

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NOS.47, 48, 49 OF 2015, 9 AND 10 OF 2016TAX APPEAL NO.47 OF 2015

M/s. Zephyr Biomedicals,
Plot No.13, Sagar Society,
Dona Paula, Panaji Goa.
Represented by its Partner
Shri Natarajan Sriram,
56 years of age,
S/o Sheshagiri Natarajan,
Plot No.13, Sagar Society,
Dona Paula, Panaji.
Goa – 403004.

... Appellant

Versus

The Joint Commissioner of Income Tax,
Range-1,
Aaykar Bhavan, Plot No.5,
EDC Complex,
Patto, Panaji Goa.

... Respondent

WITHTAX APPEAL NO.48 OF 2015

M/s. Orchid Biomedical Systems,
having office at Ground on Floor,
Geetanjali Building, Dr. Rego Bagh,
Alto Santacruz, Bambolim Goa.
Represented by its Partner,
Shri Natarajan Sriram,
56 years of age,
S/o Sheshagiri Natarajan,
Plot No.13, Sagar Society,
Dona Paula, Panaji,
Goa 403004.

... Appellant

Versus

The Joint Commissioner of Income Tax,
Range-1,
Aaykar Bhavan, Plot No.5,
EDC Complex,
Patto, Panaji Goa.

... Respondent

WITH
TAX APPEAL NO.49 OF 2015

M/s. Zephyr Biomedicals,
Plot No.13, Sagar Society,
Dona Paula, Panaji Goa.
Represented by its Partner,
Shri Natarajan Sriram,
56 years of age,
S/o Sheshagiri Natarajan,
Plot No.13, Sagar Society,
Dona Paula, Panaji.
Goa – 403004.

... Appellant

Versus

The Joint Commissioner of Income Tax,
Range-1,
Aaykar Bhavan, Plot No.5,
EDC Complex,
Patto, Panaji Goa.

... Respondent

WITH
TAX APPEAL NO.9 OF 2016

M/s. Zephyr Biomedicals,
Plot No.M46/47, Phase IIIB,
Verna Industrial Estate, Verna Goa.
Represented by its Partner
Shri Natarajan Sriram,
56 years of age,

S/o Sheshagiri Natarajan,
Plot No.13, Sagar Society,
Dona Paula, Panaji,
Goa – 403004.

... Appellant

Versus

The Joint Commissioner of Income Tax,
Range-1,
Aaykar Bhavan, Plot No.5,
EDC Complex,
Patto, Panaji Goa.

... Respondent

WITH
TAX APPEAL NO.10 OF 2016

M/s. Orchid Biomedical Systems,
having office at Ground Floor,
Geetanjali Building, Dr. Rego Bagh,
Alto Santacruz, Bambolim Goa.
Represented by its Partner,
Shri Natarajan Sriram,
56 years of age,
S/o Sheshagiri Natarajan,
Plot No.13, Sagar Society,
Dona Paula, Panaji,
Goa 403004.

... Appellant

Versus

The Joint Commissioner of Income Tax,
Range-1,
Aaykar Bhavan, Plot No.5,
EDC Complex,
Patto, Panaji Goa.

... Respondent

Mr. Pramod Vaidya and Ms. G. Almeida, Advocates for the Appellants.
Ms. Susan Linhares, Standing Counsel and Advocate Ms. S. Pinto, for
the Respondents.

***Coram : M. S. Sonak &
Dama Seshadri Naidu, JJ.***

***Reserved on : 29th September, 2020
Pronounced on : 7th October, 2020***

JUDGMENT (Per M. S. Sonak, J)

Heard Mr. P. Vaidya, learned counsel for the Appellants and Ms. S. Linhares, learned counsel for the Respondents in all these five appeals.

2. The learned counsel for the parties agree that all these appeals can be taken up and disposed of by a common judgment and order since, at least two of the substantial questions of law which arise in these appeals are common.

3. The two common substantial questions of law which arise in all these five appeals are as follows :-

(i) Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was right in law in holding that the Appellant is liable to deduct tax at source under Section 194C of IT Act on the payments made to C & F agents which is outright reimbursement of freight charges having no element of profit ?

(ii) Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was right in law in upholding the disallowance under Section 40(a)(ia) of IT Act when said section cannot be applied in the instant case ?

