen Reddy, learned counsel for the appellant, made the following submissions:

- i. That the allowances paid to employees deputed to work in U.K. fall under sub-section (14) (i) of Section 10 of the Act, but not under Section 10 (14) (ii), which relates to the place of posting or residence, as distinguished from tour/deployment abroad and that, they do not form part of perquisites as defined under Section 17 (2) (iv) of the Act;

- ii. That the provision relating to T.D.S. does not apply to the payments exempted under Section 10 (14) of the Act and the assessee is not obligated to deduct the tax thereon and
- iii. That the allowances paid by the assessee to its employees deputed to U.K. are similar to the daily allowances paid to the government employees sent abroad on tour or deputation covered by Section IV of Appendix-6 of the Fundamental Rules and hence they are not treated as perquisites assessable under the head – 'salary'.

A feeble contention is also raised by the learned counsel for the appellant that Section 9 (1) (ii) read with explanation thereto has no application to the present case as the services were rendered and allowances were earned and accrued outside India and payments were also made outside India. In support of his contentions, the learned counsel for the appellant has placed reliance on ***Commissioner of Income Tax, Gujarat, Vs. S.G.Pgnatale¹***; ***Commissioner of Income Tax Vs. Bellien Michael Andersmant²***; ***Commissioner of Income Tax Vs. Kannan Devan Hill Produce Company***

¹ (1980) 124 ITR 391 (Guj.)

² 1998 L.S. (A.P.) 672

*Limited*³; and *Commissioner of Income Tax Vs. Munni Lal and Company*⁴.

4. Opposing the above submissions, Ms. K.Mamata, learned Senior Standing Counsel for Income Tax Department, submitted that under Section 5 (1) of the Act, the total income in any previous year, of a person who is a resident, includes all incomes from whatever source derived, which is received or due to be received in India, or accrues or arises or is deemed to accrue or arise to him in India during such year or accrues or arises to him outside India during such year, provided that in the case of person not ordinarily resident in India within the meaning of sub-section (6) of Section 6, the income which accrues or arises to him outside India, shall not be so included, unless it is derived from a business controlled in or a profession set up in India. She referred to Section 6 of the Act and submitted that going by the broad definition of 'a resident in India', it is not the case of the assessee that the employees are not the residents of India and that it is the admitted case of the assessee that its employees, who were ordinarily residents of India, were deputed to work in U.K. in connection with the business of the assessee being carried on in India. As regards the payment made to the resident Indian

³ (1986) 161 ITR 477 (Ker.)

⁴ (2008) 298 ITR 250 (Raj.)

employees deputed to work in U.K., the learned counsel has submitted that the definition of 'perquisites' under Section 17 (2), which is not exhaustive but only illustrative, is broad enough, which takes within its sweep, any lump-sum payments made by the employer, other than those payments which are exempted under Section 10 (14) of the Act. She has further submitted that in order to claim exemption under Section 10 (14), the payment made, must answer the description of a special allowance or benefit not being in a nature of perquisite within the meaning of Section 17 (2) of the Act, specially granted to meet expenses wholly, necessarily and exclusively incurred in the performance of duties of an office or employment of profit, as may be prescribed, to the extent to which such expenses are actually incurred for the purpose or any such allowance granted to the assessee either to meet his personal expenses at the place where the duties of his office or employment of profit are ordinarily performed by him or at the place where he ordinarily resides, or to compensate him for the increased cost of living, to the extent as may be prescribed. She has further submitted that the proviso to sub clause (ii) of sub-section (14) of Section 10 shall not apply to any allowance in the nature of personal allowance granted to the assessee to remunerate or compensate him for performing duties of a special nature relating to his office or employment, unless such allowance is

related to the place of his posting or residence. She has drawn our attention to Rule 2BB of the Income Tax Rules, relating to subsection (14) of Section 10 of the Act and submitted that the lump sum payments made by the assessee to its employees deputed to work in U.K., do not fall under any of the exemptions enumerated thereunder.

5. We have carefully considered the respective submissions of learned counsel for both the parties and perused the record.

6. The substantial questions of law (1) and (2) pertain to the common issue. Hence, they are dealt with together. The assessee has produced consultant's agreement. One such agreement is dated 13-03-2000 between one of the employees deputed to work in U.K. and the assessee. Clause (2) of the said agreement reads as under:

"Compensation for work performed:

a. While working in India, at Rs.12,000/- per month (including pay and allowances). If he is sent on any assignment out of India, at Rs.7000/- per month (including pay and allowances).

b. While working in United Kingdom, he is entitled to allowance of—

i. Either GBP 1,400/- per month while working on a project.

ii. Or GBP 800/- per month, when he is not on a project/contract and is in between contracts".

