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TC(A)No.666 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.11.2024

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

AND

THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN

T.C.A. No. 666 of 2011

Commissioner of Income Tax-I,
Chennai.

..Appellant

Vs.

M/s. Tamil Nadu Newsprint and
Papers Ltd.,
67, Anna Salai, Guindy,
Chennai – 600 032.

..Respondent

Prayer: Appeal under Section 260A of Income Tax Act, 1961 as against the
order dated 30.06.2011 passed in ITA No. 554/Mds/2011 by the Income Tax
Appellate Tribunal, Madras 'A' Bench.

For Appellant :: Mr.J. Narayanaswamy,
Senior Standing Counsel

For Respondent :: Mr.R. Vijayaraghavan,
for M/s. Subbaraya Aiyar
Padmanabhan



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J U D G M E N T

(Delivered by Dr. ANITA SUMANTH,J.)

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The following three substantial questions of law arise for decision in this case:

'1. Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in holding that the initial assessment year referred to in section 80IA[5] would mean only the first year of the claim of deduction u/s. 80IA by the assessee and not the commencement of operation of the eligible undertaking?

2. Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in holding that the unabsorbed depreciation and carried forward losses of the earlier years which had already been set off against the other income, could not be notionally carried forward and taken into consideration for the purpose of computation of deduction u/s. 80IA, in spite of the clear provisions of section 80IA stipulating that the said undertaking should be considered as only the source of income of the assessee for the purpose of determining the eligible profits?

3. Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in deleting the disallowance of agency commission of Rs.13,71,694/- paid to non-resident without deducting tax at source, u/s. 40[a][i] of the Act wrongly applying the decision of the Supreme Court in the case of GE India Technology Pvt. Ltd Vs. CIT [327 ITR 456] without appreciating Explanation to Section 9[1] introduced with retrospective effect from 1.6.1976?'

2. Mr.J. Narayanaswamy, learned Senior Standing Counsel for the appellant/Commissioner of Income Tax and Mr.R. Vijayaraghavan, learned Senior Counsel for the respondent/Tamil Nadu Newsprint and Papers Limited agree that the issue arising in the first two substantial questions of law are covered in favour of the assessee by a judgment of Supreme Court in the case



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of Velayudhaswamy Spinning Mills Ltd V. Assistant Commissioner of Income

Tax(251 CTR 368).

3. Adverting to the third question, the facts are that the respondent/assessee had remitted commission to agents situated overseas and had claimed the amount as expenditure under the provisions of the Income-Tax Act, 1961 ('Act'), in its profit and loss account. Details were called for in regard to the remittances and the respondent had furnished the requisite details.

4. The commission agents were admittedly stationed abroad and their services had been engaged for procurement of export orders. There is no dispute that the rendition of their services was overseas and the remittances had been made through the Reserve Bank of India directly to the agents abroad. Hence, it was the case of the assessee that the payments had neither accrued nor arisen in India and the Act, in relation to deduction of tax at source, would not apply in such circumstances.

5. The assessee had also relied on Circular No.786 dated 07.02.2000 ('Circular') to the effect that there was nil taxability on export commission paid to non-resident agents rendering services abroad. Incidentally, Circular No. 786 has been withdrawn by Circular No. 7/2009 dated 22.10.2009.

6. The assessing authority proceeded to complete the assessment effecting a disallowance under Section 40(a)(i) of the Act of the expenditure



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incurred. According to the authority, who places reliance on the judgment of the Supreme Court in the case of *Transmission Corporation of A.P. Ltd. V. Commissioner of Income Tax* [1999] 239 ITR 0587, it was incumbent on an assessee, who makes remittances overseas, to, without question, deduct tax at source.

7. In appeal, the first appellate authority, on the admitted facts of the case, accepted the assessee's submission to the effect that there was no liability for tax deduction. The order of the first appellate authority was confirmed in appeal filed at the instance of Revenue. Hence, this appeal under Section 260A of the Act raising the above questions of law.

8. The facts are admitted to the effect that the commission agents are situated abroad. The factum of rendition of services abroad is also admitted. It is also not in question that no payments were made in India and that the commission was remitted through banking channels directly to the agents. Circular No. 786 dated 07.02.2000 on which the assessee relies is extracted below:

CIRCULAR NO. 786

SECTION 9 OF THE INCOME-TAX ACT, 1961 – INCOME DEEMED TO ACCRUE OR ARISE IN INDIA – INCOME ACCRUING OR ARISING THROUGH OR FROM BUSINESS CONNECTION IN INDIA – CLARIFICATION REGARDING TAXABILITY OF EXPORT COMMISSION PAYABLE TO NON-RESIDENT AGENTS RENDERING SERVICES ABROAD.