4. The learned counsel for the parties agree that there is yet another substantial question of law relating to deduction under Section 80IB of the Income Tax Act, 1961 (IT Act) which arises in Tax Appeal Nos.47 of 2015, 49 of 2015 and 9 of 2016. However, they also agree that this question will be required to be answered only if the substantial question of law (ii) above is answered in favour of the Revenue and against the Assessee. This means that only if we hold that the disallowance under Section 40(a)(ia) of the IT Act was valid in the facts and circumstances of the present case, the occasion will arise to consider the third substantial question of law relating to the deduction under Section 80IB of the IT Act.

5. Mr. Vaidya, learned counsel for the Appellants submits that in the present case, the C & F agents had raised separate bills towards reimbursement of freight charges paid to the carriers and the actual service charges of the C & F agents. Therefore, the payments made by the Assesseees towards reimbursement never had any income element therein. In such circumstances, neither was there any obligation upon C & F agents to pay any income tax upon such reimbursed amounts nor was there any obligation upon the Assesseees to deduct any tax at source (TDS) upon such amounts. He submits that the TDS is nothing but an alternate mode for recovery or collection of tax on income. Therefore, if no income element is involved in payments made, there is no obligation to deduct TDS. He relies on *(i) Director of Income Tax*

v Krupp Udhe Gmbh 354 ITR 173 (Bom); (ii) *CIT v Siemens Aktiengesellschaft* 310 ITR 320 (Bom); (iii) *Principal CIT v Consumer Marketing (India) (P.) Ltd* 64 taxmann.com 16 (Guj); (iv) *Transmission Corporation of A. P. Ltd. Vs CIT* (239 ITR 587) and (v) *GE India Technology Centre (P) Ltd v CIT* 327 ITR 456 (SC), in support of his contentions.

6. Mr. Vaidya submits that the ITAT has misconstrued the CBDT Circular No.715 dated 08.08.1995 and the interpretation of the ITAT is not in consonance with the decisions of the Karnataka High Court in *CIT Vs Kalyani Steels Ltd.* (91 Taxmann. com 359) and the Gujarat High Court in *Principal CIT Vs Consumer Marketing (India) (P) Ltd.* (64 Taxmann. Com 16).

7. Mr. Vaidya submits that there are errors apparent on the face of record of the impugned orders made by the ITAT. He points out that in this case “*Jet Air Freighters*” were the C & F agents and not carriers as incorrectly held by the ITAT. Besides, the ITAT noted only one of the five bills on record and therefore incorrectly concluded that the freight charges were only ₹1,25,272/- and the payment of ₹2,05,660/- had no nexus with the reimbursement of freight charges. He pointed out that in addition to this one bill, there were four other bills and the amounts therein totalled upto ₹2,05,660/-.

8. For all the aforesaid reasons, Mr. Vaidya submits that the first two substantial questions of law as framed in all these appeals may be answered in favour of the Assesseees.

9. Ms. Linhares, learned counsel for the Revenue stresses upon the Circular No.715 and submits that such Circular is quite clear and binding upon the Authorities under the IT Act. She submits that the view taken by the ITAT is entirely consistent with what is set out in Circular No.715. In particular, she makes reference to answers to Question Nos.7 and 30 in Circular No.715 and submits that since the view taken by the ITAT is entirely consistent with the answers in Circular No.715, there is no case made out to interfere with the impugned orders or to answer the substantial questions of law as raised in favour of the Assesseees and against the Revenue, in all these appeals. She therefore submits that all these appeals may be dismissed.

10. The rival contentions now fall for our determination.

11. In order to appreciate the rival contentions, reference is necessary to the provisions in Section 4 and Section 190 of the IT Act which explain the basis of charge of income tax and the TDS regime respectively.

12. Section 4(1) provides that where any Central Act enacts

that income tax shall be charged for any assessment year at any rate or rates, the income tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income tax) of, this Act in respect of the total income of the previous year of every person. Proviso to Section 4(1) provides that where by virtue of any provision of IT Act, the income tax is to be charged in respect of the income of a period other than the previous year, the income tax shall be charged accordingly.

13. Sub section (2) of Section 4 of the IT Act provides that in respect of income chargeable under sub-section (1) of Section 4, the income tax shall be deducted at source or paid in advance, where it is so deductible or payable under any provision of the IT Act.

14. Therefore, what is important is that the income tax is a tax payable in respect of “*total income*” of the previous year of every person. Further, such income tax shall have to be deducted at source or paid in advance, where it is so deductible or payable under any of the provision of the IT Act. From this, it follows that unless the paid amount has any “*income element*” in it, there will arise no liability to pay any income tax upon such amount. Further, in such a situation, there will also arise no liability of any deduction of tax at source upon such amount.

