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

INCOME TAX APPEAL NO. 247 OF 2014
WITH
INCOME TAX APPEAL NO. 255 OF 2014

The Commissioner of Income Tax-2
Mumbai .. Appellant

v/s.

Knight Frank (India) Pvt. Ltd. .. Respondent

Mr. Suresh Kumar a/w Ms. Samiksha Kanani for the appellant
Mr. Percy Pardiwala, Senior Counsel a/w Mr. Atul Jasani for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

DATED : 16th AUGUST, 2016.

P.C.

1. These Appeals under Section 260-A of the Income Tax Act, 1961 (the Act) challenge the common impugned order dated 10th July, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order relates to Assessment Years 2007-08 and 2008-09.

2. The Revenue urges the following questions of law for our consideration :-

"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in deleting the addition u/s 145A of the Income Tax Act, 1961 due to inclusion of service tax as part of trading receipts, by holding that the provisions of Section 145A of the Act are applicable to manufacturing segment of business and not to a service provider company.

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in consequently deleting the addition u/s 43B of the Income Tax Act, 1961 being unpaid service tax liability disallowed without appreciating the fact that service tax stands on the same footing as excise duty or sales tax visa-a-vis the phrase 'any tax, duty, cess or fee (by whatever name called)' used in Section 43B of the Income Tax Act, 1961 and allowable only on actual payment basis."

3. The respondent assessee engaged in the business of real estate consultancy / agency and property management services. During the course of the assessment proceedings, the Assessing Officer sought to include the service tax billed by it for rendering services to the service receivers as trading receipts on invocation of Section 145A(ii) of the Act. Besides, the Assessing Officer also sought to invoke Section 43B of the Act on the ground that the billed amount of service tax had not been paid over to the Government till the due date of filing the return

of income. The Assessing Officer also sought to recast the respondent's profit and loss account so as to reflect the receivable service tax as a part of the consideration for the services rendered. The respondent assessee contended that Section 145A(a)(ii) of the Act would have no application to the present facts as service tax is not mentioned therein. Further, it was submitted that as the respondent has claimed no deduction on account of service tax which is payable to the Government, therefore, Section 43B of the Act would have no application. However, the same was not accepted by the Assessing Officer and he added the service tax billed by the respondent to its service receivers as a part of its turnover / consideration received for services rendered. Further Section 43B of the Act was invoked to add the service tax billed, which has not been paid over to the Government.

4. In appeals for both the assessment years, the Commissioner of Income Tax (Appeals) [CIT(A)] held that Section 145A(a)(ii) of the Act would apply as it is not restricted only to manufacturing and trading companies. It was concluded that the service tax stands on the same footing as excise duties, sales tax and other taxes, which are collected to be paid over to the Government. Similarly, the order of the Assessing Officer with regard to Section 43B of the Act was also upheld.

5. On further appeal, the Tribunal by the impugned order held that Section 145A(a)(ii) of the Act would have no application in respect of the service tax billed on rendering of services. This for the reason the Section 145A(a)(ii) deals with goods and not services. It also held that Section 43B of the Act would have no application in the present facts as no liability to pay the same to the Government arose before the last date of filing of the Returns. Besides, it held that no deduction had been claimed on the aforesaid amounts while determining its income. Accordingly, the appeal of the respondent assessee was allowed.

6. **Regarding question (i) :-**

(a) For the better appreciation of the controversy to be examined, it is necessary to reproduce Section 145A of the Act, which at the relevant time read as under :-

> *"145A - Notwithstanding anything to the contrary contained in Section 145 -*
>
> *(a) the valuation of purchase and sale of goods and inventory for the purposes of determining the income chargeable under the head "Profits and gains of business or profession" shall be –*
>
> *(i) in accordance with the method of accounting regularly employed by the assessee; and*
>
> *(ii) further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred*

by the assessee to bring the goods to the place of its location and condition as on the date of valuation.

Explanation - For the purposes of this section , any tax, duty, cess or fee (by whatever name called) under any law for the time being in force, shall include all such payment notwithstanding any right arising as a consequence to such payment."

