

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
TAX APPEAL NO. 67 OF 2016

The Principal Commissioner of Income Tax
Aaykar Bhavan,
Patto, Panaji, Goa.

..... Appellant

Versus

M/s. Dempo Industries Pvt. Ltd.,
Dempo House, D.B. Marg,
Campal, Panaji, Goa.

..... Respondent.

Ms. Susan Linhares, Standing Counsel for the Appellant.

Mr. Mihir Naniwadekar with Ms. Vinita Palyekar, Advocates for the Respondent.

Coram:- M. S. SONAK &
DAMA SESHADRI NAIDU, JJ.

Reserved on:- 7th January 2021

Pronounced on:- 14th January 2021.

JUDGMENT : (Per M. S. Sonak, J.):

Heard the learned Counsel for the parties.

2. This appeal was admitted on 18th October 2016 on the following substantial questions of law:

A. Whether the Hon'ble ITAT was right in completely ignoring the decision of the Hon'ble ITAT, Kolkata in ACIT V/s. Bharati Cellular Ltd.(105) ITD 129 and Hindustan Coca Cola Beverages (P) Ltd. V/s. ITO (ITAT, Jp) while deleting addition made on the payment made by the assessee towards the commission paid to news paper vendors without deduction of TDS u/s. 40 (a) (ia) of I.T. Act, 1961?

B. Whether the Hon'ble ITAT was right in not appreciating the CBDT circular no.715 dated 08/08/1995 and CBDT circular No.619 dated 04/12/1991 while deleting the addition made to Rs.2,76,00,979/- towards payments of commission to Advertising Agents where TDS was not deducted under section 40(a)(ia) r.w. s.194C, wherein it was clarified that when commission or brokerage is retained by the agents and not remitted to the principal, it amounts to constructive payments of the same to him by principal and TDS needs to be made from such amount?

3. The Respondent-Assessee is engaged in the business of publishing and selling newspapers. For the Assessment Year 2011-12, the Assessee filed an e-return declaring a total income of Rs.6,96,80,950/-. The case was selected for scrutiny under CASS. The assessment was finalised vide order dated 28/11/2013 in which the Assessing Officer (AO) held that the Assessee had paid commission to the newspaper vendors to the extent of Rs.1,36,43,978/- to advertisement agents to the extent of Rs.2,76,00,979/- aggregating to Rs.4,12,44,957/- and since, the Assessee had not deducted TDS from such payments, the AO disallowed the deduction of the said amount

relying upon the provisions of Section 40(a)(ia) of the Income Tax Act, 196.

4. The Assessee appealed to the Commissioner of Income-Tax (Appeals) who, by his order dated 17/11/2014 reversed the AO's order holding that the relation between the Assessee and the newspaper vendors or the advertisement agents was on a principal-to-principal basis and, therefore, there was no requirement of deducting tax at source on the trade discount extended by the Assessee to them. The Commissioner (Appeals) relied upon the decision of the Income Tax Appellant Tribunal (Cuttack) in case of *ACIT vs. Samaj*¹ wherein it was held that sale of newspapers at a discounted price to the newspaper vendors amounts to discount and not commission.

5. The Revenue appealed to the Income Tax Appellate Tribunal (ITAT) which has, by its order dated 7/10/2015, dismissed the Revenue's appeal and upheld the order made by the Commissioner (Appeals). Hence, the present appeal on the aforesaid substantial questions of law.

6. Ms. Linhares, the learned Counsel for the Revenue submits that the view taken by the Commissioner (Appeals) and the ITAT, is contrary to the law laid down by the Kolkata Bench of the ITAT in

¹ (2001) 77 ITD 358 (Cuttack)

*ACIT vs. Bharti Cellular Ltd.*² and Jaipur Bench of the ITAT in *Hindustan Coca Cola Beverages P. Ltd. vs. Commissioner of Income-Tax*³. In these decisions, it has been held that any payment made by the Assessee towards commission to the newspaper vendors or advertising agents without deduction of tax at source under Section 40(a)(ia) of the Income Tax was not liable to a deduction. She submits that the decision of the Kolkata Bench of the ITAT has even been affirmed by the High Court Calcutta in *Bharati Cellular Ltd. vs. ACIT*⁴. She further submits that the first substantial question of law, as framed, is, therefore, required to be answered in favour of the Revenue and against the Assessee.

