(2013) 09 AHC CK 0247

In the Allahabad High Court

Case No : Income Tax Appeal Defective No. 164 of 2011

Commissioner of Income Tax and Another APPELLANT

Vs

Model Exims RESPONDENT

Date of Decision : 10-09-2013

Acts Referred:

Citation : (2014) 267 CTR 177 : (2013) 358 ITR 72 : (2013) 219 TAXMAN 289

Hon'ble Judges : Surya Prakash Kesarwani, J;Sunil Ambwani, J

Bench : Division Bench

Advocate : Dhananjay Awasthi, for the Appellant; Krishna Dev Vyas, for the Respondent

Judgement

1. We have heard Shri Dhananjay Awasthi, learned counsel for the appellant. Shri Krishna Dev Vyas appears for the respondent. The explanation of delay of 13 days in presenting the appeal has not been seriously opposed. We have gone through the cause shown for condonation of delay. The explanation is good and sufficient. The delay of 13 days in filing the appeal is condoned.

2. With the consent of parties the matter was heard.

3. This appeal has been preferred by the income tax Department u/s 260A of the income tax Act, 1961, against the order dated April 28, 2011, passed by the income tax Appellate Tribunal (TTAT) in I.T.A. No. 754/LKW/2010--since reported as Asst. CIT v. Model Exims [2013] 1 ITR (Trib)-OL 451 (Lucknow) for the assessment year 2007-08.

4. The Department has preferred the following questions of law for consideration in this appeal:

1. Whether the hon''ble income tax Appellate Tribunal is justified in law and on facts in putting reliance on the Central Board of Direct Taxes Circular No. 786, dated February 7, 2000, whereas no cognizance has been taken of the Board''s Circular No. 30/2009, dated March 25, 2009. The circular clarifies the ambiguous

interpretation of the provisions of law. Its nature is clarificatory and is, therefore, applicable retrospectively?

2. Whether the hon''ble income tax Appellate Tribunal is justified in law and on facts in ignoring the ratio of the judgment of the hon''ble Supreme Court in Commissioner of Income Tax Vs. Moser Baer India Ltd., wherein it was held that the clarificatory nature of amendment in statute is retrospective in nature?

3. Whether the hon''ble income tax Appellate Tribunal is justified in law and on facts in ignoring the Explanation inserted by the Finance Act, 2010, retrospectively with effect from June 1, 1976 in sub-section (1)(viii) of section 9 of income tax Act, 1961?

5. Brief facts giving rise to this case as stated in the order of the income tax Appellate Tribunal are quoted as below (page 453 of 1 ITR (Trib)-OL):

The facts of the case, in brief, are that the assessee is a partnership and was engaged in the business of manufacturing and export of finished leather, shoe-uppers and leather products. The assessee was running two units-one at Jajmau and other at Banthar and filed the return on October 30, 2007, declaring an income of Rs. 80,16,170, which was processed u/s 143(1) of the income tax Act. Later on, the case was selected for compulsory scrutiny. During the assessment proceedings, the Assessing Officer observed that the assessee had paid a sum of Rs. 57,49,489 to the claimed overseas entities without deduction of income tax at source u/s 195 of the income tax Act, 1961 (in short ''the Act''). The Assessing Officer confronted the assessee with the provisions contained u/s 195 and section 9 of the Act and called upon to show cause as to why the aforesaid sum be not disallowed u/s 40(a)(ia) of the Act. The assessee objected to the proposed disallowance and submitted that the expenses had been incurred in view of the business expediencies to further the business interest of the assessee overseas by the recipients having expertise in such matters, who were non-residents within the meaning of the relevant provisions of the Act, as such, there was no statutory liability on the part of the assessee to deduct at source u/s 195 of the Act. The submissions of the assessee have been highlighted by the Assessing Officer at page 25 of the assessment order dated December 15, 2009, which reads as under:

(a) Payment of commission has been made to foreign nationals operating from foreign territories.

(b) The recipients have no office, branch or any other establishments in India.

(c) The commission has been paid in respect of the services rendered by the recipients, outside Indian territory.

(d) The payment has been received by the recipients out of India.

(e) These payments are squarely covered by the directions issued by the Central Board of Direct Taxes through Circular Nos. 23 of 1969, 163 of 1975 and 786 of

2000.

(f) The aforesaid income termed as commission is not taxable under the scheme of income tax Act, 1961.

