(2016) 02 KAR CK 0382

In the Karnataka High Court

Case No : I.T.A. No. 551 of 2015

Commissioner of Income-Tax	APPELLANT
Vs	
Sri Scorpio Engineering P. Ltd.	RESPONDENT

Date of Decision : 29-02-2016

Acts Referred:
Income Tax Act, 1961 — Section 40(a)(ia)

Citation : (2016) 388 ITR 266

Hon'ble Judges : Jayant Patel and Mrs. B.V. Nagarathna, JJ.

Bench : Division Bench

Advocate : E.I. Sanmathi, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

Jayant Patel, J.—The appellant - Revenue has preferred the present appeal by raising the following substantial questions of law :

" Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the amendment to the provisions of section 40(a) (ia) of the Act, by the Finance Act, 2010, is retrospective from April 1, 2005, by relying on its earlier decision which has not reached finality and when it is expressly stated in the Finance Act 2010 that the amendment is with effect from April 1, 2010 ?"

2. We have heard Mr. Sanmathi E.I., learned counsel appearing for the appellant-Revenue. It appears that the Tribunal while considering the contention of the appellant, at paragraph 6, 7 and 8 it has observed thus :

"6. We have perused the orders and heard the learned Departmental representative the hon''ble jurisdictional High Court in the case of CIT v. Santhosh Kumar Shetty (2014) 3 ITR-OL 306 (Kam) ; (2014) 89 CCH 199 held as under, at paras. 5 to 8 of its order (page 309 of 3 ITR - OL) :

''The argument of the Revenue is, when the Finance Act, 2010, expressly states that the said provision would come into effect from April 1, 2010, it is not permissible for the Tribunals or the courts to give it a retrospective effect prior to the date and, therefore, it is submitted that the order passed by the Tribunal holding it as retrospective notwithstanding the fact that Parliament made its intention clear by declaring that it comes into effect from April 1, 2010. Therefore, the impugned orders are liable to be set aside.

This question came up for consideration before the Gujarat High Court in the case of CIT v. Om Prakash R. Chaudhary in Tax Appeal No. 412 of 2013 and connected matter,2013 (2014) 3 ITR-OL 282 (Guj), after referring to the judgments of Allied Motors (P.) Ltd. v. CIT reported in (1997) 224 HR 677 (SC) ; AIR 1997 SC 1361 and CIT v. Atom Extrusions Ltd. reported in (2009) 319 ITR 306 (SC), has held as under (pages 301 to 303 of 3 ITR-OL) :

" 15.4. Thus, considering the relevant legislative changes made by Parliament from time to time and some of the decisions relevant to consider the question of retrospectivity raised in these present appeals, the focal question, therefore, would be whether the amendment brought about by way of the Finance Act, 2010, in section 40(a)(ia) with effect from April 1, 2010 could be said to be clarificatory in nature for attending to unintended consequences, and, therefore, is having retrospective effect from April 1, 2005.

16. A closer examination needs to be done as to whether the amended provision aims to expand the prevailing position and whether the same being in the nature of curative, retrospectivity of the same is permissible as is being contended for and on behalf of the assessee. At this stage, therefore, the true effect of such amendment needs to be discerned.

16.1. It is demonstrated before us that the TDS provision caused unintended inexplicable situation whereby the assessee who deducted the tax at source from the payments made by it for and on behalf of the Government and then if misses out the time limit of depositing the same with the treasury within the time prescribed, the amount spent for its business purposes on account of the late deposit of such tax would result into disallowance of the entire expenditure under section 40(a)(ia). The said proviso thereby caused immense hardship. The amendment under consideration made by the Finance Act, 2010, relaxes the rigours of such provision by permitting the payment of tax till the filing of return as provided under sub-section (1) of section 139 of the Act.

"16.2. One can notice that the object of bringing about the provisions of section 40(a)(ia) in the year 2005-06 was to augment compliance with the deduction of tax at source provision. Tax at source either not deducted or deducted but not paid in respect of payment of interest, commission or brokerage, etc., before the expiry of time prescribed under sub-section (1) of section 200 and in accordance with the other provisions of Chapter XVII, such amount shall not be deducted in computing the ''income'' chargeable under the head ''Profits and gains of business or profession''. Such provision starts with a non obstante clause which states that notwithstanding anything contained in sections 30 to 38 of the Income-tax Act if the tax deducted at source is not paid within the prescribed time (under section 200(1)), no amount could be deducted while computing the income, under Chapter IV of the ''computation of business income''.

16.3. Thereafter, by way of amendment of the Finance Act, 2008, further amendment was made whereby tax deductible at source and deducted in the last month of the previous year if was not paid till the due date of filing of return under sub-section (1) of section 139 and in any other case, on or before the last day of the previous year, section 40(a)(ia) provided for the disallowance of expenses like interest, commission, brokerage, etc.

16.4. Since this had created anomaly, whereby tax deducted in the last month was permitted payment till filing of the return as per sub-section (1) of section 139 whereas for the tax deducted at source during the rest of the months, period was provided only till 31st March of the previous year, the Finance Act, 2010, was brought. To bring parity, to remedy unintended consequences and to make the provision workable, it proposed to amend the said provision and provided, inter alia, that no disallowance would be made if after deduction of tax during the previous year, the same has been paid on or before the due date of filing of the return of income as specified in sub-section (1) of section 139. This has been given retrospective effect from April 1, 2010.