15. Section 190 of the IT Act is to be found in Chapter XVII of the IT Act concerning the collection and recovery of tax. Sub section (1) of Section 190 of the IT Act provides that notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction or collection at source or by advance payment, or by payment under sub-section (1A) of Section 192, as the case may be, in accordance with the provisions of this Chapter. Sub section (2) of Section 190 of IT Act provides that nothing in this Section shall prejudice the charge of tax on such income under the provisions of sub-section (1) of Section 4. Section 190 of IT Act states the general rule where provisions of Chapter XVII apply. Section 194(C) of the IT Act which is a part of Chapter XVII specifically concerns payments to be made to contractors which would include C&F agents.

16. Again, the liability to deduct or collect income tax at source is upon “*such income*” as referred to in Section 190(1) of the IT Act. The expression “*such income*” would ordinarily relate to any amount which has an “*income element*” in it and not otherwise. This is because the regime of TDS was enacted for the purpose of easy collection of income tax or to prevent the tax evasion. From bare reading of text of Section 190 and other provisions to be found in Chapter XVII, it deals with “*collection and recovery of tax*”. It is clear that the TDS regime is nothing but an alternate mode of recovery or collection of income tax.

17. In all these appeals, there is no dispute or in any case, there is overwhelming material on record which establishes the following position :-

- (i) The C & F agents have raised two separate sets of bills :-
 - (a) first towards the services rendered by the C & F agents; and
 - (b) second towards the reimbursement of freight charges paid to the carriers.
- (ii) These are not cases where any composite bills were raised by the C & F agents without indicating the service charge components and reimbursement components separately;
- (iii) There are ample evidences in the form of ledger entries, bills, payment vouchers etc., placed on record to establish that separate sets of bills were invariably made towards the service charge components and reimbursement components by the Assesseees to the C & F agents;
- (iv) The Assesseees have invariably deducted tax at source when it comes to payment towards the first set of bills i.e. towards the services rendered by the C & F agents without any demur;
- (v) Even in cases where composite bills were issued or where there was any ambiguity about payment towards reimbursement components, the Assesseees have deducted tax at source;
- (vi) It is only in cases where separate bills were raised by the C & F agents towards reimbursement and the freight charges, backed by proper evidence that the Assesseees have not deducted any tax at source before making payments towards such reimbursement.

18. Thus, the Assessee only contend that in clear cases where separate bills have been raised by the C & F agents towards the reimbursement of freight charges, they are not liable to deduct tax at source upon payment towards such reimbursement components, since, such payment has no income element embedded in it. According to us, the Assessee's contention deserves to be upheld in the facts and circumstances of the present case. There are decided cases which support the contention of the Assessee and reference can be usefully made to some such cases.

19. In *Krupp Udhe GMBH* (supra), the Division Bench of this Court speaking through Dr. D. Y. Chandrachud, as His Lordship then was, held that the question as to whether the reimbursement of expenses will form a part of the taxable income is not *res integra* in so far as this Court is concerned. Reference was then made to the decision in *Siemens Aktiengesellschaft* (supra), wherein another Division Bench of this Court agreed with the view taken by the Calcutta High Court in *CIT Vs Dunlop Rubber Co. Ltd.* (142 ITR 493) and Delhi High Court in *CIT Vs Industrial Engineering Projects (P) Ltd.*, (202 ITR 1014) that the amounts by way of reimbursement expenses do not constitute income as such and liable to any income tax.

20. In *Transmission Corporation of A. P. Ltd. Vs CIT* (239 ITR 587) the Hon'ble Supreme Court held that when the Assessee

makes the payment to non-residents, the Assessee is under the obligation to deduct tax at source under Section 195. However, the obligation is limited only to appropriate proportion of income chargeable under the IT Act.

21. The decision in *Transmission Corporation of A. P. Ltd.* (supra) was considered by the Hon'ble Supreme Court in ***GE India Technology Centre (P) Ltd. Vs CIT*** (327 ITR 456), in which, it was held that the provisions for deduction of TAS which are to be found in Chapter XVII dealing with collection of taxes and the charging provisions of the IT Act form one single integral, inseparable code and therefore, the provisions relating to TDS apply only to those sums which are chargeable to tax under the IT Act.

