

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos.1669, 1670 & 1671/PUN/2014
निर्धारण वर्ष / Assessment Years : 2008-09, 2009-10 & 2010-11

Atlas Copco (India) Limited,
Sveanagar, Dapodi,
Pune - 411012

PAN : AAACA4074D

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle - 8, Pune

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.1685 to 1688/PUN/2014
निर्धारण वर्ष / Assessment Years : 2008-09 to 2011-12

Dy. Director of Income Tax (International Taxation)-1,
Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

Atlas Copco (India) Limited,
Sveanagar, Dapodi,
Pune - 411012

PAN : AAACA4074D

.....प्रत्यर्थी / Respondent

प्रत्याक्षेप सं. / CO No.60/PUN/2018
निर्धारण वर्ष / Assessment Year : 2011-12

Atlas Copco (India) Limited,
Sveanagar, Dapodi,
Pune – 411012

PAN : AAACA4074D

.....अपीलार्थी / Appellant

बनाम / V/s.

Dy. Director of Income Tax (International Taxation)-1,
Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri R. Murlidhar
Revenue by : Shri Pankaj Garg

सुनवाई की तारीख / Date of Hearing : 01-04-2019
घोषणा की तारीख / Date of Pronouncement : 05-04-2019

आदेश / ORDER

PER BENCH :

These cross appeals by the assessee and the Revenue are directed against the consolidated order of Commissioner of Income Tax (Appeals)-IT/TP, Pune dated 30-06-2014 for the assessment years 2008-09 to 2011-12 passed u/s. 201(1) and 201(1A) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”).

2. The brief facts of the case as emanating from the records are: During the Financial Years 2007-08, 2008-09, 2009-10 and 2010-11 the assessee made payments to various foreign companies based in Canada, USA, UK,

Belgium, Sweden, UAE and Hongkong. The payments were made towards procurement of Software license, Software maintenance charges, Testing charges, Website maintenance charges, Personal management charges, Software expenses, reimbursement of Internet charges, etc. On the payments made for the aforesaid services, the assessee did not deduct tax at source. The Assessing Officer issued show cause notice to the assessee on 27-01-2012 under the provisions of section 201(1) and 201(1A) in respect of foreign remittance aggregating to Rs.10,40,61,272/- without deduction of tax at source during the Financial Years 2007-08 to 2010-11. The Assessing Officer vide order dated 06-02-2014 passed u/s. 201(1) and 201(1A) of the Act, common for the assessment years 2008-09, 2009-10, 2010-11 and 2011-12 held that the aforesaid payments are in the nature of royalty/fee for technical services (FTS) under the provisions of section 9(1)(vi) and 9(1)(vii), respectively. Hence, it was mandatory for the assessee to deduct tax at source on such payments. The Assessing Officer raised total demand of Rs.1,81,06,064/- (TDS + Interest) for the impugned assessment years for non compliance of the provisions of Chapter XVII-B of the Act.

Aggrieved against the order dated 06-02-2014, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) vide impugned order confirmed the entire demand raised by the Assessing Officer; except (i) the demand raised towards payments made to the companies resident in countries other than Belgium for software maintenance charges and testing charges; and (ii) the demand raised towards payment of personal management fees. Against the aforesaid findings of Commissioner of Income Tax (Appeals), both, the assessee and the Revenue are in appeal before the Tribunal.

3. The assessee has filed appeal in ITA Nos. 1669 to 1671/PUN/2014 for assessment years 2008-09 to 2010-11, respectively. The Revenue has filed cross appeals in ITA Nos. 1685 to 1688/PUN/2014 for assessment years 2008-09 to 2011-12, respectively. The assessee has filed Cross Objections in CO No. 60/PUN/2018 for assessment year 2011-12.

4. The Cross Objections filed by the assessee are time barred by 878 days. The assessee has filed application supported by an affidavit seeking condonation of delay in filing of the Cross Objections. It has been contended that the appeal of assessee for assessment year 2011-12 was allowed in full by the First Appellate Authority and the assessee did not deem it fit to file further appeal. Subsequently, it transpired that the assessee has cause of action on legal issue. Hence, the Cross Objections were filed challenging the validity of order passed u/s. 201(1) and 201(1A) of the Act, as the order was passed much beyond the period of limitation, hence, void ab initio. The issue raised by the assessee in Cross Objections is purely legal which goes to the root of validity of order raising demand u/s. 201(1) and 201(1A) of the Act.