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1. *In their Audit Report for 1997-98 for 1997-98 [D.P. No. 79 (IT.)] the Comptroller and Auditor General (C & AG) Raised an objection that the Assessing Officer in computing the profits and gains of business or profession, in a case in Mumbai charge, had wrongly allowed a deduction in respect of a payment to a non-resident where tax had not been deducted at source. The nature of the payment in this case was export commission and charges payable for services rendered outside India. In the view of C & AG the expenditure should have been disallowed in accordance with the provisions of section 40(a)(i) of the I.T. Act, 1961. It has come to the notice of the Board that a similar view, on the same set of facts has been taken by some Assessing Officers in other charges.*

2. *The deduction of tax at source under section 195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India. In this regard attention to CBDT Circular No. 23 dated 23rd July, 1969 is drawn where the taxability of 'Foreign Agents of Indian Exporters' was considered along with certain other specific situations. It had been clarified then that where the non-resident agent operates outside the country, no part of his income arises in India. Further, since the payment is usually remitted directly abroad it cannot be held to have been received by or on behalf of the agent in India. Such payments were therefore held to be not taxable in India. The relevant sections, namely section 5(2) and section 9 of the Income-tax Act, 1961 not having undergone any change in this regard, the clarification in Circular No. 23 still prevails. No tax is therefore deductible under section 195 and consequently, the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India becomes allowable expenditure. On being apprised of this position, the Comptroller and Auditor General have agreed to drop the objection referred to above.'*

9. Mr. J. Narayanaswamy, learned Senior Standing Counsel, would rely on the judgment in the case of *Transmission Corporation of A.P. Ltd.*



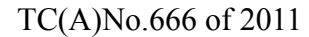
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unconditionally effect deduction of tax at source on all foreign payments. The failure to deduct would result in penal consequences, one being the application of Section 40(a)(i) of the Act as in the instant case.

10. Per contra, the assessee has relied upon the judgment of the Supreme Court in *GE India Technology Centre (P) Ltd V. Commissioner of Income Tax and Another* (327 ITR 0456). In that case, the Supreme Court has settled the proposition that there is no obligation to deduct tax in respect of remittances made to non-residents in the event that the payer/deductor was of the view that the amount was not liable to tax.

11. Needless to state, such liberty would arise only in the absence of an adjudication/determination of the liability to tax qua that remittance by the authority concerned. Moreover, if the assessee ventures to unilaterally decide on the tax liability/or the quantum thereof, in respect of a remittance, it would be exposing itself to the legal consequences of such judgement/decision. To clarify, if the decision taken by the assessee not to deduct is seen to be erroneous in the light of any proceeding where the subject remittance is held to be taxable, then all penal consequences would stand attracted in respect of the act of non-deduction.

12. Mr. Narayanaswamy would attempt to distinguish the judgment in *GE India* relying specifically on paragraph 11 extracted below:



13. The distinction that he seeks to make is that in that matter, the

14. In our considered view, the ratio in the case of *Transmission Corporation of A.P. Ltd* is different. In that case, the Court was concerned with the taxability or otherwise of a composite payment made to a foreign entity. It was in those circumstances that the Court held that in the case of a composite payment where it was unclear as to what component of the payment constituted



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income in the hands of the recipient, it was only appropriate for a deductor to approach the authorities and seek clarity on the taxability of the remittance/portion thereof, and the applicable rate. The ratio in *Transmission Corporation* has thus to be seen and understood in the context of that factual matrix only.

15. In the judgment in *GE India Technology Centre (P) Ltd*, the Court has clarified the position that as far as tax deduction is concerned, it is the deductor who would be responsible for making a judicious determination of tax liability in such circumstances where there has been no such adjudication at the instance of revenue authorities. In the event, the decision made is proved incorrect, then legal consequences would follow.

16. In the facts of the present case, Circular No.786 issued by the Central Board of Direct Taxes, is clear to the effect that export commission would not be liable to tax. There has admittedly been no determination of tax made by any other authority holding the recipients of the commission to be taxable in India. Hence, the determination of taxability made by the assessee, and the decision to remit without deduction, is, in this case, unimpeachable. Hence, we see no infirmity in the order of the Income Tax Appellate Authority having accepted the case of the assessee. The third substantial question of law



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is also answered in favour of the assessee and the tax case (appeal) is
dismissed.

nv

(A.S.M.J.) (G.A.M.J.)
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Index: Yes
Speaking Order
Neutral Citation : Yes

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AND

G. ARUL MURUGAN,J.



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