

(2002) 03 BOM CK 0068

In the Bombay High Court

Case No : Chamber Summons No. 84 of 2002 Notice No. 1163 of 2001
Execution Application No. 228 of 2001 ARB. Petition No. 25 of 2000
Award No. 3 of 1997 22 March 2002

Islamic Investment Co.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-03-2002

Acts Referred:

Income Tax Act, 1961 — Section 195

Citation : (2002) 122 TAXMAN 719

Hon'ble Judges : S.A. Bobde, J

Bench : Division Bench

Advocate : P.V. Shah, for the Assessee, R.V. Desai and A.D. Kango, for the Revenue, for the Appellant;

Judgement

This Chamber Summons is taken out by the respondents, the Food Corporation of India against whom an award was passed by the arbitrator on 21-1-1996. The award was made a rule of the court and a decree was passed in terms thereof on 8-3-2000. Under the decree a total amount payable towards principal was Rs. 7,99,067.16. The total decretal amount along with interest on principal at the rate of 10 per cent per annum from 7-2-1989 to 8-3-2000 including cost of Rs. 4,165.50 was in the sum of Rs. 16,89,430.66. The interest on the above principal sum of Rs. 7,99,067.16 for the period from 7-2-1989 to 8-3-2000 at the rate of 10 per cent per annum was Rs. 8,86,198. As per further interest on the above principal from 9-3-2000 to 31-12-2001 at the rate of 10 per cent per annum was in the sum of Rs. 1,45,145.62. Thus, the total interest at the rate of 10 per cent per annum on the above principal from 7-2-1989 to 31-12-2001 came to Rs. 10,31,344.

2. The Food Corporation of India has an account with the State Bank of India. The decree-holder Islamic Investment Co. sought a garnishee order against the State Bank of India which was granted on 12-9-2001. On the garnishee order

being served on the State Bank of India, that bank informed the Food Corporation of India which, accordingly, paid the decretal amount as per decree along with interest amounting to Rs. 10,31,344 to the Sheriff of Bombay. The aforesaid amount is not in dispute.

3. By this Chamber Summons the Food Corporation of India claims that it is entitled to withdraw a sum of Rs. 2,06,269 being 20 per cent of the interest paid by it towards satisfaction of the decree, on account of TDS which it is liable to pay u/s 195 of the Income Tax Act, 1961 (hereinafter referred to as the Act). Whether it is in law entitled to do so is the question.

4. Mr. Desai, the learned senior counsel for the Food Corporation of India, the judgment debtor, submitted that since the payment is being made to a non-resident and it is on account of interest, the Food Corporation of India is liable to deduct the interest thereto at the rate in force. Applying the current rate in force, it is entitled to deduct as aforesaid a sum of Rs. 2,06,269 under the said provisions. The learned counsel further submits that in any case since the person entitled to receive any interest, i.e., Islamic Investment Co., has not made any application in the prescribed form to the assessing officer for receiving such interest without deduction of tax, the tax as required by section 195 must be ordered to be deducted. In other words, the Food Corporation of India, therefore, seek liberty to withdraw or be refunded in the sum of Rs. 2,06,269 from the amount paid over by it to the Sheriff of Mumbai in execution of this decree.

5. Section 195 reads as follows :

Other sums.(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest on securities) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct Income Tax thereon at the rates in force.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than interest on securities and salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the assessing officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which Income Tax has to be deducted under sub-section (1) may make an application in the prescribed form to the assessing officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other

sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the assessing officer before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assesseees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

There is, no doubt, on a plain reading of section 195, that where interest is being paid to a non-resident or to a foreign company, the person responsible for making such payment must at the time of credit of such income to the account of the payee deduct Income Tax at the rate in force, unless of course, the assessing officer has granted a certificate under sub-section (3).