4.1 After examining the reasons for delay in filing of Cross Objections we are satisfied that the delay in filing of Cross Objections is unintentional and bonafide. The Hon'ble Supreme Court of India in the case of Ram Nath Sao @ Ram Nath Sahu and Others Vs. Gobardhan Sao and Others reported as 2002 AIR 1201 has held that acceptance of explanation furnished seeking condonation of delay should be the rule and refusal an exception, more so when no negligence or inaction or want of bonafide can be imputed to the defaulting parties. Taking a pedantic and hyper technical view of the matter, the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are

involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction.

4.2 The Hon'ble Apex Court in various other decisions has taken similar view in accepting the explanation furnished by the assessee for condoning the delay in filing of appeal. Taking into consideration facts of the case, the law laid down by the Hon'ble Apex Court and the reasons furnished by the assessee/appellant, the delay of 878 days in filing of Cross Objections is condoned and the same is taken for adjudication on merits along with other appeals.

5. Since, the issue raised in all the appeals and Cross Objections by the assessee is identical and is arising from same set of facts, the appeal of assessee in ITA No. 1669/PUN/2014 for assessment year 2008-09 is taken as lead case. The assessee has raised legal issue as additional grounds in ITA No. 1669/PUN/2014 for assessment year 2008-09. The additional grounds of appeal raised by assessee are as under :

“1 : 0 Re.: Validity of the Order passed u/s. 201(1) & 201(1A) of the Income-tax Act, 1961:

1 : 1 The Assessing Officer has erred in passing the impugned Order u/s. 201(1) & 201(1A) of the Income-tax Act, 1961.

1 : 2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject the Order passed u/s. 201(1) & 201(1A) of the Income-tax Act, 1961 is void-ab-initio being barred by limitation.

1 : 3 The Appellant submits the impugned Order passed u/s. 201(1) & 201(1A) of the Income-tax Act, 1961 be held as barred by limitation and consequently be struck down as null and void.

2 : 0 Re.: General

2 : 1 The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing additional grounds of appeal at or before the hearing of the appeal.”

Identical additional grounds of appeal have been raised by the assessee in ITA Nos. 1670 & 2671/PUN/2014 for assessment years 2009-10 and 2010-11, respectively. The Cross Objections for the assessment year 2011-12 are also on the same legal issue, challenging validity of order dated 06-02-2014 being passed beyond the period of one year from the end of financial year in which proceedings u/s. 201 of the Act were initiated.

6. Shri R. Murlidhar appearing on behalf of the assessee submitted that the additional grounds raised by the assessee are purely legal and no additional documents are required to be furnished for adjudication of the additional grounds. Hence, the same should be admitted in the light of decision of Hon'ble Supreme Court of India in the case of NTPC Ltd. Vs. Commissioner of Income Tax reported as 229 ITR 383.

6.1 The ld. AR submitted that in the impugned assessment years show cause notice u/s. 201(1) and 201(1A) of the Act was issued on 27-01-2012. The order u/s. 201(1) and 201(1A) common for all the impugned assessment years was passed by the Assessing Officer on 06-02-2014. As per the decision of Special Bench of Tribunal in the case of Mahindra & Mahindra Ltd. Vs. DCIT reported as 122 TTJ 577, the Assessing Officer was required to pass the order within one year from the end of the financial year in which the proceedings u/s. 201 of the Act were initiated. The aforesaid decision of Special Bench has been affirmed by the Hon'ble Bombay High Court in an appeal filed by the Department titled Director of Income-tax (International Taxation) Vs. Mahindra & Mahindra Ltd. reported as 365 ITR 560. The ld. AR submitted that the aforesaid decision of Hon'ble Bombay High Court was followed by the Tribunal in various subsequent decisions including Vodafone Cellular Ltd. Vs. Deputy Commissioner of Income Tax reported as 185 TTJ 245 (Pune-Trib.) and

Hathway Cable and Datacome Limited Vs. The Tax Recovery Officer (TDS)-1, Mumbai in ITA No. 1810/Mum/2014 for assessment year 2001-02 decided by Mumbai Bench vide order dated 01-06-2016.

