IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 989 OF 2015
(Original Tax Appeal No. 58 of 2007 – Goa Bench)
WITH
INCOME TAX APPEAL NO. 991 OF 2015
(Original Tax Appeal No. 60 of 2007 – Goa Bench)

The Commissioner of Income Tax ..Appellant
Vs.
V.S. Dempo and Company Pvt. Ltd. ..Respondent

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Ms. Asha Desai, Advocate for Appellant.
Mr. Mihir Naniwadekar, Advocate for Respondent.

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CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
DATED : 8 SEPTEMBER 2015

ORAL ORDER (Per: M.S. Sanklecha, J.)

The challenge in these two appeals under Section 260A of the Income Tax Act, 1961 (the 'Act') is to the common order dated 11 December 2006 passed by the Income Tax Appellate Tribunal (the 'Tribunal') allowing the appeals filed by the respondent-assessee. The Assessment Years involved are A.Y. 1999-00 and 2000-01.

2. Both these appeals were admitted on 12 October 2007 on the following substantial questions of law:

(I) Whether in facts and circumstances of the case, the ITAT has erred in applying the provision of Section 172 in holding that section 40(a)(i), is not applicable, particularly when section 172 concerned with levy and recovery of tax in a case of any ship, as against section 195 r/w 40(a) (i) of the IT Act, refers to non-resident Assessee as in the present case ?

(II) Whether in the facts and in the circumstances of the case, the ITAT has erred while referring the issue to the file of A.O., to exclude 90 % of 'net' interest income excess of interest received or paid provided there is direct nexus between interest earned and paid after establishing the fact that all the interest income except the interest on income tax is forming part of the profits of the business and not income from other sources ?

(III) Whether the findings of the ITAT while restoring the issue of interest income to the file of the A.O. to exclude 90 % of 'net' interest income is valid in law ?

(IV) Whether in the facts and in the circumstances of the case, the ITAT is right in law in taking into account the 'interest on bank deposits', 'interest on intercorporate deposits', 'interest on debentures', and interest from sister concerns' and 'other interest' is forming the part of the head “Profits and gains of business or profession”?

(V) Whether the findings of the ITAT that the receipts on account of 'professional services' and 'proceeds from electronic data processing' are not income falling within the exclusionary provisions of clause (baa) of Explanation to section 80HHC, is right in law ?

(VI) Whether the findings of the ITAT, that 90 % of the net income from receipts on account of 'stevedoring agency business' and 'travel agency business' are falling within the exclusive provision of clause (baa) of explanation to section 80HHC, is right in law ?

(VII) Whether the findings of the ITAT, that only 90 % of 'net' income from the 'transfer of vessel' and 'barge freight', has to be excluded, for the purpose of computing profits of the business under clause (baa) of Explanation to section 80HHC, is right in law ?

(VIII) Whether the findings of the ITAT that, only 90 % of the 'net' income from the 'lease hire charges' received by the Assessee apart from depreciation has to be excluded for the purpose of computing profits of the business under clause (baa) of Explanation to Section 80HHC, is right in law?

Regarding Question No.1:

3. The respondent-assessee had claimed expenditure of Rs.1.8 crores being the demurrage claim paid to a non-resident shipping company. The Assessing Officer disallowed part of the above expenditure for failure to deduct tax at source under Section 195 of the Act.

4. In appeal, the respondent-assessee contended that there was no obligation to deduct tax at source as the amount paid to non-resident shipping company which was engaged in operation of ships and therefore governed by Section 172 of the Act. It was pointed out that Section 172 of the Act provides for levy and collection of taxes in respect of any income of ship engaged in carriage of goods/passengers/livestock from a port in India. Reliance was also placed upon the Circular No. 723 dated 19 September 1995 issued by CBDT which interalia provides that Section 172 is a self contained code for levy and recovery of taxes ship wise and journey wise in case of ships owned or chartered by non-residents. Therefore, the requirement of deducting tax at source would not be

applicable in such a case thus the consequent disallowance of expenditure under Section 40(a)(i) of the Act was not warranted. However, the CIT(A) did not accept the contention of the respondent-assessee and held Section 44B of the Act would apply as it relates to computation of profits and gains and from shipping business. In the above view, the appeal of the respondent-assessee was dismissed.

