IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01-12-2025

CORAM

THE HON'BLE DR.JUSTICE ANITA SUMANTH

AND

THE HON'BLE MR.JUSTICE P. DHANABAL

TCA Nos. 533, 534, 535 and 536 of 2011

Director Of Income Tax
(international Taxation) Chennai

..Appellant in all TCA's

Vs

M/s Bengal Tiger Line Ltd
Cyprus Rep By M/s Bengal Tiger Line India P Ltd
No.6 Indian Chamber Building Esplanade Ch-108

..Respondent in all TCA's

Prayer in TCA.No.533 of 2011: Appeal filed under Section 260A of the Income Tax Act, 1961 against order of the Income Tax Appellate Tribunal Madras 'A' Bench dated 20.05.2011 in ITA.No.2220/Mds/2010 A.Y. 2002 – 03.

Prayer in TCA.No.534 of 2011: Appeal filed under Section 260A of the Income Tax Act, 1961 against order of the Income Tax Appellate Tribunal Madras 'A' Bench dated 20.05.2011 in ITA.No.2221/Mds/2010 A.Y. 2005 – 06.

Prayer in TCA.No.535 of 2011: Appeal filed under Section 260A of the Income Tax Act, 1961 against order of the Income Tax Appellate Tribunal Madras 'A' Bench dated 20.05.2011 in ITA.No.2222/Mds/2010 A.Y. 2006 – 07.

Prayer in TCA.No.536 of 2011: Appeal filed under Section 260A of the Income Tax Act, 1961 against order of the Income Tax Appellate Tribunal Madras 'A' Bench dated 20.05.2011 in ITA.No.2223/Mds/2010 A.Y. 2007 – 08.

(In all TCA's)

For Appellant(s): Mr.Karthik Ranganathan
Senior Standing Counsel

For Respondent(s): Mr.SP.Chidambaram

COMMON JUDGMENT

(Judgment of the Court was delivered by Dr.Anita Sumanth J.)

This is a batch of four appeals relating to assessment years 2002-03, 2005-06, 2006-07 and 2007-08. The questions of law admitted for resolution on 06.02.2012 are as follows:

"(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in quashing the assessment years 2005-06, 2006-07 and 2007-08 by holding that the assessee was not specifically appointed as statutory agent for each of the aforesaid years ignoring the correct legal position that the assessee was all along acting as an agent under the General Law and therefore the question of specific treatment as agent under Section 163 did not arise?

(ii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in quashing the assessments for the assessment years 2002-03 and 2005-06 on the ground that the notices under Section 148 were time barred as per the provisions of Section 149(3), ignoring the fact and the legal position that the assessee was an agent under the General Law and had acted as such all along and therefore the main provisions of Section 149 regarding time limit would be applicable?"

2. As the second question of law relates to question of limitation, we take the same up first for decision. The assessee was taken to be a statutory agent of M/s Bengal Tiger Line Limited, based in Cyprus by way of an order dated 31.03.2009 passed under Section 163 of the Income Tax Act, 1961 (in short 'Act'). To be noted, that such an order has been passed only in respect of A.Y. 2002-03 and no order under Section 163 has been passed for A.Y. 2005-06. Notwithstanding this, orders of assessment had been passed under Section 143 (3) read with Section 147 and 144C (13) for A.Y.2005-06 also.

3. Section 149(3) of the Act provides specifically for the limitation that governs cases of re-assessment where the noticee is treated as an agent of the non-resident assessee. Since the proceedings in this case purport to treat the assessee as an agent under Section 163 of the Act, the Assessing Authority is bound by Section 149(3) of the Act, that reads as follows:

> ' **Time limit for notices under sections 148 and 148A.**
>
> *149 (3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry a period of two years from the end of the relevant assessment year.'*

4. Admittedly, the notices under Section 148 of the Act in respect of A.Y.s 2002-03 and 2005-06 were issued on 31.03.2009 and 19.01.2009, long past expiry of two years from the end of the assessment year in question. In

light of this admitted factual position, substantial question of law No.2 is answered in the affirmative and against the Revenue.

5. The first question now survives only in respect of AYs. 2006-07 and 2007-08, and relates to whether a notice is required to be issued prior to treating the assessee as a representative assessee/agent. It is an admitted position that no order under Section 163 has been passed by the Assessing Authority in respect of AYs. 2006-07 and 2007-08 prior to framing of assessments.

6. The argument of Mr.Karthik Ranganathan, learned Senior Standing Counsel for the Department, is that such notice/order stands obviated in the present cases as no objection on this score had been raised by the assessee in the course of the assessments for AYs 2006-07 and 2007-08. For that matter, no objection had been taken even before the first appellate authority, and it is for the first time only before the Tribunal, that the assessee raised such objection by way of additional ground, contending that it ought to have been put to notice in regard to the status as representative assessee.