6.2 The ld. AR contended that in the light of aforesaid decisions the order passed by the Assessing Officer dated 06-02-2014 is barred by limitation. The Assessing Officer should have passed order on or before 31-03-2013 i.e. within one year from the end of the financial year in which proceedings u/s. 201 are initiated. Since, the order is beyond the period of limitation the same is void ab initio and the subsequent proceedings arising there from are vitiated.

7. Per contra, Shri Pankaj Garg representing the Department vehemently defended the impugned order. The ld. DR submitted that as per the provisions of section 201(3) as it was applicable to the impugned assessment years, the order u/s. 201(1) could have been passed at any time after the expiry of six years from the end of financial year in which payments is made or credited or credit is given to the payee. The ld. AR contended that the Assessing Officer passed the order u/s. 201(1) and 201(1A) on 06-02-2014, the demand raised for the assessment years 2008-09 to 2011-12 u/s. 201 is within the period of limitation as specified in sub-section (3) of section 201 of the Act. The ld. DR contended that the case laws relied on by the assessee are distinguishable on facts. The Special Bench decision was rendered in 2009, whereas, the provisions of sub-section (3) of section 201 were inserted by the Finance (No. 2) Act, 2009 w.e.f. 01-04-2010. The ld. AR contended that the decision rendered by Pune Bench of Tribunal in the case of Vodafone Cellular Ltd. Vs. Deputy Commissioner of Income Tax (supra) was in respect of order passed u/s.

201(1) and 201(1A) in the absence of notice under the aforesaid provisions. Hence, the aforesaid decisions are distinguishable.

8. Controverting the submissions forwarded on behalf of the Revenue the ld. AR submitted that the provisions of sub-section (3) would not apply in the case of assessee. The provisions of sub-section (3) are attracted only where the assessee fails to deduct tax at source on the payments made to a **'person resident in India'**. Whereas, in the present case the payments which are subject matter of order u/s. 201(1) and 201(1A) are the payments made by the assessee to foreign entities. The ld. AR contended that this fact has been recorded by the Assessing Officer in para 2 and para 4 of the order dated 06-02-2014 passed u/s. 201(1) and 201(1A) of the Act. The payments in respect of which the provisions of section 201 have been invoked does not include any payments made to the persons resident in India.

8.1 The ld. AR submitted that if additional grounds raised by the assessee are allowed, the grounds of appeal raised by the assessee would become academic.

9. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The assessee has raised legal issue challenging the validity of order passed u/s. 201(1) and 201(1A) of the Act in the additional grounds of appeal. It is an undisputed position that the additional grounds raised by the assessee which are legal in nature have been raised for the first time before the Tribunal. It is a well settled law that the Tribunal has jurisdiction to examine a question of law which arises from the facts already on record and have bearing on the tax liability of the assessee. In the light of law laid down by the Hon'ble

Supreme Court of India in the case of NTPC Ltd. Vs. Commissioner of Income Tax (supra), the legal grounds raised as additional grounds of appeal by the assessee are admitted and are taken up for adjudication.

10. The assessee has raised legal ground challenging the validity of order passed u/s. 201 on the ground that it has been passed beyond the period of limitation of one year from the end of the financial year in which proceedings u/s. 201 of the Act are initiated. The undisputed facts are that the show cause notice u/s. 201 was issued to the assessee for the assessment years 2008-09 to 2011-12 on 27-01-2012. The order u/s. 201(1) and 201(1A) was passed on 06-02-2014. As per the assessee the due date for passing the order u/s. 201(1) and 201(1A) was 31-03-2013. Prior to April, 2010 there was no limitation period for passing the order u/s. 201 of the Act. The issue of limitation for passing the order u/s. 201(1) and 201(1A) was examined by the Special Bench of Tribunal in the case of Mahindra & Mahindra Ltd. Vs. DCIT (supra). The Special Bench of Tribunal after considering various provisions of the Act at length and after considering catena of judgments concluded as under :