7. Ms. Linhares further submits that the Commissioner (Appeals), as well as the ITAT, have not appreciated the CBDT Circular No.715 dated 8.8.1995 and CBDT Circular No.619 dated 4/12/1991 in the context of payment of commission to the advertising agents. She submits that whenever the TDS is not deducted under Section 40(a)(ia), read with Section 194(C) of the Income Tax Act, then such amount cannot be deducted from taxable income of the Assessee. Based on the CBDT circulars, she submits that the second

² 105 ITD 129 (Kolkata)

³ [2018] 402 ITR 539 (Raj).

⁴ (2011) 12 Taxmann.com 30 (Calcutta)

substantial question of law is also required to be answered in favour of the Revenue and against the Assessee.

8. Mr. Naniwadekar, the learned Counsel for the Assessee, at the outset, pointed out that the decision of Jaipur Bench of the ITAT in Hindustan Coca Cola Beverages P. Ltd.(supra) has been reversed by the Rajasthan High Court in the case of *Hindustan Coca Cola Beverages Pvt. Ltd. vs. Commissioner of Income-Tax*⁵. He submits that the view of the Kolkata Bench of the ITAT in *ACIT vs. Bharti Cellular Ltd.* (supra) is at variance with the view taken by the Karnataka High Court in the case of *Bharti Airtel Ltd. vs. Deputy CIT*⁶. He submits that the view taken by the Karnataka High Court has been accepted and followed by this Court in *CIT (TDS), Pune vs. M/s. Vodafone Cellular Ltd.*⁷ and *The CIT (TDS) Pune vs. M/s. Idea Cellular Ltd.*⁸. He submits that in any case, the view taken by the Commissioner (Appeals) and the ITAT, is quite consistent with the law laid down by the Gujarat High Court in the case of *Ahmedabad Stamp Vendors Association vs. Union of India*⁹ which, in turn, is based on the ruling of the Hon'ble Supreme Court in *Bhopal Sugar Industries Ltd. vs.*

⁵ [2018] 402 ITR 539 (Raj).

⁶ [2015] 372 ITR 33 (Karn).

⁷ ITA Nos.1152, 1274 & 1995 of 2017 with ITA Nos. 571 & 1266 of 2018 decided on 27/1/2020.

⁸ ITA No.1129/2017 decided on 13/1/2020.

⁹ [2002] 257 ITR 202 (Guj HC).

*STO*¹⁰. Mr. Naniwadekar, therefore, submits that the first substantial question of law is required to be decided against the Revenue and in favour of the Assessee.

9. Mr. Naniwadekar submits that even the second substantial question of law is required to be decided against the Revenue and in favour of the Assessee given the decision of the Allahabad High Court in *Jagran Prakashan Ltd. vs. Deputy CIT (TDS)*¹¹. He pointed out that the view taken in this decision has been expressly accepted by the Revenue, as is evident from the CBDT Circular No.5/2016 dated 29th February 2016 which, according to him, supersedes or, in any case, clarifies the CBDT Circulars No.715 and 619 relied upon by the Revenue in the present matter. He relies on *K.P. Varghese vs. ITO, Ernakulum and anr.*¹² to submit that the CBDT circulars bind the Revenue and the Revenue cannot, therefore, assert some position contrary to the position clarified by the CBDT Circular No.5/2016 on the status of trade discount extended to the advertisement agencies.

10. Mr. Naniwadekar submits that the material on record very clearly establishes that the relation between the Assessee and the newspaper vendors or the advertising agencies was on a principal-to-

¹⁰ (1977) 3 SCC 147

¹¹ [2012] 345 ITR 288 (All)

¹² (1981) 131 ITR 597 (SC)

principal basis. He submits that the terminology employed to describe the parties, is hardly relevant and emphasis has to be on the real nature of transactions. He submits that the Commissioner (Appeals) and the ITAT have recorded concurrent findings of fact that the Assessee did not pay any commission to the newspaper vendors or the advertising agencies, but what was extended was only the trade discount, quite consistent with the industry practice in such matters. He submits that there is no perversity in the findings of fact recorded concurrently by the two authorities and no substantial question of law has been framed on the aspect of any alleged perversity. He submits that this is yet another reason as to why the present appeal may be dismissed.

