IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

FRIDAY, THE 3RD DAY OF JULY 2015/12TH ASHADHA, 1937

ITA.No. 278 of 2014 ()

AGAINST THE ORDER IN ITA 63/COCH/2014 of I.T.A.TRIBUNAL,COCHIN BENCH
DATED 28.8.2014

APPELLANT(S)/APPELLANT/ASSESSEE::

SHRI.THOMAS GEORGE MUTHOOT
MUTHOOT HOUSE, KOZHENCHERRY, PATHANAMTHITTA DISTRICT
PIN: 689 641.

BY ADVS.SRI.T.M.SREEDHARAN (SR.)
SRI.V.P.NARAYANAN
SMT.DIVYA RAVINDRAN

RESPONDENT(S)/RESPONDENT/REVENUE:

THE COMMISSIONER OF INCOME TAX
PUBLIC LIBRARY BUILDING, LALBAHADUR SASTHRI ROAD
KOTTAYAM - 686 001.

R BY SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 29-06-2015, ALONG WITH ITA. 279/2014 AND CONNECTED CASES, THE COURT ON 03-07-2015 DELIVERED THE FOLLOWING:

APPENDIX IN ITA.278/14

APPELLANT'S EXHIBITS:

ANNEXURE A: TRUE COPY OF THE ASSESSMENT ORDER AND DEMAND NOTICE DATED 27.12.2011 FOR AY 2006-07.

ANNEXURE B: TRUE COPY OF THE COMMON APPELLATE TRIBUNAL'S ORDER DATED 28.8.2014 IN ITA.63/COCH/2014 OF THE ITAT, COCHIN BENCH FOR AY 2006-07.

ANNEXURE C: TRUE COPY OF THE MISCELLANEOUS PETITION DATED 13.09.2014 FILED BY THE APPELLANT BEFORE ITAT, COCHIN BENCH FOR AY 2006-07.

ANNEXURE D: TRUE COPY OF THE CERTIFICATE DATED 26.2.2014 ISSUED BY TE CHARTERED ACCOUNTANT.

ANNEXURE E: TRUE COPY OF THE ORDER NO.TVDTO 1734F/AE/13-14 DATED 31.3.2014 ISSUED BY THE DY. COMMISSIONER OF INCOME TAX (TDS), KOTTAYAM, FOR AY 2006-07.

/TRUE COPY/

PS TO JUDGE

C.R.

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

I.T.A.Nos.278,279, 282, 283, 288, 289, 290 and 292 of 2014

Dated this the 3rd day of July, 2015

JUDGMENT

Antony Dominic, J.

1. ITA No.278/14 and 279/14 are filed by Sri.Thomas George Muthoot in relation to the assessment orders passed for the assessment years 2006-07 and 2007-08. ITA Nos.282/14, 289/14 and 290/14 filed by Sri.Thomas Muthoot arise out of the orders for the assessment years 2005-06, 2007-08 and 2006-07, respectively. Sri.John Muthoot has filed ITA Nos.283/14, 288/14 and 292/14 against the orders for the assessment years 2005-06, 2006-07 and 2007-08 respectively.

2. During the aforesaid assessment years, the appellants paid interests on amounts drawn by them from partnership firms of which they are Partners, as provided under Chapter XVIIB of the Income Tax Act, 1961 (hereinafter referred to as 'the Act' for short). For that reason, the interest paid was disallowed in terms of Section 40(a)(ia) of the Act. This order passed by the Assessing Officer was

confirmed by the Commissioner (Appeals) and further appeals filed before the Tribunal were dismissed by a common order dated 28.08.2014. It is aggrieved by the orders passed by the Tribunal, the assessees have filed these appeals, formulating the following questions of law:

(i) Whether on the facts and in the circumstances of the case, did not the Appellate Tribunal err in law in sustaining the addition of Rs.6,28,28,000/- by invoking Sec.40(a)(ia) for the Assessment Year 2006-07?

(ii) Did not the statutory Authorities and the Appellate Tribunal err in law in making addition u/s 40(a)(ia) when the payee has included the entire interest paid by the appellant in its total income and filed return of income accordingly?

(iii) Did not the statutory Authorities and the Appellate Tribunal failed to follow the principle of law laid down by the Hon'ble Apex Court in M/s.Hindustan Coca Cola Beverages Pvt. Ltd. (293 ITR 226 (SC) where it was held that the payer is not liable to pay the amounts of short/non-deduction of tax u/s 201(1) in cases whether the payee has already included the relevant amount in its total income?

(iv) Should not the statutory Authorities and the Appellate Tribunal accepted the contention that the second proviso inserted with effect from

1.4.2013 was intended to remove the unintended consequences and was a beneficial provision for removal of hardship and therefore, retrospective in operation and applicable to the appellant's case?

(v) Did not the Appellate Tribunal err in law in not following the judgment of the Allahabad High Court in CIT Vs. M/s Vector Shipping Services (2013) 357 ITR 642 (All) which is in favour of the appellant by following the principle of law laid down in the case of CIT Vs. M/s Vegetables Products Ltd. (1973) 88 ITR 192 (SC)?

(vi) Is not the order and the findings of the Appellate Tribunal in the impugned common order in I.T.A. Nos.71/C/2014 dated 28.08.2014 for AY-2006-07 erroneous in law and hence unsustainable?