“17.10 As we have held above that the order under s. 201(1) is akin to assessment and further the assessment includes reassessment, naturally the reasonable time-limits for initiation and completion of action under s. 201(1) have to be similar to those available for assessment under s. 147. Accordingly we hold that proceedings under s. 201(1) can be initiated in the extended period of six years from the end of the relevant assessment year if the income by virtue of sum paid without deduction of tax at source by the payer chargeable to tax in the hands of the payee is equal to or more than one lakh rupees. If on the other hand such amount is less than Rs. 1 lakh then the lower period of four years as prescribed under s. 149(1)(a) from the end of the relevant assessment year is available for initiation of proceedings under s. 201(1). Going by the same logic and taking assistance from s. 153(2), the completion of proceedings under s. 201(1), that is the passing of the order under this sub-section, has to be within one year from the end of the financial year in which proceedings under s. 201(1) were initiated. Same time-limits for initiation and passing of orders will be valid for the passing of order under s. 201(1A) also. We hold accordingly.”

11. The Department assailed the findings of Special Bench of Tribunal before the Hon'ble Bombay High Court. The Hon'ble Bombay High Court affirmed the findings of Special Bench. Thus, in the light of decision of Hon'ble Jurisdictional High Court and the Special Bench of Tribunal, the period of limitation for passing the order u/s. 201 is one year from the end of the financial year in which the proceedings u/s. 201 of the Act are initiated.

12. The ld. DR has pointed that subsequent to passing of the order by the Special Bench, the provisions of section 201 were amended and sub-section (3) and (4) were inserted. For the sake of ready reference the relevant extract of sub-section (3) as it was originally inserted by the Finance Act, 2009 w.e.f. 01-04-2010 is extracted here-in-below :

“(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of—

(i) two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed;

(ii) four years from the end of the financial year in which payment is made or credit is given, in any other case :

Provided that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed at any time on or before the 31st day of March, 2011.”

After the insertion of sub-section (3) the same was amended by the Finance (No. 2) Act, 2014 w.e.f. 01-04-2014. The amended provisions of sub-section (3) reads as under :

“(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of seven years from the end of the financial year in which payment is made for credit is given.”

13. A bare perusal of sub-section (3) as it was inserted by the Finance Act, 2009 and subsequently amended by the Finance Act, 2014 would show that reference is to the payments made without deduction of tax at source to **'person resident in India'**. The sub-section (3) is silent about the limitation period for passing the order u/s. 201 where the payments are made without deduction of tax at source to non-resident/overseas entities. In the present case as is evident from the impugned order, during the assessment years under appeal the payments have been made to the entities based in Canada, USA, UK, Belgium, Sweden, UAE and Hongkong. Thus, the provisions of sub-section (3) to section 201 does not get attracted as it relates only to the payments made without deduction of tax to person resident in India.

14. In our considered opinion, where the payments are made to the entities/persons other than the persons specified in sub-section (3), the limitation period of one year from the end of financial year in which the proceedings u/s. 201 were initiated, as laid down by the Special Bench of Tribunal and affirmed by the Hon'ble Jurisdictional High Court would apply. In the instant case, since, the order u/s. 201 has been passed much after the elapse of one year period from the end of financial year in which proceedings u/s. 201 were initiated, the order u/s. 201 in the impugned assessment years is void-ab-initio and hence, is liable to be quashed. We hold and direct accordingly.

15. In the result, the additional grounds raised in the appeals for assessment years 2008-09 to 2010-11 and Cross Objections for assessment year 2011-12 by the assessee are allowed.

16. As we have allowed the appeals of assessee on the legal issue, the grounds raised by the assessee challenging the additions on merits have become academic and hence, are not deliberated upon.

17. The Revenue in appeals for all the four assessment years i.e. assessment years 2008-09 to 2011-12 have challenged the order of Commissioner of Income Tax (Appeals) on merits. Since we have held the order passed by the Assessing Officer u/s. 201(1) and 201(1A) void-ab-initio, the subsequent proceedings arising there from are vitiated. Consequently, the appeals by the Revenue are dismissed.

18. To sum up, the appeals of the assessee, as well as Cross Objections by the assessee are allowed and the appeals by the Revenue are dismissed.

Order pronounced on Friday, the 05th day of April, 2019.

Sd/-
(R.S. Syal)
VICE PRESIDENT

Sd/-
(Vikas Awasthy)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 05th April, 2019.

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-IT/TP, Pune
4. The DIT (TP/IT), Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune