

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SMT. JUSTICE ANIS**

I.T.T.A.NOS.119,120,121,122,123,126,128 AND 130 OF 2016

C O M M O N J U D G E M E N T

(Per Hon'ble Sri Justice Sanjay Kumar)

These appeals by the Revenue under Section 260A of the Income-tax Act, 1961 (for brevity, 'the Act of 1961'), arise out of the common order dated 07.03.2006 passed by the Income Tax Appellate Tribunal, Hyderabad Bench 'B', Hyderabad, in I.T.A.Nos.1057 to 1060 of 2001, filed by the respondent assessee, and I.T.A.Nos.283 to 286 of 2003, filed by the Revenue, in relation to the assessment years 1999-2000 to 2002-2003.

As the appeals were filed with substantial delay in representation, notice was ordered to the respondent assessee, M/s.Andhra Pradesh Power Generation Corporation Limited, Hyderabad. Sri Ch.Pushyam Kiran, learned counsel, entered appearance on its behalf in all the appeals. By separate orders dated 17.11.2015 passed in each of these appeals, this Court condoned the delay upon payment of costs of Rs.5,000/- in each appeal to the assessee within a time frame. Costs having been paid, the appeals were numbered and posted for admission.

Heard Sri J.V.Prasad, learned senior standing counsel for the Revenue, and Sri S.Ravi, learned senior counsel appearing for Sri Ch.Pushyam Kiran, learned counsel for the respondent assessee.

The six substantial questions of law reframed by the Revenue for consideration in these appeals read as under:

1. Whether, in the facts and in the circumstances of the case, the Appellate Tribunal is justified in not holding that the assessee was mandatorily required to cause deduction of tax

at source in respect of the remittances made to a non-resident arising out of a composite contract, in the absence of clearance or approval given by the Income Tax Authority under Sec.195(2) of the Income Tax Act?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in not holding that the contract is a turnkey contract, is an integral one for carrying out the whole work of supply, erection and commissioning required to be executed in India more so when vivisection of such a contract is impermissible in law?
3. Whether, on the facts and in the circumstances of the case, the order of the Tribunal is correct, in law and on fact, in holding that the assessee cannot be held to be deemed to be in default for non-deduction of tax at source by placing reliance on and giving its manner of interpretation to Explanation to Sec.195 of the Income-tax Act, 1961, when the Explanation is to be read without prejudice to other consequences of non-deduction of tax at source?
4. Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the substantial part of the work covered by the subject contract was executed outside India and that the situs is outside Indian territory is not perverse and based on no relevant material on record and by ignoring and grossly misconstruing the relevant material on record?
5. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in adjudicating the issue on the touch stone of ultimate liability of the “Non-Resident” while sitting in appeal over the order passed in summary proceedings under Sec.201 of the Income-tax Act?
6. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is correct in law in accepting the plea of the assessee that grossing up of tax is impermissible in law?

Sri S.Ravi, learned senior counsel, would contend that questions 1, 2, 3 and 5 do not require independent consideration at

this stage in the light of the judgment of the Supreme Court in **GE (G.E.) INDIA TECHNOLOGY CENTRE PRIVATE LTD. V/s. COMMISSIONER OF INCOME TAX AND ANR.**¹. As regards the other two questions, viz., questions 4 and 6, he would state that these relate to factual aspects and do not constitute questions of law.

The Revenue's case was that the assessee did not deduct tax at source while making payments to one Sumitomo Corporation, a Non-Resident Company. The Assessing Officer therefore held that the assessee had committed default by not deducting tax at source in relation to these payments, in violation of Section 195 of the Act of 1961, and the entire remittances during the four years in question were grossed up and brought to tax.

In appeal by the assessee, the Commissioner of Income Tax (Appeals) rendered findings, some of which were in favour of the Revenue and some, in favour of the assessee. Aggrieved thereby, both parties preferred appeals before the Tribunal. By way of the lengthy common order under appeal, the Tribunal allowed the appeals of the assessee and dismissed the appeals of the Revenue. The Tribunal found that no portion of the gross remittances made by the assessee was liable to charge under the Act of 1961 and there was, therefore, no liability to deduct tax at source under Section 195 thereof. The Tribunal also found that the remittances by the assessee were for purchase of plant and machinery manufactured outside India, which were imported into India, after sale in favour of the assessee. While examining whether the contract between the assessee and the Non-Resident Company was a turnkey contract or a sale/supply contract, the Tribunal relied on the judgments of this

¹ (2010) 10 SCC 29

Court in **C.I.T. V/s. SUNDWINGER EMFG & CO.**² and **C.I.T. V/s. VISAKHAPATNAM PORT TRUST**³ and held, on facts, that the value of the supervisory charges was just 2.63% of the total cost of the generating equipment and 2.91% of the total cost of the 400 KV Gas Insulated Switchgear. Applying the tests adumbrated by precedential law, the Tribunal concluded that the contracts in question were sales contracts and not works contracts.

