IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.11.2018

CORAM:

THE HONOURABLE MRS.JUSTICE V. BHAVANI SUBBAROYAN

W.P.Nos.447 & 448 of 2009
and
M.P.No. 1 of 2008

M/s.Shivaji Productions
Represented by its Partner,
Shri G.Ramkumar,
No.25, Besant Road,
Royapettah,
Chennai 600 014. .. Petitioner in both W.P's

Vs.

1.Deputy Commissioner of Income-tax,
Media Circle-II,
121, Nungambakkam High Road,
Chennai 600 034.

2.Union Of India,
Ministry of Finance,
Represented by its Secretary,
Department of Revenue,
Central Secretariat, North Block,
New Delhi 110 001. .. Respondents in both W.P's

Prayer in W.P.No.447 of 2009: Writ Petition filed under Article 226 of Constitution of India, praying to issue a Writ of Certiorari, calling for the records in PAN: AABFS4418H dated 18.12.2008 relating to the Assessment Year 2006-07 of the 1st Respondent quashing the same insofar as in the said proceedings the 1st Respondent has disallowed the various expenses claimed by the petitioner invoking clause (ia) of Sec. 40 (a) of the Income Tax Act on the ground that tax has not been deducted at source or paid over to the Government in respect of the payments covered by such expenses within the time prescribed under Sub-sec (1) of Sec. 200 of the Income Tax Act.

Prayer in W.P.No.448 of 2009: Writ Petition filed under Article 226 of Constitution of India, praying to issue a Writ of Declaration, to declare the provisions of clause (ia) of Section 40 (a) of the Income Tax Act introduced by the Finance Act No.2 of 2004 with effect from 01.04.2005 as ultra vires and striking down the same insofar as it provides for the disallowance of expenses in respect of which tax is not deducted at source or paid over to the Government with the time prescribed under sub-section (1) of Section 200 of the Income Tax Act, in computing the taxable income.

For Petitioner : Mr.N.Muthukumar

For Respondents : Mr.J.Narayanasamy
for Income Tax

COMMON ORDER

The petitioner who is an assessee has filed these Writ Petitions for issuance of a Writ of Certiorari, to quash the assessment order records in PAN: AABFS4418H dated 18.12.2008 relating to the Assessment Year 2006-07 sofaras in the said proceedings the 1st Respondent has disallowed the various expenses claimed by the petitioner invoking clause (ia) of Sec. 40 (a) of the Income Tax Act on the ground that tax has not been deducted at source or paid over to the Government in respect of the payments covered by such expenses within the time prescribed under Sub-sec (1) of Sec. 200 of the Income Tax Act.

2. The case of the petitioner is that the petitioner's partnership firm is engaged in the business of production of cine films. The petitioner incurs various expenses, regarding the production expenses, shooting expenses, dubbing expenses under broad categories for which the petitioner maintaining the regular accounts. The petitioner in the said business also enters into an agreement for advertising and publicity agencies and the expenses are also fully vouched.

3. The assessee has filed a return of income on 31.10.2006 admitted a total income of Rs.3,61,23,129/- in 2004-05 a film titled "Chandramukhi" was produced and the filming work was carried out in the year 2004-05, but the picture was released only in the year 2006 and the most of the expenses met during 2005-06 were post production, advertisement, publicity and the 200th days celebration function expenses. For the extent in the year 2004-05 as per the said Rule 9A of the Income Tax

Rules which prescribed the manner in which income from film production was to be reckoned, the petitioner had claimed the expenditure only in the subsequent year.

4. For the Assessment Year 2006-07, being the previous year ending on 31st March, 2006, on a total income of Rs.5,65,61,702/- in the final assessment made on 18.12.2008 the 1st respondent disallowed a sum of Rs.1,43,98,164/- under Section 40 (a) (ia) of the Income Tax Act. The respondent had also disallowed a sum of Rs.15,00,000/- being the amount paid to the Kerala Film Producers' Association pursuant to a settlement of dispute relating to the purchase of a story right. A amount of Rs.13,39,105/- was also disallowed on account of interest on drawing by the partners. The petitioner would contend that the above dis-allowances is arbitrary and no notice was given to the petitioner. When the petitioner was called for by the first respondent relating the production of “Chandramukhi” picture, the petitioner was not given an opportunity with regard to the dis-allowance of the aforesaid amounts. Substantial portion of the assessment relates to the dis-allowance amount of Rs.1,43,98,164/- under Section 43(a) (ia) of the Income Tax Act. The first respondent disallowed the above expenditure on the ground that the tax in respect of the above payment to various parties has not been deducted at source and paid over to the Government in due time. And they also classified the various components forming part of the aforesaid sum into different categories. Various payments made to certain person relating to the processing of the exposed film, payments for hotel expenses and payment for publicity expenses have been classified under Section 194C and payments for shield making, photography etc. are classified as payments under Section 194C and 194J, even though such payments do not fall within the said provisions.