16.5. Of course, the Legislature has given the effect from a specified date and applied the same to the assessment year 2010-11 and subsequent years, this provision being curative in nature, its effect needs to be read retrospectively in operation. Its very purpose would not be sub-served, if the effect is limited to the assessment year 2010-11 and subsequent years only. Strict construction if leads to a result not intended to be fulfilled by the object of legislation and another construction is possible apart from the literal construction; then that construction needs to be preferred as held in a decision in the case of CIT v. Alom Extrusions Ltd. (supra).

16.6. We also cannot be oblivious of the submissions not denied by the other side that various representations were made to the Finance Minister to bring about suitable amendment as the assessee otherwise was losing genuine deduction of expenditure on this count as also reflected in the speech of the Finance Minister so also in the memorandum explaining the provisions in the Finance Bill.

16.7. Giving plain or natural meaning to the amendment as contended by the Department, it is likely to create a situation enhancing the'' hardship and advance discrimination, purposive and reasonable interpretation is required to be given by the court. When plain interpretation frustrates the very legislative intent, the court is expected to bear in mind the legislative intent from the language used in the statute with the help of permissible tools of interpretation of statute.

17. The core issue as to whether the amendment made by the Finance Act, 2010, to section 40(a)(ia) of the Act is retrospective in effect from the date of insertion of the provision, i.e., April 1, 2005, therefore, needs to be answered in affirmation. It can be seen that the amendment made by the Finance Act, 2010, allows additional time up to the due date of filing of the return in respect of even those instances where tax has been deducted at source during the first eleven months of the previous year. The additional time till the due date of filing of the return, in case of tax deducted at source made during the last month of the previous year was already available by the amendment made by the Finance Act 2008. Thus, it is apparent that the relaxation made by the amendment under the Finance Act, 2010, brings the law in parity with the aforementioned situation and, accordingly, for the tax deducted at source all throughout the year, time is extended from payment till the filing of return. It is thus apparent that when the amendment introduced by the Finance Act, 2008, of relaxing the time for deposit of tax deducted at source was made retrospective effect from the year 2005 (April 1, 2005), the amendment by the Finance Act, 2010, with regard to other limb of time limit for payment of tax deducted at source has to be held retrospective riot from April 1, 2010, only. If we recall at this stage the speech of the Finance Minister while introducing this provision by way of the Finance Act, 2010, this amendment essentially has been brought for relaxing the current provision on disallowance of expenditure. The tax, if is deducted at any time during the financial year and paid before the date of filing of the return, the Legislature intended to allow deduction on such expenditure with an intention to permit additional time for most deductors up to September of the next financial year.

17.1. We draw further support from the fact that the rigour of payment of interest is also enhanced by increasing the interest charged on tax deducted, if any deposit by the specified dale, i.e., up to the filing of the return is not made, from 12 per cent, to 18 per cent, per annum in the provision of section 201(1A). Prior to the said amendment of the Finance Act, 2010, under section 201 (1A), the assessee was liable to pay simple interest at one per cent, for every month or part of month, in case of failure to deduct tax on payment of deducted tax, increase is made correspondingly from one per cent, to one and half per cent, for every month or part of month for discouraging delay in deposit.

As rightly contended by the respondents arithmetical discrepancy can be well judged from the fact that the rates of tax deducted at source may vary between 1 per cent, to 10 per cent., whereas the legitimate business expenditure denied is 100 per cent, resulting into taxation of gross receipts coupled with the levy of interest and penalty, which would mean that the possibility cannot be ruled out of business of the taxpayer getting closed down permanently, if there is absence of any scope of claiming any expenses in the next year."

Similar is the view expressed by the Delhi High Court in the cases of CIT v. Oracle Software India Ltd. reported in (2007) 293 ITR 353 (Delhi), H.S. Mohindra

Traders v. ITO and the Calcutta High Court in the case of CIT v. Virgin Creations.

We are in the respectful agreement with the view expressed by the Gujarat High Court in giving retrospective operation to the said amendment notwithstanding that Parliament has expressly stated that it comes into effect from April 1, 2010. The said amendment is curative in nature. The Tribunal committed an error in holding it as prospective. The substantial questions of law is answered in favour of the assessee and against the Revenue.''"

3. The aforesaid shows that, the question was already covered by the decision of this court in case of CIT v. Santhosh Kumar Shetty (2014) 3 ITR-OL 306 (Karn) : (2014) 89 CCH 199.

4. Once the Tribunal has followed the decision of this court, we do not see any substantial question of law which would arise for consideration. However, learned counsel for the appellant-Revenue did contend that, subsequently, similar view taken by this court in case of Uday Kumar, ITA 590/13 is carried before the apex court and therefore, the issue has not yet been concluded.

5. In our view, as on today, the decision of this court operates and therefore, it cannot be said that substantial questions of law would arise for consideration in the present appeal. However, if the apex court takes a different view, the appellant may be in a position to take appropriate proceedings in accordance with law and at that stage, rights and contentions of both sides shall remain open.

6. Subject to the above said observation, the present appeal need not be entertained. Hence, it is dismissed.

