IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 690 OF 2017

Commissioner of Income Tax-16 .. Appellant
v/s.
KPMG .. Respondent

Mr. Suresh Kumar for the appellant
Mr. Arijit Chakravarty a/w Mr. Abhishek Tilak for the respondent

CORAM : M.S. SANKLECHA &
NITIN JAMDAR, J.J.
DATED : 24th SEPTEMBER, 2019

P.C.

1. This appeal under Section 260A of the Income Tax Act, 1961 (Act) challenges the order dated 18th March, 2016 passed by the Income Tax Appellate Tribunal (Tribunal). This appeal relates to Assessment Year 2008-09.

2. The Revenue has urged the following questions of law for our consideration :-

> *(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the dis-allowance u/s 40(a)(ia) of the I.T. Act, 1961 cannot be made in respect of the payment of professional fees outside India without realizing that the tax was required to be deducted on these payments u/s 195 of the Income Tax Act, 1961?*

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the requirement of 'rendering of services' in India was done away with by the insertion of an Explanation by the Finance Act, 2010, with retrospective effect without appreciating that the said explanation was merely clarificatory in nature and as such the tax was supposed to be deducted on receipts taxable on India even if the services were rendered outside India?

3. The respondent is engaged in the business of rendering taxation business, advisory audit related services and other consultancy services. During the previous year relevant to the subject assessment year, the respondent had paid fees for professional services outside India without TDS deduction to (1) Rahman Rahman Haq.,Bangladesh (2) KPMG Huazhen, China (3) KPMG, Mauritius (4)KPMG, Portugal (5) KPMG, Sweden (6) KPMG, Accounts N.V. The Netherlands (7) Background Bureau Inc. USA (8) Sidney Austin LLP, USA (9) Scherzer International, USA (10) Conference Board Inc. USA (11) KPMG IFRG Ltd. UK (12) KPMG, LLP, USA (13) KPMG USCMG Ltd. UK and (14) KPMG International, the Netherlands ("service providers" for short).

4. During the course of assessment proceedings for the subject

assessment year, the Assessing Officer disallowed the professional fees paid under Section 40(a)(i) of the Act to the service providers outside India. This on account of the fact that no tax had been deducted at source. This by following his order in case of the same respondent for A.Y. 2007-08. In the above year, the respondent's contention that no tax is liable to be deducted in view of the fact that the payments made to service providers for service outside India were governed by the Double Taxation Avoidance Agreement (DTAA) entered into between India with the countries in which the service providers render service. However, the Assessing Officer did not accept the same. Consequently, the Assessing Officer disallowed the professional fees of Rs.7 crores paid under Section 40(a)(i) of the Act, for non deduction of tax at source on payments made to the service providers in his Assessment Order dated 24th December, 2010.

5. Being aggrieved with the Assessment Order dated 24th December, 2010, the respondent filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By order dated 19th December, 2012, the CIT(A) held that the amounts were paid to the service providers in various countries (except China) were governed by the

DTAA. Thus, the dis-allowance for not deducting tax was not justified. Thus, the entire amount of Rs. 7 crores which was disallowed was deleted except the payment of Rs.33.54 lakhs made to KPMG, China.

6. Being aggrieved, both the Revenue and the Assessee filed appeals to the Tribunal. The Revenue being aggrieved with the deletion of dis-allowance for non-deduction of tax at source to service providers in all countries (save China). The Assessee being aggrieved to the extent the disallowance for non deduction of tax at source in respect of payment made to service providers in China. The Tribunal heard both the appeals together. The impugned order is a common order for Assessment Year 2007-08 and 2008-09. It allowed the respondent’s appeal and dismissed the Revenue’s appeal for the subject Assessment Year 2008-09 for the reasons indicated in its very order while dealing with the Assessment Year 2007-08. In the Revenue’s appeal it found that services received by the respondent outside India were in the nature of audit and Advisory. It held that none of the services had attributes of making available of any technical knowledge to the respondents in India. It further held

that none of the service providers had Permanent Establishment (PE) in India. Therefore, it held that the payment made to the service providers outside India is covered by the DTAA. Consequently, the same would be outside the scope of taxation in India. So far as the respondent's appeal in respect of China, the Tribunal found that the nature of services rendered were professional services and the service providers had no PE in India. Thus, covered by Indo-China DTAA. Thus, not taxable in India.

7. In any view of the matter, the impugned order further holds that at the relevant time there was no obligation to deduct tax at source in respect of fees paid to service providers, on the basis of its deemed income under Section 9(1)(vii) of the Act. It was only by the amendment made by the Finance Act, 2010 with retrospective effect by adding an Explanation to Section 9(1)(vii) of the Act, that the requirement of the service providers providing the same in India was done away with, for its application. Thus, making it deemed income subject to tax in India and require tax deduction at source by the respondent. However, the Tribunal held that yet the obligation to deduct tax cannot be created with the aid of an amendment made

with retrospective effect, when such obligation was absent at the time of making payment to the service providers.

8. We inquired of the Revenue the status of its challenge to the impugned order to the extent it relates to A.Y. 2007-08. Mr. Suresh Kumar informed us that the appeal was dismissed for non-removal of office objections. However, the tax effect is less than the limit provided in the CBDT Circular dated 8th August, 2019. Thus, the appeal would not be pressed. In the above circumstances, we took up this appeal for consideration.

9. From the questions proposed by the Revenue, it is clear that there is no challenge by them to the findings of the Tribunal that the payments made by the respondent to its service providers is covered by the DTAA. There is no challenge to the applicability of DTAA in favour of the respondent. In fact, the only challenge is the question urged, as reiterated by the Revenue also at the hearing. In these circumstances, the findings of the Tribunal that the payments made to the service providers are not subject to tax in India in view of the DTAA, is not a subject of challenge by the Revenue as it does not

seem to be aggrieved by it. Thus, the issue stands covered in favour of the respondent in the absence of challenge by the Revenue. In terms of Section 90(2) of the Act, it is open to an assessee to adopt either the DTAA or the Act as is beneficial to it. The Revenue having accepted that the service providers during the relevant period, did not receive any income in view of the DTAA, the occasion to deduct tax at source would not arise. Therefore, dis-allowance under Section 40(a)(i) of the Act will also not arise.

10. In the above view, the question no.(i) as proposed by the Revenue is academic in these facts as the application of DTAA which results in no income arising for the service providers in India is a concluded issue. Therefore, the occasion to examine Section 195 of the Act in these facts would not arise.

11. So also, question (ii) as proposed is academic as no occasion to deduct tax at source would arise in the absence of any income in the hands of the service providers outside India in view of Section 195 of the Act. Even otherwise a retrospective amendment cannot cast an obligation to deduct tax when not in force at the relevant time i.e. when payment was made. In fact, this Court in ***Commissioner of***

Income Tax V/s. M/s. NGC Networks (India) Pvt. Ltd. (Income Tax Appeal No.397 of 2005, decided on 29th January, 2018) has held that a party cannot be called upon to perform an impossible act i.e. to comply with the provision which was not in force at the relevant time. Admittedly, the Explanation if applicable is introduced later by a retrospective amendment. Thus, there could be no obligation to deduct tax at source when the payments have been made to the service providers abroad in the absence of a specific provision at the time when the payments were made.

12. In view of the above facts, the questions as proposed by the Revenue are academic, as the basis of the Tribunal's order that the amounts paid to the service providers is not income taxable in India in terms of DTAA. This is not being challenged by the Revenue in the present proceedings.

13. Accordingly, the appeal is dismissed.

(NITIN JAMDAR, J.) **(M.S. SANKLECHA, J.)**