6. Mr. P.V. Shah, the learned counsel for the petitioner/ decree-holder, however, submits that this amount is not liable to be now refunded to the Food Corporation of India in order to enable it to deduct tax at source because the amount though paid on account of interest has now assumed the character of a judgment debt. He relies on a judgment of the Supreme Court in the case of All India Reporter Ltd. v. Ramchandra D. Datar AIR 1961 SC 943. In that case the appellant-company was liable to deduct tax at the appropriate rate on the salary payable to the respondent-Datar u/s 18(2) of the Act. The services of Datar had been terminated by the All India Reporter. In the suit filed by Datar against his termination the court passed a decree for Rs. 44,359 which was inclusive of Rs. 36,000 as compensation for termination of employment and Rs. 6,000 as salary in lieu of six months' notice and interest and costs and interest on judgment. Datar applied for execution of the decree after deducting the sum decreed against him in a cross suit. The Income Tax Officer served a notice upon the respondent and also gave intimation to the District Judge, Nagpur, that the appellant-company be permitted to deduct tax at source and to pay into the government treasury Rs. 15,956.13 as Income Tax surcharge and super-tax due in the sum of Rs. 50,972. The appellant-company also made an application to the executing court to declare that the appellant-company was entitled and in law bound to deduct the tax due on the amount.

7. Before the Supreme Court, the question was, inter alia, whether between the All India Reporter and Datar the decretal amount represented salary or whether the court having passed a decree on that claim, it became a judgment debt. It is clear from the report of the case that the All India Reporter had not applied in the suit to the court for making a provision in the decree for payment of Income

Tax due by Datar. It is important to note, in the present case, also that when the award was made rule of the court and a decree was passed on 8-3-2000, the judgment debtor, i.e., Food Corporation of India did not apply to the court for making a provision in the decree for payment of Income Tax due on the interest payable to the petitioner/ decree-holder under the decree.

8. Before the Supreme Court, the issue was that if the amount payable to Datar was treated as salary, it would have attracted deduction of tax at source u/s 18. While considering this issue, the Supreme Court observed that a substantial part of the claim decreed represented compensation for wrongful termination of employment and it would be difficult to predicate of the claim sought to be enforced what part thereof if any represented salary due. However, the Supreme Court observed as follows :

.....Granting that compensation payable to an employee by an employer for wrongful termination of employment be regarded as in the nature of salary, when the claim is merged in the decree of the court, the claim assumes the character of a judgment debt, and to judgment debts, section 18 has not been made applicable. The decree passed by the civil court must be executed subject to the deductions and adjustments permissible under the Code of Civil Procedure. The judgment-debtor may, if he has a cross-decree for money, claim to set off the amount due thereunder. If there be any adjustment of the decree, the decree may be executed for the amount due as a result of the adjustment. A third person who has obtained a decree against the judgment-creditor may apply for attachment of the decree and such decree may be executed subject to the claim of the third person; but the judgment-debtor cannot claim to satisfy, in the absence of a direction in the decree to that effect the claim of a third person against the judgment-creditor, and pay only the balance. The rule that the decree must be executed according to its tenor may be modified by a statutory provision. But there is nothing in the Income Tax Act which supports the plea that in respect of the amount payable under a judgment-debt of the nature sought to be enforced, the debtor is entitled to deduct Income Tax which may become due and payable by the judgment-creditor on the plea that the cause of action on which the decree was passed was the contract of employment and a part of the claim decreed represented amount due to the employee as salary or damages in lieu of salary.

