

OD-10

ITAT/44/2021
IA No.GA/2/2021

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction [Income Tax]
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME
TAX

-Versus-

M/S. M C NALLY SAYAJI ENGINEERING
LIMITED

Appearance:

Mr. Debasish Chowdhury, Adv.
Mr. Soumen Bhattacharjee, Adv.
...for the appellant.

Mr. J.P. Khaitan, Sr. Adv.
Mr. A.K. Dey, Adv.
Mr. Sanjay Bhowmik, Adv.
...for the respondents.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 24th February, 2022.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' in brevity) is directed against the order dated 17th January, 2020 passed by the Income Tax Appellate Tribunal, Kolkata "A" Bench (the 'Tribunal' in short) in ITA No.1173/Kol/2018 for the assessment year 2013-14.

The revenue has raised the following substantial questions of law for consideration:

- "A. Whether the Learned Tribunal has committed substantial error in law in deleting the addition of Rs.20,38,637/- on account of disallowance for delayed payment of employees contribution to Provident Fund violating the provision of Section 36(1)(va) read with Section 2(24)(x) of the Income Tax Act ?
- B. Whether the Learned Tribunal has committed substantial error in law in giving relief to the assessee on account of disallowance of retention money amounting to Rs.7,72,10,900/- added back during assessment ?
- C. Whether the Learned Tribunal has committed substantial error in law by not considering the CBDT's Circular No.22/2015 dated 17.12.2015 which has specifically directed assessing officer to allow credit of employees contribution to provident fund or superannuation fund or any other fund for the welfare of employees, by invoking the provisions of Section 43B of the Income Tax Act, if the same has been paid after due date ?
- D. Whether the Learned Tribunal has committed substantial error in law by not considering that CBDT's Circular No.22/2015 dated 17.12.2015 which clarified that the Circular does not apply to claim of deduction relating to employees contribution to welfare funds which are governed by Section 30(1)(va) of the Income Tax Act, 1961 ?

We have heard Mr. Debasish Chowdhury, learned Counsel assisted by Mr. Soumen Bhattacharyya, learned Advocate for the appellant/revenue and Mr. J. P. Khaitan, learned senior Counsel

assisted by Mr. A. K. Dey and Mr. Sanjay Bhoumik, learned Advocates for the respondent.

The first issue which falls for consideration is with regard to the correctness of the order passed by the tribunal in deleting the addition of Rs.20,38,637/- on account of disallowance for delayed payment of employees contribution to the Provident Fund Authorities in contravention to the provisions of Section 36(1)(va) read with Section 2(24)(x) of the Act. The said issue is pending consideration before this Court and two other appeals have been admitted. However, in the instant case, there is one more issue involved with regard to the retention money where the tribunal had granted relief to the assessee by affirming the order passed by the Commissioner of Income Tax (Appeals) (CIT(A)) deleting the disallowance of retention money amounting to Rs.7,72,10,900/-. If the substantial questions framed for consideration with regard to the retention money are decided in favour of the respondent/assessee, then the other issue pertaining to the disallowance for delayed payment of employees contribution to the provident fund will become academic as the tax effect involved on the said issue is around Rs.6 lakhs and the appeal cannot be pursued further by the revenue on account of low tax effect. In such event, we will have to leave the question open as the said question is now pending consideration before this Court in other appeals which have been entertained.

With this prelude we proceed to consider the second issue regarding the disallowance of retention money. The assessee's case was that the retention money is payable after certain period of time on the satisfactory performance of the contract executed by the parties as per the terms of the agreement and could not be said to be accrued to the assessee at the time of raising invoice and could be said to be accrued only after the customer accepts its claim for satisfactory completion of the contract. The assessee contended that the retention money represents certain percentage of delayed amounts retained by the parties in respect of contracts entered by them which will be paid only after satisfactory completion of the contract. The assessee is engaged in the manufacture and supply of heavy equipments and tools under contract. In terms of the contract which have been entered into by the assessee with the third parties a certain percentage of the invoice amount raised by the assessee is retained by the customer/parties as retention money to be paid after the successful completion of the contract or on fulfilment of certain pre-determined conditions mentioned in the purchase order. The assessee produced sample contracts entered into with the customers. These contracts were perused by the CIT(A). Further, the assessee contended that in the assessee's own case for the assessment years 2008-09 and 2009-10 the tribunal had decided the issue in their favour. The assessee also placed reliance on the decision of this Court in *Commissioner of Income Tax Vs. Simplex*

