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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ ITA 359/2024 & CM APPL. 39600/2024 (680 Days Delay in Refiling)
PR. COMMISSIONER OF INCOME TAX
(CENTRAL)-2Appellant

Through: Mr. Sanjay Kumar, Ms.Esha,
Advs.

versus

M/S ERA INFRASTRUCTURE (INDIA)
LTD.Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER
16.07.2024

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1. Mr. Kumar, learned counsel appearing for the appellant draws our attention to the final judgment rendered in ITA 204/2022 *inter partes* and where while dealing with an identical issue, the Court in **Pr. CIT vs. Era Infrastructure (India) Ltd.** [2022 SCC OnLine Del 2157] had held as follows:-

“5. However a perusal of the Memorandum Explaining the Provisions in the Finance Bill, 2022 ([2022] 440 ITR (St.) 226) reveals that it explicitly stipulates that the amendment made to section 14A will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of clauses 4, 5, 6 and 7 of the Memorandum Explaining the Provisions in the Finance Bill, 2022 ([2022] 440 ITR (St.) 226) are reproduced hereinbelow (page 252 of 440 ITR (St.)) :

"4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to section 14A of the Act to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case



where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income.

5. This amendment will take effect from 1st April, 2022.

6. It is also proposed to amend sub-section (1) of the said section, so as to include a non obstante clause in respect of other provisions of the Income-tax Act and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.

7. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years." (emphasis supplied)

6. Furthermore, the Supreme Court in *SedcoForex International Drill. Inc. v. CIT* [2005] 279 ITR 310 (SC) ; (2005) 12 SCC 717 has held that a retrospective provision in a tax Act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. The relevant extract of the said judgment is reproduced hereinbelow (page 316 of 279 ITR) :

"The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellant. However the respondents have urged the point before us.

In our view the 1999 Explanation could not apply to the assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in *CIT v. S. G. Pgnatale* [1980] 124 ITR 391 (Guj) was followed in 1989 by a Division Bench of the Gauhati High Court in *CIT v. Goslino Mario* [2000] 241 ITR 314 (Gauhati). It found that the 1983 Explanation had been given effect from April 1, 1979, whereas the year in question in that case was 1976-77 and said (page 318) :

'.. . it is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question had somehow remained pending on April 1, 1979, cannot be cogent reason to make the Explanation applicable to the cases of



the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessee at hand.'

The reasoning of the Gauhati High Court was expressly affirmed by this court in CIT v. Goslino Mario [2000] 241 ITR 312 (SC) ; (2000) 10 SCC 165 at page 314. These decisions are thus authorities for the proposition that the 1983 Explanation expressly introduced with effect from a particular date would not affect earlier assessment years.

In this state of the law, on February 27, 1999, the Finance Bill, 1999, substituted the Explanation to section 9(1)(ii) (or what has been referred to by us as the 1999 Explanation). Section 5 of the Bill expressly stated that with effect from April 1, 2000, the substituted Explanation would read :

'Explanation.—For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—

- (a) service rendered in India ; and
- (b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment,

shall be regarded as income earned in India.'

The Finance Act, 1999, which followed the Bill incorporated the substituted Explanation to section (9)(1)(ii) without any change. The Explanation as introduced in 1983 was construed by the Kerala High Court in CIT v. S. R. Patton [1992] 193 ITR 49 (Ker), while following the Gujarat High Court's decision in CIT v. S. G. Pgnatale [1980] 124 ITR 391 (Guj) to hold that the Explanation was not declaratory but widened the scope of section 9(1)(ii). It was further held that even if it were assumed to be clarificatory or that it removed whatever ambiguity there was in section 9(1)(ii) of the Act, it did not operate in respect of periods which were prior to April 1, 1979. It was held that since the Explanation came into force from April 1, 1979, it could not be relied on for any purpose for an anterior period.

