
(2013) 01 KAR CK 0202

In the Karnataka High Court

Case No : Income Tax Appeal No's. 371 and 372 of 2007

Commissioner of Income Tax and Another

APPELLANT

Vs

Igate Global Solutions Ltd.

RESPONDENT

Date of Decision : 23-01-2013

Acts Referred:

Income Tax Act, 1961 — Section 115A, 201, 260A

Citation : (2013) 354 ITR 1

Hon'ble Judges : D.V. Shylendra Kumar, J;B. Sreenivase Gowda, J

Bench : Division Bench

Advocate : K.V. Aravind, for the Appellant; Suryanarayan, Advocate for M/s. King and Partridge, for the Respondent

Judgement

D.V. Shylendra Kumar, J.—These two appeals are preferred under the provisions of section 260A of the income tax Act, 1961 (for short "the Act"), by the Revenue and are directed against the common order dated September 15, 2006, passed in I.T.A. Nos. 1794 and 1793/Bang/2005 respectively. The assessment orders in question is for the period 2004-05 and 2005-06 and is in respect of the same assessee.

2. These two appeals had been admitted to examine the substantial questions of law as indicated in the memorandum of appeals.

3. At the time of hearing of these appeals, Mr. Aravind, learned standing counsel for the Revenue, submitted that the substantial questions of law as has been indicated in the memorandum of appeal are so indicated by a mistake; that these substantial questions really do not arise and on the other hand, the substantial questions, which arise in the order of the Tribunal if at all are as under:

1. Whether the Tribunal was correct in holding that TDS has to be deducted at the rate prescribed u/s 115A of the Act after recording a finding that payment made by the assessee to a non-resident company is not towards fee for technical services and recorded a perverse finding?

2. Whether the Tribunal was correct in applying the provisions of section 115A of the Act, directing deduction of tax at 20 per cent. when the payment was towards managerial services and when the managerial service does not include technical services as per the DTAA?

4. Mr. Suryanarayan, learned counsel appearing for the assessee, on the other hand, submits that even the question as indicated now, by the learned standing counsel for the Revenue really does not arise, but, if at all, the question which arises is whether the Tribunal was correct in directing deduction of tax by 20 per cent, as specified in Part 2 of Schedule 1 to the Finance (No. 2) Act, 2004, and while the payment was towards managerial services and the technical services does not include the managerial services as per the DTAA, etc.

5. On a perusal of the impugned order, what we notice is that the Assessing Officer had passed the assessment order invoking the provisions of section 201 of the Act on the respondent-assessee. In view of the assessee's default in not deducting tax at source in respect of payment made to a nonresident under the provisions of section 195 of the Act and, therefore, had called upon the assessee to make payment with interest, etc., as per the assessment order passed u/s 201 of the Act, at the rate of 40 per cent, of the amount remitted to the non-resident with interest, etc. The assessee had contended that a non-resident being not assessable to any tax till now in India, the order is bad and even otherwise, contended that the rate of interest of 40 per cent, is not correct as the payment was in respect of technical services rendered by the non-resident assessee in favour of the assessee-company and by providing managerial services in India.

6. The Tribunal on noticing this position though the first appeals had been dismissed, allowed the appeals of the assessee in terms of the order referred to above to the extent of modifying the order and indicating that the rate for deduction is 20 per cent, and not 40 per cent. as had been taken by the Assessing Officer and affirmed by the first appellate authority. For such purpose, the Tribunal had taken the view, that the managerial services is also a part of technical services in view of the definition of "technical services" as indicated in Explanation 2 to section 9(1)(vii) of the Act.

7. The Tribunal having invoked the provisions of the Double Taxation Avoidance Agreement with India and the country in which the non-resident was residing, whether it could have made a distinction for the purpose of rate of deduction of tax and the inconsistency in looking into the rate of tax under the Schedule and, on the other hand, also as per article 13 of the DTAA when as per the definition in article 13 of the DTAA technical services do not include managerial services.

8. While on this aspect, the substantial questions could have been examined, Mr. Suryanarayan, learned counsel appearing for the respondent, has raised another preliminary objection regarding the maintainability of these appeals on the ground that difference of liability as between the orders passed by the Tribunal which is the extent of relief given to the assessee in the two appeals is less than

Rs. 10 lakhs in each appeal and in view of the Board circular, the appeals cannot be maintained is the submission.

9. Further, Mr. Aravind, learned standing counsel, submits that though such is the view taken by this court in several other appeals by applying the Board circular and by holding that if the subject-matter of the appeal preferred by the Department u/s 260A of the Act, is less than Rs. 10 lakhs, such appeal is not tenable. The Department having pursued the matter by way of special leave petitions which are pending before the Supreme Court, this court in subsequent cases had disposed of the appeals by applying the Board circular, but reserving liberty to the Revenue to revive the appeal in the event of success in the special leave petitions said to have been filed in respect of a similar order. It is, therefore, that the question as indicated above though could have been examined if appeals were otherwise tenable nevertheless, we dismiss these two appeals as not tenable in view of the value of the subject-matter in each of the appeal being less than Rs. 10 lakhs, but reserving liberty to the appellants to revive the appeals, in the event of their success before the Supreme Court in the special leave petitions preferred by the Revenue.