Concrete Piles (India) Pvt. Ltd., reported in [1989] 179 ITR 8 (Cal.) The contentions advanced by the assessee were considered by the CIT(A) and the sample contract which was produced by the assessee was examined. The law as laid down in *Simplex Concrete Piles (India) Pvt. Ltd.* was noted and the CIT(A) granted relief to the assessee. While doing so, the CIT(A) took into consideration of the order passed by the tribunal in the assessee's holding company, M/s. Mc Nally Bharat Engineering Co. Ltd. Kolkata in ITA No.100/Kol/2011 wherein the tribunal dismissed the department's appeal on the said issue and held that the retention money should not be included in computing book profits under Section 115JB as well as normal provisions. We are informed that the revenue has preferred appeal only with regard to the finding concerning computation of books of account under Section 115JB and not under the normal provisions and the finding to the said effect has attained finality.

Mr. Debasish Chowdhury, learned counsel for the revenue submitted that the decision in *Simplex Concrete Piles (India) Pvt. Ltd.* was rendered in the year 1989 and the law as of now needs to be looked into. We find that the legal principle has not undergone any change. In fact, as recently as on 30th July, 2020, in the case of *Commissioner of Income Tax vs. Voltech Projects Pvt. Ltd.* reported in [2020] 428 ITR 270 (Mad.) the same issue was considered and the revenue's appeal was dismissed.

The tribunal while considering the correctness of the order passed by the CIT(A) once again re-examined the facts and took note of the conditions of the contract entered into between the assessee and the third parties and affirmed the order passed by the CIT(A). In Simplex Concrete Piles (India) Pvt. Ltd. it was held that the conditions of the contract provide for retaining 10 per cent or 5 per cent of the amount payable to the assessee only upon satisfactory completion of the work as certified by the contracting party. The Court noted that only after the assessee fulfilled their obligations under the contract, the retention money would be released and the assessee would secure the right to receive such retention money. Thus, it was held that when the bills were submitted having regard to the nature of the contract, no enforceable liability accrued or arose and, accordingly, it could not be said that the assessee had any right to receive the entire amount on the completion of the work or on the submission of the bills. Further, it was held that the assessee had no right to claim any part of the retention money till the verification of satisfactory execution of the contract. The above decision would apply with full force to the case on hand. That apart the CIT(A) as well as the tribunal have examined the sample contract produced by the assessee which they have entered into with the third party customers/parties and found on facts that the assessee would be entitled to the amount retained only upon satisfactory completion of the work which would be certified by the contracting parties.

Thus, we find that the tribunal rightly rejected the appeal filed by the revenue on the said aspect. Hence, the present appeal on the said issue needs to be rejected. Accordingly, substantial question of law no.B is answered against the appellant/revenue.

As prefaced earlier, if substantial question of law no.B is decided against the revenue, then the other questions of law namely, A, C and D all relate to disallowance for delayed payment of employees contribution to the provident fund authorities. The deletion is to the tune of Rs.20,36,637/- and the approximate amount of tax that would become payable on the said amount would be about Rs.6 lakhs. If that is so, the said issue cannot be pursued by the revenue on account of low tax effect. We are conscious of the fact that other appeals have been entertained by this Court to decide this issue which are pending. Therefore, we leave substantial questions of law nos.A, C and D open and they are not decided in this appeal as we are dismissing this appeal by deciding substantial question of law no.B in favour of the assessee and the other three questions are left open.

With the dismissal of the appeal, the connected application for stay stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)