In the appeal preferred from the decision by the Revenue before this court, the Revenue did not question this reading of the Explanation by the Kerala High Court, but restricted



itself to a question of fact, viz., whether the Tribunal had correctly found that the salary of the assessee was paid by a foreign company. This court dismissed the appeal holding it was a question of fact (CIT v. S. R. Patton [1998] 233 ITR 166 (SC) ; (1998) 8 SCC 608). Given this legislative history of section 9(1)(ii), we can only assume that it was deliberately introduced with effect from April 1, 2000, and, therefore, intended to apply prospectively (CIT v. Patel Brothers and Co. Ltd. [1995] 215 ITR 165 (SC) ; (1995) 4 SCC 485, 494). It was also understood as such by the Central Board of Direct Taxes which issued Circular No. 779 dated September 14, 1999 ([1999] 240 ITR (St.) 3, 10) containing Explanatory Notes on the provisions of the Finance Act, 1999, in so far as it related to direct taxes. It said in paragraphs 5.2 and 5.3 :

'5.2 The Act has expanded the existing Explanation which states that salary paid for services rendered in India shall be regarded as income earned in India, so as to specifically provide that any salary payable for rest period or leave period which is both preceded and succeeded by service in India and forms part of the service contract of employment will also be regarded as income earned in India.

5.3 This amendment will take effect from April 1, 2000, and will accordingly, apply in relation to the assessment year 2000-2001 and subsequent years.'

The Departmental understanding of the effect of the 1999 amendment even if it were assumed not to bind the respondents under section 119 of the Act, nevertheless affords a reasonable construction of it, and there is no reason why we should not adopt it.

As was affirmed by this court in *Goslino Mario* [2000] 241 ITR 314 (SC), a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication (see also : *Reliance Jute and Industries Ltd. v. CIT* [1979] 120 ITR 921 (SC) ; (1980) 1 SCC 139). An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section (see *Ku. Sonia Bhatia v. State of U. P.* [1981] AIR 1981 SC 1274 ; (1981) 2 SCC 585. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that



the main provision came into force (See Shyam Sunder v. Ram Kumar (2001) 8 SCC 24 ;Brij Mohan Das Laxman Das v. CIT [1997] 223 ITR 825 (SC) ; (1997) 1 SCC 352, CIT v. Podar Cement P. Ltd. [1997] 226 ITR 625 (SC) ; (1997) 5 SCC 482. But if it changes the law it is not presumed to be retrospective irrespective of the fact that the phrases used are 'it is declared' or 'for the removal of doubts'." (emphasis supplied)

7. The aforesaid proposition of law has been reiterated by the Supreme Court in M. M. Aqua Technologies Ltd. v. CIT [2021] 436 ITR 582 (SC) ; 2021 SCC OnLine SC 575. The relevant portion of the said judgment is reproduced hereinbelow (page 597 of 436 ITR) :

"Second, a retrospective provision in a tax Act which is "for the removal of doubts" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in SedcoForex International Drill. Inc. v. CIT [2005] 279 ITR 310 (SC) (2005) 12 SCC 717 as follows (page 318 of 279 ITR) :

'17. As was affirmed by this court in CIT v. Goslino Mario [2000] 241 ITR 312 (SC) ; (2000) 10 SCC 165 a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [1979] 120 ITR 921 (SC) ; (1980) 1 SCC 139)). An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section (see Ku. Sonia Bhatia v. State of U. P. (1981) 2 SCC 585, 598). If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force (see Shyam Sunder v. Ram Kumar (2001) 8 SCC 24 (para 44) ;Brij Mohan Das Laxman Das v. CIT [1997] 223 ITR 825 (SC) ; (1997) 1 SCC 352, 354 ; CIT v. Podar Cement (P.) Ltd. [1997] 226 ITR 625 (SC) ; (1997) 5 SCC 482, 506). But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".



18. There was and is no ambiguity in the main provision of section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in CIT v. S. G. Pgnatale [1980] 124 ITR 391 (Guj) by the High Court of Gujarat, in our view, correctly, to mean income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning to "earned in India" and bring about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively'."

2. Following the aforesaid judgment, we dismiss the instant appeal.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 16, 2024/neha