5. The petitioner would further contend that no dis-allowance under Section 40(a) (ia) of the Act can be made, insofar as the said provision is ultra vires, arbitrary and is liable to be struck down. And he also submit that the levy of tax by the respondent without the authority of law. As per Section 5 which imposes the charge, seeks to levy tax on the total income, the tax can be levied only on the real income and not on the gross receipts. All items of expenditure lawfully incurred in earning the income are allowable as deduction. This prima facie is inbuilt in Section 5 and Section 28. Any provision which permits the determination of total income in an artificial and unreasonable manner is violative of the basic structure of the Income Tax Act.

6. They would also further submit that, the payments made were eligible for deduction notwithstanding the tax was not deducted at source or remitted to the Government. The Chapter

XVIIB of the Income Tax Act which provides for deduction of tax at source also sets out the penal consequences in respect of non-deduction or non-payment of such tax to the Government within the prescribed time.

7. The petitioner would further contend that the provisions of sub-clause (ia) is unreasonable, unconscionable and violative of the petitioner's guaranteed right under the Constitution of India and they are inconsistent with the provisions of the Income Tax Act and hence liable to be struck down as ultra vires insofar as it provides for non-deductibility of the amounts paid to the contractor or sub-contractor on the ground that tax is not deducted at source or paid over the Government within the time specified under Section 200. They would also submit that the provisions for deduction of tax are not charging provisions, but provisions intended for recovery. The liability to tax is on the person who receives the amount and not on the payer and the liability arising in regard to the responsibility should have reasonable nexes to the object of the provision Sub-clause (ia) introduced by the Finance (No.2) Act of 2004 goes beyond the above object of the tax deduction and such provision is liable to be unreasonableness.

8. In the event of non-deduction or non-payment loss accruing to the State would be only to the extent of tax amount and interest in the event of delayed payment. Both these positions are taken care of by Sub-Sections (1) and (1A) of Section 201, which protects and safeguard the revenue regarding the non-payment of the tax if any.

9. The penal provisions brought in Chapter XXII of the Income Tax Act to meet failure to deduct tax or make payment without reasonable cause. The introduction of additional provision disallowing the deduction of amount in computing the income would constitute multiple jeopardy for the same alleged non-compliance with the statutory provisions and hence unsustainable in law.

10. Section 265 of the Constitution enjoins upon the State not to impose any tax or financial liability except in accordance with law. Any law imposing tax or financial liability should be reasonable and should comply with the avowed object. The Income Tax Act deals with levy of tax of real income. The provisions like Section 40 can come into operation only in exceptional circumstances. Clause (ia) introduced by the Finance (N0.2) Act of 2004 converts Section 40 into a charging section enabling the State to levy tax on receipts which would not constitute real income and travels beyond this scope.

11. It is seen that the petitioner had committed the

default in the deduction and payment of tax lawfully deductible, the petitioner entails liability under Section 201 (1) to pay the amount of tax so deductible out of its own pocket to the Government, in addition to the payment of interest under Sub-Section (1A) to Section 201 in the rate of 12 % and due to the dis-allowance by invoking Section 40 (a) (ia) of the Income Tax Act. Some of the other dis-allowances have been made without affording the opportunity to the petitioner as required by law. Hence, the petitioner has filed this Writ Petition challenging the validity of Clause (ia)40(A) and he is in violation of the Act and no opportunities has been given to the petitioner to explain the stand.

12. When the petitioner approached his Court by filing this Writ Petition the Sub-Clause (ia) of Section 40A has been challenged in various High Courts and before this Court also. This matter was admitted and interim stay of notice has been ordered by this Court on 23.04.2009.