7. Upon consideration of the rival contentions, the Tribunal has held that there ought to have been an order of appointment of the assessee as an agent under Section 163 of the Act and in the absence of such order of appointment, assessments made on the assessee in its capacity as agent, were bad in law. In coming to such a conclusion, the Tribunal relied on a judgment of the Supreme

Court in *H.L. Sud, Income Tax Officer V. Tata Engineering & Locomotive Co. Ltd.* (71 ITR 457).

8. Mr.Karthik would seek to distinguish that judgment pointing out that it was rendered in the context of Section 43 of the Indian Income Tax Act, 1922. He also relies upon a judgment of the Supreme Court in *Kanchanganga Sea Foods Ltd. V. Commissioner of Income Tax* (325 ITR 540) on the merits of tax liability in the context of a commission agent.

9. Mr.Chidambaram, learned counsel on behalf of the assessee/respodnent would rely upon the judgment in *H.L. Sud, Income Tax Officer* (supra) pointing out that the two statutory provisions were in pari materia with each other.

10. We have heard the parties and perused the material papers. Section 163, dealing with '*who may be regarded as agent'* reads as follows:

> ***Who may be regarded as agent.***
> *163. (1) For the purposes of this Act, "agent", in relation to a non-resident, includes any person in India –*
> *(a) who is employed by or on behalf of the non-resident; or*
> *(b) who has any business connection with the non-resident; or*
> *(c) from or through whom the non-resident is in receipt of any income, whether directly or indirectly; or*
> *(d) who is the trustee of the non-resident;*
> *and includes also any other person who, whether a resident or non-resident, has acquired by means of a transfer, a capital asset in India:*
> *………….*
>
> *(2) No person shall be treated as the agent of a non-resident unless he has had an opportunity of being heard by the Assessing Officer as to his liability to be treated as such.*

11. It is an admitted position that it is only in respect of A.Y.2002-03 that the authority has passed an order under Section 163 (1) (b) of the Act, having served a notice under Section 163 and considering the reply of the assessee. Neither the notice issued nor the reply filed by the assessee are before us and hence we do not have the benefit of the contents, but parties are ad idem that it is on consideration of the reply that the assessee has been held to be a representative assessee, and that too, only for A.Y.2002-03.

12. In light of the admitted position that no notice under Section 163 has been issued for A.Ys.2006-07 and 2007-08, clearly, there has been non-compliance of the statutory condition under Section 163(2). That apart and importantly, we make reference to a concession made by the learned Department representative before the Income Tax Appellate Tribunal recorded at paragraph 7 of the Tribunal's order as follows:-

> *' 7. Per contra, the learned D.R. fairly submitted that there was no fresh appointment done in years after assessment year 2002-03. Nevertheless, according to him, such technical issues would not make the assessments invalid.'*

It is thus an admitted position that notice under Section 163 of the Act has been issued only in respect of AY 2002-03 and no period thereafter.

13. As far as Section 43 is concerned, the second proviso to Section 43 states that an opportunity of being heard should be given to the assessee, and the relevant portion of Section 43 is extracted below:

'43. ***Agent to include persons treated as such*** *- Any person employed by or on behalf of a person residing out of the taxable territories, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the ITO has caused a notice to be served of his intention of treating him as a the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent:*

……..

Provided further that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the ITO as to his liability.

………..'

14. In our view, Section 163 and erstwhile Section 43 of the 1922 Act are analogus and in parimateria with each other. In fact, the language used in Section 163 is more categoric in regard to putting the assessee to notice regarding the liability of being treated as a representative assessee, as the requirement flows from, and has been incorporated in the main provision itself.

15. In *H.L. Sud, Income Tax Officer* (supra), Section 43 and the proviso have been interpreted by the Supreme Court to state that it is incumbent on the part of the Assessing Authority to fix the status of the assessee as representative assessee of another assessee first, prior to framing such an assessment on the former. Such a step cannot be bypassed by the authority in the process of framing an assessment.

16. The judgment in the case of *Kanchanganga Sea Foods Ltd.* (supra) is not relevant as it does not relate to an assessment under Section 163 and is rather on the merits of the matter.

17. In fine, we are of the considered view that the conclusion of the Tribunal to the effect that non-issuance of notice under Section 163(2) would be fatal, and hence the orders of assessment dated 26.10.2010 for A.Ys.2006-07 and 2007-08 would have no legs to stand, are perfectly in order.

18. The argument relating to the conduct of the assessee would have no relevance in a case such as the present where the breach is of a statutory duty cast by Section 163(2). Question No.1 is also answered against the revenue.

19. These Tax Case (Appeals) are dismissed, answering both the substantial questions of law in favour of the assessee. No costs.

(A.S.M.,J.) **(P.D.B.,J.)**

01-12-2025

Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No

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DR.ANITA SUMANTH J.

AND

P.DHANABAL J.

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