5. On further appeal, the Tribunal by the impugned order allowed respondent's appeal by following its decision in DCIT Vs. Orient (Goa) (P) Ltd. rendered on 2 December 2004. The impugned order holds that Section 40(a)(i) of the Act would apply only when there is an obligation to deduct tax at source. Reliance was placed upon the Circular No. 723 issued by CBDT to support it's plea that there was no obligation to deduct tax at source in respect of payment made towards demurrage charges in cases where Section 172 of the Act applies. It was not disputed by the revenue that in this case Section 172 of the Act applies. The impugned order specifically holds that Section 172 of the Act is a charging as well as

a machinery provision in respect of non-resident shipping companies. It provides for determination and collection of tax. Thus Chapter XVII of the Act in respect of deducting tax at source would not apply in such cases. Consequently, the disallowance of expenditure on account of Section 40(a)(i) of the Act was deleted.

6. In appeal before us, Ms. Desai, the learned Counsel for the revenue invites our attention to the decision of this Court in ***CIT Vs. Orient (Goa)(P) Ltd.*** 325 ITR 554 by which this Court reversed the decision of the Tribunal in Orient (Goa)(P) Ltd. rendered on 2 December 2004. In the above view, she submits that the appeal be allowed.

7. On the other hand, Mr. Mihir Naniwadekar, learned Counsel for the respondent-assessee submits that the decision of this Court in Orient (Goa)(P) Ltd. (supra) may require reconsideration.

8. The substantial question interalia which arose for consideration of this Court in Orient (Goa)(P) Ltd. (supra) was as under:

"(B) Whether on the facts and in the circumstances of the case, the assessee was entitled to claim deduction of the demurrage charges of Rs.1,08,53,980/- paid to foreign company, without deducting tax on it, under s. 40(a)(i) of the IT Act, in view of the Circular No. 723 dt. 19Th September 1995 [(1995) 128 CTR (St) 6], issued by the CBDT?"

9. The above question arose for consideration by this Court on the following facts:

(a) M/s Orient (Goa)(P) Ltd. (assessee) had for A.Y. 1997-98 declared an income of Rs.2.10 crores. It had paid an amount of Rs.1.08 crores as demurrage charges to a non-resident shipping company viz. M/s Mitsui & Co. Ltd. However as the assessee had not deducted tax at source on the demurrage charges paid, the Assessing Officer disallowed the expenditure of demurrage charges in view of Section 40(a)(i) of the Act.

(b) In appeal, the CIT(A) held that demurrage charges had been paid by assessee. However in the hands of recipient M/s Mitsui & Co. Ltd. It was in the nature of profits of a non-resident from

occasional shipping business. Placing reliance upon the CBDT Circular No. 723 and Section 172 of the Act, the CIT(A) allowed the appeal.

(c) The revenue's appeal to the Tribunal was dismissed.

10. This Court held that Section 172 of the Act is applicable only in respect of non-resident carrying on shipping business while assessee i.e. Orient (Goa)(P) Ltd. is admittedly a resident and therefore Section 172 of the Act cannot be applied. Thus the expenditure of demurrage charges cannot be allowed in the absence of tax being deducted at source. The relevant observations of this Court is found in paragraph 8 are as under:

> *"8. Sec. 172 of the Act 1961 is carefully considered by us. Chapter XV titles as "Liability in special cases". We have no concern with sections, starting from s. 159, till s. 171 from this Chapter XV. Sec. 172 comes under sub-title "H.- Profits of non-residents from occasional shipping business". Title of s. 172 is "Shipping business of non-residents". For bringing a case under Chapter XV-H of the Act 1961, one has to establish a case of profits of non-residents from occasional shipping business. "Non-resident" is defined u/s. 2(30), as a person who is not a "resident" and for the purpose of ss. 92, 93 and 168, includes a person who is not*