That the allowances paid to the employees while working in U.K. are towards boarding and lodging is clear from the 1st substantial question of law framed by the assessee itself. Therefore, the issue that needs to be considered is whether the allowances paid towards boarding and lodging of an employee fall within the definition of 'perquisite' under Section 17 (2) or the same are exempted under sub-section (14) of Section 10 of the Act read with Rule 2BB of the Rules.

7. Section 15 of the Act deals with salaries and the income enumerated thereunder shall be chargeable to income tax under the head – 'salaries'. Section 17 defines 'salary' as including several things. Under this provision, apart from salary, various other things, including perquisites are chargeable to income tax. Sub-section (2) of Section 17 defines perquisites. It is an inclusive definition, which takes within its sweep, various things, including any sum paid by the employer in respect of any obligation, which, but for such payment, would have been payable by the assessee. Section 10 excludes such incomes which do not form part of total income. Sub-section (14) thereto, excludes certain allowances. This provision *inter alia* reads as under:

"i. any such special allowance or benefit, not being in the nature of a perquisite within the meaning of clause (2) of Section 17, specifically

granted 'to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit, [as may be prescribed], to the extent to which such expenses are actually incurred for that purpose;

- ii. any such allowance granted to the assessee either to meet his personal expenses at the place where the duties of his office or employment of profit are ordinarily performed by him or at the place where he ordinarily resides, or to compensate him for the increased cost of living [as may be prescribed and to the extent as may be prescribed]. [Provided that nothing in sub-clause (ii) shall apply to any allowance in the nature of personal allowance granted to the assessee to remunerate or compensate him for performing duties of a special nature relating to his office or employment unless such allowance is related to the place of his posting or residence]''*

8. The rule making authority has prescribed various allowances which are exempted from total income. Rule 2BB reads as follows:

- (a) any allowance granted to meet the cost of travel on tour or on transfer;
- (b) any allowance, whether, granted on tour or for the period of journey in connection with transfer, to meet the ordinary daily charges incurred by an employee on account of absence from his normal place of duty;
- (c) any allowance granted to meet the expenditure incurred on conveyance in performance of duties of an office or employment of profit :
Provided that free conveyance is not provided by the employer;
- (d) any allowance granted to meet the expenditure incurred on a helper where such helper is engaged for the performance of the duties of an office or employment of profit;
- (e) any allowance granted for encouraging the academic, research and training pursuits in educational and research institutions;
- (f) any allowance granted to meet the expenditure incurred on the purchase or maintenance of uniform for wear during the performance of the duties of an office or employment of profit.

9. In ***S.G.PGNATALE*** (1st *supra*), a Division Bench of Gujarat High Court dealt with the meaning of 'perquisites' with reference to a living allowance paid by the employer to the employee. One of the issues dealt with by Gujarat High Court was whether living allowance fell within the definition of 'perquisite'. That was the case where the employee of a French company in pursuance of an agreement entered into by the Gujarat State Fertilizer Company Limited with a French company, rendered his services, namely; in the shape of supervisory and advisory assistance. The services of assessee French National were referred to the Gujarat Company and in lieu thereof, the assessee was paid certain emoluments. The Division Bench, while considering whether the living allowance was a perquisite or not, referred to and relied upon the decision of House of Lords in ***Owen Vs. Pook (Inspector of Taxes)***⁵, wherein it was held that the perquisite is something which arises by reason of a personal advantage and the same would not apply to a mere reimbursement or a necessary expenditure. Noticing earlier decision in ***Corry Vs. Robinson***⁶, which took a different view, the Division Bench, however, followed the test in ***Owen*** (5th *supra*) and observed that the said test in their opinion is a better test, namely; to decide whether

⁵ (1969) 74 ITR 147

⁶ (1933) 18 TC 411

the allowance of this kind was given by way of reimbursement or whether it was given as a personal advantage. The Court took notice of the fact that the allowance paid to the assessee, depending upon his posting at different places such as Delhi or Baroda, was likely to be reduced or increased, depending upon the change in the circumstances from place to place and depending upon whether free transport was allowed or not, which goes to indicate that this allowance was being given to the assessee as a reimbursement rather than as a personal advantage given to him. On those facts, the Division Bench held that living allowance paid to the assessee did not fall within the definition of perquisites under Section 17 (2) of the Act.