(g) There was no liability on the part of the assessee to deduct income tax at source u/s 195 or any other provisions of the Act, and

(h) Therefore, the same cannot be disallowed u/s 40(a)(ia) of the income tax Act, 1961.

The Assessing Officer was not satisfied with the explanation of the assessee and made the disallowance of Rs. 57,49,489 for the reason stated at pages 25 to 34 of the assessment order dated December 15, 2009. For the sake of repetition, the same are not repeated here. The Assessing Officer, while making the disallowance, held as under:

... that there was mandatory liability on the part of the assessee u/s 195 of the income tax Act, 1961, read with section 9(1)(vii) thereof to deduct income tax at source from the sum of Rs. 35,41,082 which he has debited in his books of account as commission to his claims overseas agents. Since he has failed to deduct income tax at source, the consequent provision contained u/s 40(a)(ia) of the Act are squarely applicable to the facts of the case and, accordingly, a sum of Rs. 57,49,489 is disallowed.

6. In appeal the Commissioner of income tax (Appeals) held that the Assessing Officer has not brought anything on record, which could demonstrate that these agents had been appointed as selling agents, designers and technical advisers. In the absence of any such evidence, this observation of the Assessing Officer is mere conjecture and, therefore, no cognizance of the same can be taken. Circular No. 7/2009, dated October 22, 2009, withdrawing Circular Nos. 23 of 1969, 163 of 1975 and 786 of 2000 will be operative only from October 22, 2009, and not prior to that date. The withdrawal of earlier circulars with effect from October 22, 2009, has no bearing to the instant assessment.

7. The income tax Appellate Tribunal considered the submissions of both the parties and held relying upon its earlier decision in (2011) 135 TTJ 641 that where a circular issued earlier created a vested right in the taxpayer and such right is sought to be curtailed or withdrawn by a subsequent circular, then such subsequent circular will not have a retrospective effect. The income tax Appellate Tribunal confirmed the order of the Commissioner of income tax (Appeals) and dismissed the appeal.

8. Shri Dhananjay Awasthi submits that the liability to deduct tax arises out of section 195 of the Act. The disallowance was made by Assessing Officer u/s 40(a)(i) for non-deduction of tax at source u/s 195. The liability has to be determined in accordance with the provisions of law and not of the circular. Even if earlier circulars did not make it obligatory on the part of assessee to deduct TDS since by Circular No. 7/2009 all earlier circulars were withdrawn, the assessee would

be liable as the withdrawal of the earlier circulars would be retrospective in nature and further that the assessment has to be made after withdrawal of the circular in accordance with law. The Circulars did not create any vested right and were only by way of clarification, which were withdrawn. The observations made by the Assessing Officer u/s 40(a)(i) for non-deduction of tax at source u/s 195 was justified.

9. Shri Dhananjay Awasthi has relied upon Commissioner of Income Tax Vs. Moser Baer India Ltd., in which considering the provisions of Explanation 4 to section 271(1)(c)(iii) the Supreme Court held that the amendment is only clarificatory and would apply even to earlier assessment years.

10. In the present case, we are concerned with the circulars, which did not oblige the assessee to deduct TDS. The assessment in question for the assessment year 2007-08 would be governed by Circular, which was operative at the relevant time. The assessee was not entitled to deduct TDS. The Department could not have taken a different stand in subsequent years or assessment year 2007-08, when the circulars were operative and were not withdrawn. Circular No. 7/2009, dated October 22, 2009, withdrawing earlier circulars became operative only from October 22, 2009.

11. We also do not agree with learned counsel for the income tax Department that there was obligation to deduct tax at source u/s 195 on the commission paid to non-resident recipient, who was not liable to pay tax in India. In such case the assessee payer was not liable to deduct tax at source u/s 195(1).

12. Learned counsel for the respondent-assessee submits that apart from argument based on Circular, the Commissioner of income tax (Appeals) also observed as a matter of fact that the Assessing Officer has not brought anything on record, which could demonstrate that non-resident agents had been appointed as selling agents, designers or technical advisers. The payment of commission to foreign agents did not entitle such foreign agents to pay tax in India and thus the TDS was not liable to be deducted.

13. Having carefully considered the submissions, we are of the view that the circulars in the relevant year was binding upon the Department and the assessee can challenge the effect of the Circular but that the Assessing Officer did not have any right to ignore the circulars and to disallow non-deduction of tax at source u/s 195 and u/s 40(a)(i) of the Act. The questions of law are thus decided in favour of the assessee and against the Revenue. The income tax appeal is dismissed.