ordinarily resident within the meaning of cl. (6) of s. 6. The respondent assessee is a company, incorporated under the provisions of Indian Companies Act, 1956, is fairly an admitted position. The assessee cannot be said to be non-resident. We have also taken notice of s. 6 i.e. "residence in India". In short, respondent assessee cannot be said to be non-resident. The present appeal pertains to the respondent assessee. In our view, in the facts of the present case, the respondent assessee cannot lay fingers on s. 172, since we are not dealing with profits of non-residents. The other aspect is that such profits of non-residents should be from occasional shipping business. It is not the case that the respondent assessee has earned some profit from occasional shipping and is a non-resident. In our view, s. 172 does not have application in relation to the respondent assessee and in the facts and circumstances of the present case. The company from Japan viz., Mitsui & Co. Ltd., Japan, recipient of demurrage amount is not before us. In other words, we are not examining the tax liability of the foreign company i.e., Mitsui & Co. Ltd., Japan. ……. Provisions of s. 172 are to apply notwithstanding anything contained in the other provisions of the Act. Therefore, in such cases, the provisions of ss. 194C and 195 relating to TDS, are not applicable. The recovery of tax is to be regulated for voyage undertaken from any port in India by a ship, under the provisions of s. 172. In this view, these observations of the learned Vice President of Tribunal have no concern with the factual aspect that it is a case of occasional shipping, pleaded or raised by assessee. There is no dispute about interpretation of s. 172 or s. 195. Crucial point is as to how s. 172 applies to the facts of the present case wherein the respondent assessee is an Indian company, incorporated under the provisions of Indian Companies Act, 1956. In our view, the learned Vice President of the Tribunal has recorded a perverse observation/finding in para 3 regarding application of ss. 44B and 172 of the Act 1961..”

11. We are unable to agree with the above view of this Court in Orient (Goa)(P) Ltd. (supra). This is for the reason that the respondent-assessee placed reliance upon Section 172 of the Act in respect of payments made by it to a non-resident shipping company by way of demurrage charges. The tax which is deducted at source by the assessee company is on behalf of the recipient of the charges. The issue before the Court was whether demurrage charges which are paid by the respondent-assessee to a non-resident company would be allowed as an expenditure in the absence of deduction of tax at source in view of Section 40(a)(i) of the Act. Although the Court was concerned with the issue in an appeal concerning a resident company. The introduction of section 172 of the Act by the assessee was to determine whether in view thereof, was there any obligation to deduct tax at source by the payer-assessee. Section 172 of the Act has to be examined through the prism of the non-resident shipping company in respect of it's income. It is in the above view that Section 172 of the Act and Circular No. 723 issued by the CBDT was relied upon by the respondent-assessee to point out that as Section 172 of the Act provides a complete code itself for

levy recovery of tax ship wise and journey wise. Thus there is no occasion to deduct tax under Chapter XVII of the Act.

12. It is a settled position under the law of precedents that, it is not open to us (Division Bench) to take a view contrary to the view taken by another Division Bench of this Court. In case, we are unable to agree with the view of the earlier Division Bench and it does not fall within the exclusionary categories of binding precedent by being contrary to and/or in conflict with a decision of the Apex Court or rendered per-incurrim. In such a case it is best that the issue is resolved at the hands of a Larger Bench of this Court. Certainty of law is an important ingredient of Rule of Law.

13. As we do not agree with the view taken by this Court in Orient (Goa) (P) Ltd. (supra) and it does not fall with the exclusions mentioned in Paragraph 12 above, we direct the Registry to place papers and proceedings of the present two appeals before the Hon'ble The Chief Justice to obtain suitable directions to place the following question of law for the opinion of the Larger Bench of this Court as under:-

Whether while dealing with the allowability of expenditure under Section 40(a)(i) of the Act, the status of a person making the expenditure has to be a non-resident before the provision to Section 172 of the Act can be invoked?

14. It is made clear that all the substantial questions of law would be considered after the receipt of the view of the Full Bench of this Court.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**

CERTIFICATE

Certified to be true and correct copy of the original signed Oral Order.