

OD-6

ITAT/26/2022
IA No.GA/2/2022

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME
TAX, CENTRAL-1, KOLKATA

-Versus-

M/S. EMC LIMITED

Appearance:

Mr. Smarajit Roychowdhury, Adv.
...for the appellant.

Mr. S. M. Surana, Adv.
Mr. Bhaskar Sengupta, Adv.
...for the respondent.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE BIVAS PATTANAYAK

Date : 25th July, 2022.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 27th May, 2020 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (in short the 'Tribunal') in ITA No.2149/Kol/2017 for the assessment year 2014-15.

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

- i) *Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal erred in holding that the retention money of Rs.142.53 crores did not arise in the relevant assessment year 2014-15 when the entire amount of Rs.142.53 crores was credited by the Principal Contractors and TDS was deducted and paid by those parties and also claimed by the assessee ?*
- ii) *Whether on the facts and circumstances of the case and in law, the learned Tribunal has failed to adjudicate the question raised by the Revenue in Appeal that by such crediting of income by contractors and TDS Deduction thereupon, the facts of the case was clearly distinguishable from the decision passed in Simplex Concrete Piles (I) Ltd. since there was no such TDS provision at the time of said decision relied upon and there was no concept of accrual of income under clause (2) of Section 194C of the Act ?*
- iii) *Whether on the facts and circumstances of the case and in law, the learned Tribunal has failed to appreciate the fact that assessee has changed its method of computation of Income in AY 2014-15 for reducing the retention money from the taxable income ?*

We have heard Mr. Smarajit Roychowdhury, learned standing counsel for the appellant/revenue and Mr. S.M. Surana, learned counsel assisted by Mr. Bhaskar Sengupta, learned Advocate appearing for the respondent/assessee.

The short question which falls for consideration is whether the assessing officer was right in holding that the income on account of retention money is deemed to be the income of the assessee for the assessment year under consideration A.Y. 2014-15. On appeal before the Commissioner of Income Tax (Appeals)-20, Kolkata, (CIT(A), the appellant contended that the retention money was withheld by the principal in accordance with the terms of contract did not accrue to the assessee as income in the assessment year under consideration and only because the principal deducted tax under Section 194C of the Act, the assessing officer ought not to have held that the retention money was includible in the gross receipts as income. It was further contended that the finding of the assessing officer that the assessee was following mercantile system of accounting, yet the retention money for the contract completed during the year was to be included in the total income as per the provision of Section 194C of the Act when the said provision has nothing to do with the accrual of income in the hands of the recipients when the assessee under the law was not entitled to claim payment until fulfilment of the terms of contract and expiry of the period for which the retention money was withheld and, as such, under the mercantile system of accounting, the said amount did not accrue to the assessee. Before the CIT(A), a sample contract entered into between the assessee and the Power Grid Corporation was produced wherein there

was a specific condition that 10% of the amount shall be retained and paid after successful commissioning of the transmission line and issuance of taking over certificate. The assessee placed reliance on the decision of this Court in the case of *CIT vs. Simplex Concrete (Piles) India Pvt. Ltd.* reported in 179 ITR 8 (Cal). On facts, the assessee pointed out that part of the said retention money was taken as income for the assessment year 2015-16 to 2017-18 when a particular project was completed and have been duly included in the return of income for the said assessment years 2015-16 to 2017-18. Further, the assessee stated that the remaining amount of retention money shall also be included in the income for the year when particular projects were completed. There are several other decisions which the assessee has referred to before the CIT(A).

After considering the facts of the case, specially the documents which were produced namely, the sample contract and other materials, the CIT(A) concluded as follows:

"I think the AO has discussed/raised an important point that the assessee has also claimed TDS deducted on retention money in its return of income. In my view, once the assessee claims that retention money is not its income in the assessment year in question (on the basis of judgement cited above including in the case of Mcnally Bharat Ltd (supra), the assessee should not have claimed TDS on retention money during assessment year in question. As the order delivered by the Jurisdictional

bench of ITAT Kolkata in the case of McNally Bharat Ltd (supra) and the Hon'ble Calcutta High Court in the case of Simplex Concrete (Piles) India Pvt. Ltd. (supra) are very much applicable in this case, therefore, respectfully following the ratio decided in the above mentioned cases, retention money has to be excluded from the income. The assessee's appeal on grounds no. 2, 3 and 4 are to be allowed. However, the TDS claimed by the assessee relatable to such retention money is to be disallowed in the assessment year in question. It may be allowed in the year in which the assessee declares retention money as its income. Accordingly, assessee's appeal on grounds no.2, 3 and 4 are partly allowed.

Aggrieved by the above finding of the CIT(A), the revenue had preferred appeal before the learned Tribunal. The learned tribunal took note of the submissions on either side as well as the law on the subject and examined the factual position and recorded the following findings:

"We note from the relevant clauses of the contract that the contractees had the right to withhold certain percentage of the consideration till the conclusion of the project and only after certification of concluded projects the retained portion of the amounts are disbursed finally which may be in the succeeding assessment years and is contingent upon the terms and conditions of the contract. We also note that the AO has not disputed the amount which has been retained by the contractees. In such a scenario, merely because the

assessee had booked the income in this year without actual receipt of it, cannot be chargeable to tax as per the Act. The reasons given by the AO to disallow the claim of the assessee cannot be sustained and was rightly repelled by the Ld. CIT(A) whose view to accept the claim of assessee is based on the accepted judicial precedents laid down by the Hon'ble jurisdictional High Court in CIT Vs. Simplex Concrete Piles (supra); Hon'ble Gujarat High Court in Anup Engineering Ltd. (supra) and Hon'ble Bombay High Court in CIT Vs. Associated Cables P. Ltd. (supra) and Hon'ble Gujarat High Court in CIT Vs. Ignifluid Boilers (I) Ltd. (2006) 283 ITR 295 (Mad.) We hold that in the factual circumstances especially as per the terms of contract between the assessee and the contractee, the retention money retained by the contractee is deferred payment and is contingent upon satisfactory completion of contract work. We hold that the right to receive the retention money is accrued only after the obligations under the contract are fulfilled and the assessee had no vested right to receive the same in this assessment year, therefore, it would not amount to an income of the assessee in the year in which it is retained. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) and so, we confirm it and dismiss the appeal of the Revenue".

From the above finding, we have no hesitation to hold that the CIT(A) as well as the tribunal firstly took into consideration the undisputed facts. Thereafter applied the correct legal position and granted relief to the assessee. Thus, we find

the revenue has not made out any ground to interfere with the order passed by the learned tribunal.

Accordingly, the appeal is filed by the revenue (ITAT/26/2022) is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the connected application for stay (GA/2/2022) also stands closed.

(T.S. SIVAGNANAM, J.)

(BIVAS PATTANAYAK, J.)