13. The said issue has been decided by this Hon'ble Court in Tube Investment of India Ltd., & ANR. Vs. Assistant Commissioner of Income Tax & others reported in (2010)325 ITR 0610, wherein the dis-allowance of Business expenditure under Section 40(a)(ia) of the Income Tax Act was challenged, wherein it was held that the Finance Act (No.2) Bill of 2004 states that the insertion of Clause (ia) in clause (a) to Section 40 was with the view to augment compliance of TDS provisions. The objective was fairly achieved and Section 40(a)(i) has been successfully working for more than two decades. There is no reason why this 40(a)(ia) alone is been challenged. The dis-allowance provided under Section 40(a)(ia) is for the failure of the petitioner in making TDS as provided under chapter XVII-B which varies from 2% - 10%. If the TDS has been effected, such deduction would be credited to the tax liability of the contractor when his liability is assessed. Only in the event of non-deduction of the deducted amount, there would be scope for the contractor being mulcted with the entire liability inclusive of TDS which could have been otherwise made under chapter XVII-B.

14. The Division Bench of this Court has held that,

"111.A conjoined reading of the various principles laid down in the above decisions, boils down to the position viz.
(a) That so far as it is reasonably possible to read down a provision in order to construe the legislation as being within its power.
(b)By applying the doctrine of reading down, no additional words into a statutory order

which would transgress the limits of such order or the scheme. It can only be resorted to give the statute a reasonable meaning in order to make it constitutionally valid.

(c) Under the guise of reading down a provision nothing can be supplemented. Where a literal interpretation leads to an absurd or intended result, the language of the statute can be modified to accord with the intention of Parliament and to avoid absurdity.

(d) The doctrine of reading down a statutory provision is to make it a valid provision and prevent its nullification as unconstitutional.

112. Keeping the above principles in mind when we consider the submissions of the learned counsel appearing for the petitioners, at the outset it will have to be stated that having considered the various submissions on the grounds of arbitrariness, unreasonableness as well as discrimination, we have found that such grounds are not available for the petitioners when challenging the impugned Section 40(a)(ia). Therefore when we have held that there is no ambiguity to be cleared, the question of applying the doctrine of reading down to Section 40(a)(ia) does not arise. Equally, there is no doubt in our minds that the provision is constitutionally valid, having regard to the various inbuilt safeguards in the substantive section read along with its proviso. In such circumstances, the very question of applying the doctrine of reading down does not arise. When that be so, if it were to be held that in the event of a reasonable doubt about the applicability of Chapter XVII-B, Section 4(a)(ia) cannot be invoked, would be stretching our jurisdiction beyond the permissible limit which cannot be done. In as much as we have reached a conclusion that the object sought to be achieved while enacting Section 40(a)(ia) was for augmenting the provision of TDS, with which object we do not find any impermissibility or lack of constitutionality and hence there is no scope for applying the doctrine of reading down to the said provision. Therefore the last contention of the learned senior counsel appearing for the petitioners cannot also be accepted."

15. Where the challenge is to the vires of substantive provisions Section 40(a)(ia) in as much as those Writ petitions and in all fairness those parties should be permitted to workout their appellate remedies within a reasonable time and accordingly dismissed all those writ petitions holding that Section 40(a)(ia) is constitutionally valid and there is no arbitrariness, unreasonableness or discrimination in the said provision.

16. Since this matter is also covered by the judgment stated supra, this writ petition challenging the said 40(a)(ia) cannot be entertained already the same issue has been decided by this Hon'ble Court in the case of Tube Investment of India Ltd.,

17. Accordingly, these Writ Petitions fail and the same are dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

vji/nsd

To

1.The Deputy Commissioner of Income-tax,
Media Circle-II,
121, Nungambakkam High Road,
Chennai 600 034.

2.The Secretary, Union Of India,
Ministry of Finance,
Department of Revenue,
Central Secretariat, North Block,
New Delhi 110 001.

+1 cc to Mr.N.Muthukumar, Advocate Sr.No.76205

W.P.Nos.447 & 448 of 2009
and M.P.No. 1 of 2008

VD(CO)
CSL/21.03.2019