9. Having regard to this observation, I am of the view that the argument of the learned counsel on behalf of the Food Corporation of India that since the amount of Rs. 10,31,344 has admittedly been paid on account of interest, it retains its character as interest and, therefore, the Food Corporation of India must be allowed to deduct interest thereon at the rate in force, is not tenable. There is no doubt that if the amount is paid as interest to a non-resident in the usual course of business then at the time of credit of such amount to the account of the payee or at the time of payment thereof in cash, or by issue of a cheque or draft the payer would be bound to deduct Income Tax at the rate in force. However, as

observed by the Supreme Court when such amount becomes part of a judgment debt, it lose its original character and assumes the character of a judgment debt. Once such an amount assumes the character of a judgment debt, the decree passed by the civil court must be executed subject only to the deductions and adjustments permissible under the Code of Civil Procedure. The learned counsel for the Food Corporation of India has not been in a position to point out any provision under the Income Tax Act or u/s 195 in particular or under the CPC where the amount of the interest payable under a decree is deductible from the decretal amount on the ground that it is an interest component on which tax is liable to be deducted at source.

10. The learned counsel for the Food Corporation of India relies on two judgments of the Supreme Court in (1966) 62 ITR 458 (sic) and T.N.K. Govindarajulu Chetty Vs. Commissioner of Income Tax, Madras, , which take the view that interest retains its character and is liable to be treated as income under the Act. This decision has no direct application to the facts of the present case. The learned counsel for the Food Corporation of India further cited a recent decision of the Supreme Court in The Transmission Corporation of A.P. Ltd. and Anr Vs. The Commissioner of Income Tax, A.P., and relied on the observation of the Supreme Court. In particular the learned counsel relied on the following observations :

.....Under the Act, total income for the previous year would become chargeable to tax u/s 4. Sub-section (2) of section 4, inter alia, provides that in respect of income chargeable under sub-section (1), Income Tax shall be deducted at source where it is so deductible under any provision of the Act. If the sum that is to be paid to the non-resident is chargeable to tax, tax is required to be deducted. The sum which is to be paid may be income out of different heads of income provided u/s 14 of the Act, that is to say, income from salaries, income from house property, profits and gains of business or profession, capital gains and income from other sources....

11. Having given thought to the observations, it appears that the issue in this case did not fall directly for consideration before the Supreme Court inasmuch as there was no question of the amount of interest having been paid into court in pursuance of the decree and whether such amount retaining the character as interest or whether it was liable to be treated as judgment debt. I am, therefore, of the view that prayer clause (a) of the Chamber Summons which reads as follows is liable to be rejected :

(a) That this Hon"ble court be pleased to direct the Sheriff of Bombay to allow the respondents to withdraw the amount of Rs. 2,06,269 towards TDS on the interest accrued to the petitioner on the said decretal amount of Rs. 18,65,419.82 which was deposited by the respondents pursuant to the Garnishee Notice No. 1163 of 2001 dated 12-9-2001 and this Hon"ble High Court order dated 8-2-2002 in Execution Application No. 228 of 2901 in Arbitration Petition No. 25 of 2000 in Award No. 37 of 1997 on 9-11-2001 and on 27-2-2002,

respectively, in the office of Sheriff of Bombay in order to deposit the amount of Rs. 2,06,269 in the office of Income Tax Department as per provision laid down in section 195 of the Income Tax Act, 1961.

12. As regards prayer (b), the learned counsel for the respondents admitted that on re-calculation no amount is liable to be refunded to the respondent by the Sheriff of Bombay. On the other hand, the respondents are liable to make up the deficit towards the poundage to the Sheriff of the Bombay amounting to Rs. 2,369. The respondents shall make this payment to the Sheriff of Bombay on or before 9-4-2002.

13. The petitioner/decreed-holder is directed to give security in the sum of Rs. 2,06,269 to the satisfaction of the Prothonotary and Senior Master before withdrawing any sum from the Sheriff of Bombay.

14. The petitioner/decreed-holder shall be allowed to withdraw the balance decretal amount lying with the Sheriff of Bombay. He shall, however, give security for the sum of Rs. 2,06,269.

15. The learned counsel for the decreed-holder may be granted liberty to apply for being released from the security, if it gets a certificate or an adjudication from the Income Tax authority that it is not liable to pay tax in India on the decretal amount or any part thereof.

16. Chamber Summons disposed of accordingly. No order as to costs.