22. Based upon legal position as explained in the aforesaid decisions of the Hon'ble Supreme Court and our High Court, the Assessee's contention that there was no liability to deduct tax at source upon payments made towards reimbursement of amounts to the C & F agents, will have to be accepted.

23. The ITAT, in its impugned order dated 16/01/2015, indeed appears to have misread the bills issued by Jet Air Freighters and proceeded to incorrectly style "*Jet Air Freighters*" as "*carriers*" and not as the C & F agents. These very bills as well as other material on record

very clearly establishes that Jet Air Freighters were indeed the C & F agents and it is “*Jet Airways*” which was the carrier in these cases. The reasoning of the ITAT is therefore vitiated by this apparent error.

24. Similarly, the ITAT once again erred in observing that the bills towards reimbursement was only in an amount of ₹1,25,272/- and since the Assessee had paid by cheque an amount of ₹2,05,660/-, this payment has no nexus with reimbursement of freight charges of the C & F agents. The record clearly bears out that in all there were five bills raised by the C & F agents towards reimbursement of freight charges and the break up of the same reads as follows :-

Date	Doc No.	Amount
02/05/2008	ZJV/0029/9	3268
07/05/2008	ZJV/0067/9	39026
12/05/2008	ZJV/0075/9	11903
14/05/2008	ZJV/0087/9	125272
15/05/2008	ZJV/0091/9	26191
	Total	205660

25. The bill amounts total upto ₹2,05,660/-, which is the precise amount paid by the Assessee by consolidated cheque No.46101 dated 16/05/2008. The nexus, is thus clearly established. There is apparent error in the reasoning of the ITAT on this count as well.

26. Finally, we come to CBDT Circular No.715 and the answers to Question Nos.7 and 30 to be found therein. The questions and answers do not seem to clearly suggest that even in cases where

separate bills are raised towards reimbursement components, the payments against such separate bills carry liability of TDS. In any case, it is well settled that the CBDT Circular has to be read and construed in consonance with the provisions of the IT Act. If there is any ambiguity, such ambiguity has to be resolved by accepting the position consistent with the provisions of the IT Act. If there is conflict, then, it is obvious that the provisions of the IT Act will have to prevail.

27. The Karnataka High Court in *Kalyani Steels Ltd.* (supra) has referred to Circular No.715 but not read or construed it in the manner which the ITAT has, in the present case. There the Assessee had made payment to a company named HSL towards reimbursement of some travel expenses of deputed personnel. The High Court held that there was no income element embedded in such payment towards reimbursement and therefore, any insistence upon deduction of tax at source on these payments might run counter to the intent of Circular No.715.

28. Similarly, the Gujarat High Court in *Consumer Marketing (India) (P) Ltd.*, (supra), the facts and circumstances which bear close resemblance to the facts and circumstances of the present case, held that there will arise no liability to deduct tax at source where C & F agents raises separate bills towards reimbursement of transportation components alongwith supporting bill invoices, receipts etc. This was after considering the impact of Circular No.715.

29. In fact, the Gujarat High Court, referred to a previous decision of ITAT in *Om Satya Exim (P) Ltd. Vs ITO* rendered on 13.05.2011 in ITA No.1335/Ahd/2010 and observed therein the Tribunal held after considering Circular No.715, taken a view that when no composite bills were issued but separate bills were issued towards reimbursement of transportation charges, the Circular No.715 was not applicable. On this basis, the High Court held that there was nothing in Circular No.715 which required the deduction of tax at source in respect of payment made to C & F agents towards the reimbursement of transportation charges, when separate bills were raised for reimbursement claims.

30. Since, no decision of the jurisdictional High Court or the Hon'ble Supreme Court was pointed out, the ITAT in the present case, should have construed the Circular No.715 in consonance with its construction by the coordinate Bench and in any case the High Courts of Karnataka and Gujarat.

31. For all the aforesaid reasons, we allow these appeals and answer the first two substantial questions of law, which were common to all these appeals, in favour of the Assesseees and against the Revenue.

32. In view of the above, there is no necessity to consider the third substantial question of law framed in Tax Appeal Nos.47 and 49

of 2015 and Tax Appeal No.9 of 2016.

33. The impugned orders will now have to be modified accordingly.

34. These appeals are allowed in the aforesaid terms. There shall however be no order as to costs.

Dama Seshadri Naidu, J

M. S. Sonak, J

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