11. The rival contentions now fall for our determination.

12. Ms. Linhares, in support of her contention that the first substantial question of law is required to be answered in favour of the Revenue and against the Assessee, has relied upon the decisions in *Bharti Cellular Ltd.* (supra) and *Hindustan Coca Cola Beverages P. Ltd.* (supra). However, there is no dispute that the decision of the ITAT in *Hindustan Coca Cola Beverages P. Ltd.* (supra) has expressly been reversed by the Rajasthan High Court in *Hindustan Coca Cola Beverages Pvt. Ltd.* (supra).

13. Further, we find that the ITAT, in the present case, has relied upon the decision of the Karnataka High Court in *Bharti Airtel Ltd. vs. DCIT* (supra), which takes a view contrary to the view taken by the ITAT in *Bharti Cellular Ltd.* (supra) or the Calcutta High Court in *Bharti Cellular Ltd. vs. ACIT* (supra). This Court in the case of *Vodafone Cellular Ltd. (supra)* and *Idea Cellular Ltd. (supra)*, has approved the view taken by the ITAT by following the decision of the Karnataka High Court in *Bharti Airtel Ltd.* (supra). Accordingly, it will not be proper for us to follow the decision of the Kolkata Bench in *Bharti Cellular Ltd.* (supra) and answer the first substantial question of law in favour of the Revenue and against the Assessee, in the facts and circumstances of the present case.

14. Besides, we note that in the present case, the Commissioner (Appeals), as well as the ITAT, have recorded concurrent findings of fact that the transactions or the dealings between the Assessee and the newspaper vendors were on a principal-to-principal basis. There was no commission paid by the Assessee to the newspaper vendors, but the Assessee merely extended a trade discount to the newspaper vendors. The newspaper vendors were, thus, not agents of the Assessee in the facts and circumstances of the present case. The circumstance that the Assessee would repurchase the unsold papers, was not sufficient to conclude that there was no concluded sale in the favour of the

newspaper vendors, in the first instance. The findings of fact on this aspect, as concurrently recorded, do not suffer from any perversity, to raise any substantial question of law and warrant interference with the same.

15. This is yet another reason as to why the first substantial question of law cannot, in the facts and circumstance of the present case, be decided in favour of the Revenue and against the Assessee.

16. In so far as the second substantial question of law is concerned, we find that the view taken by the Commissioner (Appeals) and the ITAT is consistent with the ruling of the Allahabad High Court in *Jagran Prakashan Ltd.* (supra). The CBDT Circular No.5/2016 dated 29/2/2016 takes express cognizance of the rulings of Allahabad High Court in *Jagran Prakashan Ltd.* (supra) and Delhi High Court in *CIT vs. Living Media India Ltd.* ITA No.1264 of 2007 and proceeds to clarify that no TDS is attracted on payments made by television channels/newspaper companies to the advertising agency for booking or procuring of or canvassing for advertisements. The CBDT circular further clarifies that '*commission*' referred to in question No.27 of the Board's Circular No.715 dated 8.8.95, does not refer to payments by media companies to advertising companies for booking of advertisements, but to payments for engagements of models, artists,

photographers, sportsperson, etc. and therefore, is not relevant to the issue of TDS referred to in this Circular.

17. The aforesaid means that the Circular No.715 dated 8.8.1995 cannot be interpreted in the manner suggested by Ms. Linhares, any longer. The CBDT itself has clarified the position in its subsequent Circular No.5/2016 dated 29/2/2016 and such clarification is binding upon the Revenue which cannot now take up some contrary position in the matter.

18. Besides, both the Commissioner (Appeals), as well as the ITAT, have concurrently recorded findings of fact that the dealings between the Assessee and the advertising agencies were on a principal-to-principal basis and, therefore, there was no element of commission involved. Since there was no element of commission involved or paid by the Assessee to such agencies there was no question of any deduction of tax at source on such amounts. No perversity was pointed out in such concurrent findings of fact, to warrant any interference with the same in this appeal. Therefore, even the second substantial question of law is required to be answered against the Revenue and in favour of the Assessee in this matter.

19. Resultantly, both the substantial questions of law are answered against the Revenue and in favour of the Assessee.

20. The Appeal is, accordingly, dismissed. There shall be no order as to costs.

DAMA SESHADRI NAIDU, J.

M. S. SONAK, J.

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