Facts, relevant for the purposes of this order, are that the assessee, a State Government Undertaking, entered into three contracts with Sumitomo Corporation, Japan. The first contract was for supply of pump turbines, inlet valves, motor generator sets, associated auxiliary control and ancillary equipment. The second contract was for supply of Gas Insulated Switchgear. The third contract was for supply of 400 KV XLPE Insulated Power Cables. This last contract was for designing, manufacturing, shop-testing and supply of the cables along with accessories. Another contract was entered by the assessee with Electrical Power Development Company Limited, Japan, whereby the said company was retained to advise the assessee, on a continuous basis, on implementation of the Srisaïlam Left Bank Canal Power Station Project. Though the contracts entered by the assessee with Sumitomo Corporation provided for payment of separate charges towards supervision of installation, assembly, erection, testing and commissioning, it is not in dispute that in so far as the second contract is concerned, the assessee did not utilize the services of Sumitomo Corporation and entered into a separate agreement with Larsen and Toubro Limited for installation, for which it paid a sum of Rs.27,00,000/-. In **C.I.T. V/s. SUNDWINGER EMFG**

² 262 ITR 110 (AP)

³ 144 ITR 146

& CO.², this Court held that supervision is incidental to the sale of plant and machinery and it must therefore be treated as part of the sale price. Ancillary and subsidiary services linked to the sale would therefore partake the character of sale.

As regards the third contract relating to XLPE cables, it is not in dispute that there was no separate fee for installation, supervision and commissioning and Sumitomo Corporation estimated the income from the activity in relation to this and paid taxes thereon. As pointed out by the Tribunal, once Sumitomo Corporation paid the entire taxes due in relation to this contract, the question of attaching any liability upon the assessee under Section 201 of the Act of 1961 did not arise. This Court therefore finds no reason to interfere with the finding of the Tribunal that the contracts in question were not turnkey contracts but were contracts simpliciter for sale/supply of equipment, as 80% of the contract value in relation to the contracts of the assessee with Sumitomo Corporation was attributable to the activity that was undertaken in Japan for manufacture of the equipment and sale also took place there. Merely because the equipment purchased by the assessee in Japan was made operational by assembling the same in India and supervision of such assembly and erection was undertaken by Sumitomo Corporation, it did not have the effect of converting the supply contract into a works contract. In that view of the matter, notwithstanding the fact that Sumitomo Corporation had a permanent establishment in India, as none of the activities in relation to the contracts entered into by it with the assessee had anything to do with the permanent establishment in India and the supply was made of equipment manufactured in Japan, the Tribunal correctly held that no part of

the transaction and remittances relatable thereto were attributable to the permanent establishment of Sumitomo Corporation in India. The Tribunal further found that no portion of the remittances made by the assessee to Sumitomo Corporation constituted income chargeable under the Act of 1961 and that the question of deducting tax at source under Section 195 thereof did not arise.

This reasoning of the Tribunal finds support in the judgment of the Supreme Court in **GE (G.E.) INDIA TECHNOLOGY CENTRE PRIVATE LTD.¹**. Upon considering Sections 195(1) and 195(2) of the Act of 1961, the Supreme Court observed that Section 195 also covers composite payments which have an element of income incorporated in them. But the obligation to deduct tax at source would be limited to the appropriate proportion of income chargeable under the Act of 1961, which forms part of the gross sum of money payable to the non-resident. As regards the applicability of Section 195(2) of the Act of 1961, the Supreme Court held that this provision presupposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but it is not sure as to what is the portion taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the Revenue for determining the amount. The Supreme Court observed that it is only when these conditions are satisfied and an application is made to the Revenue that the question of making an order under Section 195(2) would arise. The observations of the Supreme Court thereafter, are apposite of extraction:

‘We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression “sum chargeable under the provisions of the Act” from Section 195(1). While interpreting a Section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the machinery Sections. The Act is to be read as an integrated Code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of C.I.T. v. Eli Lilly & Co. (India) (P.) Ltd. MANU/SC/0487/2009 : 312 ITR 225 the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the I.T. Act form one single integral, inseparable Code and, therefore, the provisions relating to TDS applies only to those sums which are “chargeable to tax” under the I.T. Act . It is true that the judgment in Eli Lilly (supra) was confined to Section 192 of the I.T. Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income “chargeable under the head salaries”. Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum “chargeable under the provisions of the Act”, which expression, as stated above, do not find place in other Sections of Chapter XVII. It is in this sense that we hold that the I.T. Act constitutes one single integral inseparable Code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the I.T. Act.’

On the above analysis, we are of the opinion that most of the substantial questions of law sought to be raised by the Revenue in this batch of appeals do not warrant consideration as they stand

answered by earlier judgments and more particularly, **GE (G.E.) INDIA TECHNOLOGY CENTRE PRIVATE LTD.¹**. As regards questions 4 and 6, we find that these questions do not merit consideration. On question 4, the Tribunal considered the issue of the situs of the contract at length and rendered a cogent finding which, on the face of it, does not reflect any perversity. As regards question 6, the aspect of grossing up of tax on facts was found to be unsustainable by the Tribunal and this Court finds no reason to disagree with the said finding of the Tribunal. This does not constitute a question of law as it is wholly dependant upon construction of the factual aspects surrounding the contract.

On the above analysis, this Court finds no fresh substantial question of law surviving for consideration in the light of the settled legal position governing every aspect of the issues sought to be raised by the Revenue.

The appeals are devoid of merit and are accordingly dismissed.
No costs.

SANJAY KUMAR, J

ANIS, J

25th JANUARY, 2017

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