10. In ***Bellien Michael Andresmant*** (2nd *supra*), a Division Bench of this Court considered whether the living allowance, granted to defray the expenses of purely personal nature, was exempted under Section 10 (14) of the Act. In that case, the assessees were foreign technicians. They were employed by M/s. L' Air Liquide of France, under the collaboration agreement entered between the said company and M/s. Bharat Heavy Plate and Vessels Ltd., Visakhapatnam. In connection with the said agreement, the services of technicians were utilised for erection and commissioning of a unit. Clause (3) of the agreement provided for payment of living allowance in addition to

daily fees. As per the said clause, a sum of Rs.220/- was payable at Delhi, Bombay, Calcutta and Madras @ Ra.150/- per day, plus free transport is payable at any other place in India. After considering Section 10 (14) of the Act, this Court has observed that there was no evidence on record to establish that the living allowance was paid to the assesseees in connection with the duties to be performed by them and that in the absence of such evidence, it cannot be held that the allowance paid to them was exempted under Section 10 (14) of the Act. The Bench distinguished the judgment in ***S.G.PGNATALE*** (1st *supra*) and relied on the observations in the judgments of this Court in ***Zdziz-law Skakuz Vs. CIT***, of Allahabad High Court in ***CIT (Addl.) Vs. A.K.Misra*** and of Patna High Court in ***CIT Vs. Arthur Fucks***. The relevant portion of the judgment in ***Bellien Michael Andresmant*** (2nd *supra*) is extracted below:

"10. *The judgment of the Gujarat High Court in CIT v. S.G.Pgnatale, on which reliance is placed by the Tribunal, in our view, has no application to the facts of the present case. In that case, as pointed out by learned standing counsel for the Revenue, the Court was considering a case of payment of living allowance, whether it falls within the meaning of "perquisite" under Section 17 (2) of the Act.*

11. *At this stage, we may also refer to the judgment of this Court in Zdziz-law Skakuz v. CIT, wherein it was held (headnote):*

".... That the outstation allowance and hotel charges were merely allowance granted to the assessee to meet his personal expenses at the place where the duties of his office were ordinarily performed by him. They were not exempt under Section 10 (14)."

12. *In CIT (Addl.) v. A.K.Misra, ITO [1979] 117 ITR 342, the Allahabad High Court held (headnote):*

"City compensatory allowance is granted to meet the personal expenditure necessitated by the high cost of living in big cities. The allowance is not granted with reference to the nature of duties but exclusively with reference to the place of posting. Such an allowance will, therefore, fall within the Explanation to Section 10 (14) and is not exempt from tax."

13. *In CIT v. Arthur Fucks, the Patna High Court held (headnote):*

"A plain reading of Section 10 (14) of the Income Tax Act, 1961, makes it clear that one of the preconditions for the claim of exemption is that the allowance in question should have been specifically granted to meet expenses wholly incurred in the performance of duties of office and the exemption is only to the extent such expenses were actually incurred."

14. *It was further held (headnote):*

"In the instant case, there was no evidence to suggest that the whole or any part of the amount received by the assessee as living allowance represented expenses actually incurred by the assessee in the performance of duties of his office. One of the necessary ingredients of Section 10 (14) being absent in this case, the assessee could not claim any exemption in respect of the amount in question under that section."

11. From the case laws referred to above, the following ratio is deducible:

- (i) If any personal advantage is derived from payment, it falls within the definition of perquisite;
- (ii) A mere reimbursement or necessary disbursement does not fall within the explanation of perquisite;
- (iii) If an allowance is paid to the assessee to meet his personal expenses at the place where the duties of his office are ordinarily performed, the same is not exempt under Section 10 (14) of the Act. Allowance such as City Compensatory Allowance necessitated by the high cost of living in big cities and not granted with reference to the nature of duties but exclusively with reference to the place of posting is not exempt from tax under Section 10 (14) of the Act; and
- (iv) For being exempt under Section 10 (14) of the Act, an allowance should have specifically been granted wholly in the performance of duties.

