OD-2

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION [INCOME TAX]
ORIGINAL SIDE

RVWO/24/2023
IA NO: GA/2/2023
SURENDRA COMMERCIAL AND EXIM PRIVATE LIMITED
VS
INCOME TAX OFFICER, WARD- 8(4), KOLKATA

BEFORE :

THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 28TH August, 2023

<u>Appearance</u> :
Mr. Subhas Agarwal, Adv.
...for appellant
Mr. Prithu Dudhoria, Adv.
....for respondent

The Court : - This review application has been filed to review the judgment and order in ITA 45 of 2010 dated 13.06.2022. By the said judgment and order the appeal filed by the assessee, challenging the order passed by the Income Tax Appellate Tribunal B Bench Kolkata (the Tribunal) in ITA 853 of 2009 for the assessment year 2005-06 was affirmed.

Aggrieved by the judgement and order dated 13.6.2022 in ITA 45 of 2010 the assessee filed an appeal before the Hon'ble Supreme Court in Special Leave Petition (Civil) Diary No. 29896 of 2022. By the said order the Hon'ble Supreme Court granted permission to the assessee to withdraw the Special Leave Petition with liberty to file review petition before this Court on a solitary issue namely with regard to the invocation of Section 40(a)(ia) of the Income Tax Act, 1961 (the Act) with regard to the payment made to clearing and forwarding agents. Pursuant to such liberty granted to the appellant present review application has been filed. The solitary questions of law canvassed in this review application is as follows :-

> "Whether in the facts and circumstances of the case this Court ought to have held that there is no liability to deduct TDS in respect of claim of reimbursement of expenses relating to port and handling charges claimed by Customs House Agents ?"

Mr. Subhas Agarwal, learned Advocate appearing for the applicant/ assessee, submitted that there were two issues before the Assessing Officer, one regarding payments which were made by the assessee to consignment agents and the other relating to payments made to Customs House agents under two heads namely, for clearing charges and the other for customs clearing expenses which were in the nature of reimbursement relating to Port and Handling charges claimed by Customs House agents.

The learned Advocate appearing for the applicant/assessee submitted that the Assessing Officer while completing assessment by order dated 28.12.2007 has elaborately considered the payments made towards Customs House agents and came to the conclusion that TDS was required to be deducted on such reimbursements. However, with regard to reimbursements of expenses relating to Port and Handling charges, the Assessing Officer though noted the submissions of the assessee just to follow the findings recorded by him in respect of payments made to commission agents and no independent finding was given with regard to the claim of reimbursement of expenses relating to Port and Handling charges claimed by the Customs House agents. It is submitted that the payments made to the Customs House agents relating to expenses for Port and Handling charges was a reimbursement expenditure and that has been shown separately and it is incorrect to state that the bill was a composite bill. The learned CIT[A] while affirming the order passed by the Assessing Officer took note of the facts with regard to the payments made to consignment agents which was admittedly a composite bill. However, it was not the case with regard to the payments made to the Customs House agents for Port and Handling charges which was a reimbursable expenditure. The order passed by the CIT[A] was affirmed by this Court in its judgment dated 13.6.2022.

Therefore, it is submitted that this issue was required to be considered and it is undoubtedly a question of law and facts which has to be adjudicated by the authority and therefore it is prayed that the review application may be allowed and that portion of the order passed by this Court may be reviewed.

We have heard Mr. Prithu Dudhoria, learned standing counsel on the above submission.

After elaborately hearing the learned Advocates for the parties, we are inclined to accept the submission of Mr. Agarwal that the issue with regard to the payment made to Customs House agents relating to Port and Handling charges claimed by the assessee as reimbursable expenditure was not specifically considered in the judgment dated 13th June, 2022. The error partly is attributable to the assessee since the substantial question of law on which the appeal was admitted by order dated 15th February, 2010, did not specifically mention this issue and it was a composite question of law. Therefore, the endeavour of the applicant/assessee should have been to place relevant facts concerning the payments made to the consignment agents and those made to the Customs House agents which were claimed to be reimbursable expenditure. This has ultimately led to the error, which has crept in, in the judgment dated 13th June, 2022. We find that the same mistake has crept in, in the order passed by the CIT(A) dated 19th February, 2009. Before the CIT(A), a specific ground was raised by the appellant/assessee that the Assessing Officer erred in disallowing payment of actual Port and Handling charges paid through clearing agent which are paid on behalf of the assessee to the Port authorities to the tune of Rs.2,77,861.00. The CIT(A) has noted the ground raised by the assessee. However, without discussing the subject issue which was taken up as ground no.1, the CIT(A) has elaborately considered the issue only with regard to payments made to the consignment agent and not with regard to the payment of Port and Handling charges paid through the clearing agent which are paid on behalf of the applicant/assessee to the Port authorities.

As rightly pointed out by the learned Advocate for the applicant/assessee, the Assessing Officer also did not segregate the two issues and adopted the findings recorded in paragraph 7.3 of his order dated 28th December, 2007 with regard to the payments paid to the Clearing and Forwarding agents as well towards expenses relating to Port and Handling charges.

Thus, we are of the view that the error which crept in during the assessment proceedings has travelled upto this Court which would warrant exercise of our review jurisdiction as we find that the error is apparent on the face of the judgment and order.

As we mentioned above, the assessee has to be partly blamed for the present situation since the grounds raised by the assessee before this Court in the appeal were not specific, as has been submitted before us in this review application. Since we find this issue has not been adjudicated by taking into consideration of the facts and the separate bills which were produced by the assessee, we are of the view that the issue should stand remanded to the Assessing Officer for fresh consideration.

Accordingly, the review application is allowed and the judgment and order dated 13th June, 2022 is set aside only with regard to the contention of the assessee that there is no liability to deduct TDS in respect of the claim of reimbursement of expenses relating to the Port and Handling charges claimed by the Customs House agent.

Accordingly, the Assessing Officer is directed to afford an opportunity of personal hearing to the assessee, examine the records and bills and take a decision in accordance with law. The Assessing Officer shall take note of the decisions which were placed by the assessee before us in the case of *CIT vs. DLF Commercial Project Corporation, (2017) 88 taxmann.com 422 (Delhi)*, wherein the Court referred to its earlier decision in the case of *CIT vs. Industrial Engineering Projects (P) Ltd., (1993) 202 ITR 1014 (Delhi),* wherein it was held that reimbursement of expenses can under no circumstances be regarded as revenue receipt. To the same effect, the assessee placed reliance on the decision in the case of *CIT vs. Fortis Health Care Ltd., (2019) 181 taxmann.com 257 (Delhi)* and the decision in the case of *CIT - III vs. Gujrat Narmada Valley Fertilisers Co. Ltd., (2013) 35 taxmann.com 638 (Gujrat).*

Learned Advocate appearing for the applicant/assessee submitted that the circular issued by the CBDT has been wrongly relied on and interpreted by the Assessing Officer and in this regard the Assessing Officer shall also take note of the observations made in the judgment in the case of *Gujarat Narmada Valley Fertilisers Ltd.*, more particularly, in paragraph 3 of the said judgment.

Consequently, the question of law, which has been raised in this review application, is left open.

(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)

Pkd/GH/SN