(b) The grievance of the Revenue to the impugned order of the Tribunal is that Section 145A(a)(ii) of the Act would apply as the amount receivable on rendering of services would also include the service tax. This service tax is similar to excise duty, sales tax and other taxes, which have to be collected to be paid over to the Government.

(c) It is very clear from the reading of Section 145A(a)(ii) of the Act that it only covers cases where the amount of tax, duty, cess or fee is actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation.

(d) In this case, the respondent-assessee has admittedly not paid or incurred any liability for the purposes of bringing any goods to the place of its location. In this case, the respondent- assessee is rendering services. Thus, on the plain reading of Section145A(a)(ii) of the Act, it is self evident that the same would not apply to the service tax billed on rendering of services. This is so as the service tax billed has no relation to any goods nor does it have anything to do with bringing the

goods to a particular location.

(e) The Explanation to Section 145A(a) of the Act does not expand its scope. An Explanation normally does not widen the scope of the main section. It merely helps clarifying an ambiguity. (See Zakiyr Begam v/s. Shanaz Ali & Ors., 2010 (9) SCC 280). The main part of the Section specifically restrict its ambit only to valuation of purchase and sale of goods and inventory. Rendering of service is not goods or inventory. Goods would mean movables and inventory would mean stock of goods. Therefore, the Explanation would only apply for valuation of sales and purchase of goods and stock of goods as provided in the main part. The Explanation in this case clarifies/ explains that any tax, duty, cess or fee paid or incurred will have to be taken into account for valuation of goods even if such payment results in any benefit/ right to the person making the payment. This Explanation was necessary as otherwise in terms of Accounting Standard – (AS-2) issued by the Institute of Chartered Accountants of India provides that cost of goods would include the duties and taxes paid, other then the duties and taxes which give a right to recover the same from the taxing authorities – to illustrate duty draw back etc. Thus, the Explanation only seeks to clarify the fact that notwithstanding any right acquired on payment of taxes to recover the same from the government, for the

purpose of Section 145A of the Act, the same cannot be excluded even though the AS-2 provides otherwise. It does not even remotely deal with the issue of service tax.

(f) Further, it is to be noted that Service Tax was first introduced in India by Finance Act, 1994. Section 145A of the Act was first introduced into the Act only by Finance (No.2) Act, 1998 w.e.f. 1st April, 1999. It was thereafter substituted by Finance (No.2) Act, 2009 which is identical, except for addition of clause (b), dealing with interest. However, the Parliament did not while substituting it, deem it fit to explicitly include the valuation of Services therein. Thus, it is clear that the legislature never intended to restrict the applicability of Section 145A of the Act only to goods and not extend it to Services. As observed by the Apex Court in ***State of Bihar v/s. S. K. Roy AIR 1966 (SC) 1995:-***

> *"It is well recognized principle in dealing with construction that a subsequent legislation may be looked at in order to see what is the proper interpretation to be put upon an earlier Act where the earlier Act is obscure or capable of more then one interpretation."*

We must make it clear that we do not find any ambiguity in Section 145A of the Act as arising for our consideration. However, even if one were to assume the main part of Section 145A of the Act, is capable of more then one interpretation, the interpretation sought to be canvassed by the Revenue, is not sustainable. Therefore, Section 145A

of the Act would have no application in cases where service is provided by the Assessee.

(f) In view of the above, the question (i) as proposed does not give rise to any substantial question of law. Thus, not entertained.

7. **Regarding question (ii) :-**

(a) It is an admitted position before us that the respondent assessee had not claimed any deduction on account of the service tax payable in order to determine its taxable income. In the above view, there can be no occasion to invoke Section 43B of the Act.

(b) Mr. Suresh Kumar, learned Counsel for the Revenue fairly states that the issue stands concluded against the Revenue by the decisions of this Court in ***Commissioner of Income Tax Vs. Ovira Logistics P. Ltd. 377 ITR 129*** and ***Commissioner of Income Tax Vs. Calibre Personnel Services Pvt. Ltd.*** (Income Tax Appeal No. 158 of 2013) rendered on 2nd February, 2015.

(c) In view of the above, the question (ii) as proposed is covered by the decision of this Court. Therefore, it does not give rise to any substantial question of law. Thus, not entertained.

8. Accordingly, both the appeals are dismissed. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**