When we apply the above settled legal position to the facts of this case, we have no doubt that the lump sum payment made to the

employees is by way of conferring additional advantage in order to make them to meet the high cost towards accommodation and other personal expenditure. Such expenditure in our opinion cannot be treated as having been incurred in connection with discharge of their duties within the meaning of Section 10 (14) of the Act. Further, as found by both the *fora* below, neither any break-up of the amounts payable to the employees in U.K. has been given nor is it envisaged that the expenses so incurred are reimbursable. Hence, we are entirely in agreement with the findings rendered by the 1st appellate authority in para Nos. 6 to 6.3 of its order which read as under:

"6. *Be that as it may, even considering for a while the assessee's plea that the allowances are only to reimburse the expenses actually incurred by the assessee, it is strange to note that the assessee has not kept any evidence regarding the expenses incurred by the employees nor the employees maintained any log books or other evidence to substantiate the claim that the expenses are actually incurred in the performance of duties. The assessee made lump-sum payment as allowances and no evidence was available for the expenditure incurred by the employees.*

6.1 *A perusal of the ledger copy of the SBI account maintained in assessee's books, from 01-04-2003 to 31-12-2003, it is observed that on 07-04-2003, the assessee paid a sum of Rs.52,153/- in India to one of the employee consultant Sri D.Srinivas towards outstanding U.K. allowances. Like-wise on 03-05-2003, the*

assessee paid Rs.82,000/- in India to Sri N.Ravi Gopal towards outstanding U.K. allowances, without obtaining any details of expenditure incurred by the employees at London. Thus, the assessee paid some of the allowances even in India after the employee's return to India lump-sum.

6.2 *From the facts stated above, it is to be concluded that the assessee is not reimbursing the expenditure actually incurred by the consultant employees at London, but they are paid a lump-sum amount without obtaining any Log Book and Vouchers for the expenses incurred by the consultants. In the absence of such primary evidence, the entire allowances paid to the consultant employees are taxable and tax has to be deducted necessarily as per the provisions of the Act.*

6.3 *Further, the employees are at liberty to claim the above allowances as exempt by producing necessary evidence before the Assessing Officer. It is the primary duty of the assessee to deduct taxes whenever allowances are paid and the assessee is not entitled to sit on judgment whether to deduct tax or not. Or else, the assessee ought have obtained a certificate from the employee U/S 197 of the Act so as not to deduct tax or deduct tax at a lower rate. In the absence of such certificate obtained from the employees, the assessee is legally bound to deduct tax."*

Therefore, we have no hesitation to hold that the amounts in dispute attract the definition of perquisite in Section 17 (2) of the Act and they do not fall within the exception of Section 10 (14) of the Act.

We accordingly answer question Nos. 1 and 2 against the appellant.

12. As regards question No. 3, under Section 201 of the Act, if an employer does not deduct or does not pay or after so deducting fails to pay the whole or any part of the tax, as required by or under the Act, such person shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax. Under Section 201 (1A) of the Act, such person is liable to pay tax as required by or under the Act apart from simple interest at the rate prescribed therein. Learned counsel for the appellant has submitted that as his client was under a *bona fide* impression that the amounts paid by it to its employees were not taxable, it failed to deduct the same and that as there was no malice or *mens rea* on its part, imposition of interest cannot be sustained. He has further submitted that the burden lies on the Revenue to prove that the employer deliberately failed or neglected to deduct tax and in support of his submission, he has placed reliance on the judgment of Rajasthan High Court in ***Munni Lal*** (4th *supra*). We are unable to understand as to how this judgment would help the appellant as the case decided thereunder pertains to imposition of penalty under Section 194 C (2) of the Act for non deduction of tax at source. Under the second proviso to the said provision, where assessee proves to the satisfaction of the assessing officer that the default or non-payment of tax was for good and sufficient reasons, no penalty

shall be levied. As rightly argued by the learned counsel for the Revenue, unlike Section 221 of the Act, Section 201 (1A) of the Act is not hedged in by any requirement such as good faith, wilful default *etc.*,. Therefore, for levying interest, *mens rea* or wilful conduct is wholly irrelevant. In view of the fact that the appellant failed to deduct tax on the payments made, Section 201 (1A) is automatically attracted and even if the appellant is *bona fide* in not making such deduction, it is nevertheless liable to pay interest. The third question of law framed by the appellant is accordingly answered against it.

13 In the result, the appeals are dismissed.

14. As a sequel to dismissal of the appeals, *interim* stay granted on 07-10-2005 stands vacated and I.T.T.A.M.P.Nos. 753 and 754 of 2017 shall stand dismissed as infructuous.

C.V.NAGARJUNA REDDY, J.

Date: 27-12-2017.

M.S.K.JAISWAL, J.

Note: L.R. Copies to be marked.

B/O

MSB/JSK