(vii) Is the order of the Appellate Tribunal Annexure-B legal, valid and sustainable in law?

3.We heard the senior Counsel for the appellants and the learned Senior Standing Counsel appearing for the Revenue.

4. Section 194A (1) of the Act provides that any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest, other than income by

way of interest on securities, 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 issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate in force. As per the proviso to the said section, an individual or Hindu undivided family whose total sales, gross receipts or turnover from business or profession carried on by him exceeds the monetary limits specified under Section 44AB(a) or (b) during the financial year immediately preceding the financial year in which such interest is credited or paid, shall be liable to deduct income tax under Section 194A.

5. One of the consequences of the non-compliance of Section 194A is contained in Section 40 of the Act. As per this Section, notwithstanding anything to the contrary contained in Sections 30 to 38, the amounts specified in the Section shall not be deducted in computing the income chargeable under the head profits and gains of business or profession. Among the various amounts that are specified for deduction

of tax, clause (a) (ia) of Section 40, in so far as it is relevant, provides that in the case of any assessee any interest is payable to a resident on which tax is deductible at source under Chapter XVIIB and such tax has not been deducted. This is evident from the Section itself, which, at the relevant time, read as follows:

> "40. Amounts not deductible.- Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession".—
> (a) in the case of any assessee –
> (ia) any interest, commission or brokerage, rent, royalty, fees or professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVIIB and such tax has not been deducted or, after deduction, has not been paid,--
> (A) in a case where the tax was deductible and was so deducted during the last month of the previous year, or or before the due date specified in sub-section (1) of section 139; or
> (B) in any other case, on or before the last day of the previous year."

6.In so far as these cases are concerned, admittedly assessees are partners of the firms and during the assessment years in question they have paid interest to the firms without deducting tax as required under Section 194A. It was in such circumstances that the interest paid by them to the firms was disallowed as provided under Section 40(a)(ia), which order has been concurrently upheld.

7.The first contention raised before us was that under Section 194A, an individual is excluded from the liability to deduct tax and that therefore, disallowance is without jurisdiction. In order to answer this contention, reference to Section 194A(1) and its proviso is necessary and therefore, these provisions are extracted for reference:

> "(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, 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 issue of a cheque or draft

> or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:
>
> Provided that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause 9b) of section 44AB during the financial year immediately preceding the financial year in which such interest is credited or paid, shall be liable to deduct income-tax under this section."

8. Reading of the provision shows that individuals and Hindu undivided family are excluded in Section 194A (1) and therefore, are not liable to deduct tax at source. However, by virtue of the proviso which was inserted by the Finance Act 2002, the benefit of exclusion is restricted only to those individuals and Hindu undivided families, whose total sales, gross receipts or turnover from business or profession do not exceed the monetary limit specified under Section 44AB(a) or (b) of the Act during the financial year immediately preceding the financial year in which such interest is credited or paid.

9.In the light of the proviso to Section 194A(1), if the appellants are claiming the exemption provided in the Section, the burden is on them to establish that they, being individuals, satisfied the conditions specified in the proviso to the Section. From the orders impugned, we find that no such contention was urged before the statutory authorities. In fact the Tribunal has entered into a specified finding that;

> "in this case, business income of the assessee exceeded the limit prescribed u/s 44AB of the Act, therefore the assessee, even though an individual is liable to deduct tax while paying interest to the firm u/s 194A(1) of the IT Act".

10.No material whatsoever has been supplied by the appellants to contradict this specific factual finding recorded by the Appellate Tribunal. Therefore, this contention cannot be accepted.

11. The second contention raised was that second proviso to Section 40(a)(ia) of the Act, introduced by the Finance Act 2012, being retrospective in operation, disallowance could not have been ordered

invoking Section 40 (a)(ia) of the Act. This contention was sought to be substantiated relying on the judgments in Allied Motor (P) Ltd. v. Commissioner of Income Tax [(1997) 224 ITR 677 (SC)] and Commissioner of Income Tax v. Alom Extrusions Ltd. [(2009) 319 ITR 306].

12.The second proviso to Section 40(a)(ia) of the Act reads thus:

> "Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVIIB on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso."

13.Admittedly this proviso was inserted by Finance Act 2012 and came into force with effect from 01.04.2013. The fact the second proviso was introduced with effect from 01.04.2013 is expressly made clear by

the provisions of the Finance Act 2012 itself. This legal position was clarified by this Court in Prudential Logistics And Transports v. Income Tax Officer [(2014) 364 ITR 689 (Ker)].

14.However, counsel for the appellants placed reliance on the judgment in Allied Motor (P) Ltd. (supra). That was a case where the Apex Court was considering the scope and applicability of the first proviso to Section 43B inserted by the Finance Act 1987, with effect from 01.04.1988. On examination of the legislative history the court found that the language of Section 43B was causing undue hardship to the tax payers and the first proviso was designed to eliminate unintended consequences which cause undue hardship to the assessees and which made the provision unworkable or unjust in a specific situation. Accordingly, the court held that the proviso was remedial and curative in nature and on that basis held the proviso to be retrospective in operation. In Commissioner of Income Tax (supra) also following the judgment in Allied Motors (supra), the Apex Court held that provisions of the Finance

Act 2003 by which the second proviso to Section 43B was deleted and the first proviso was amended, were curative in nature and therefore retrospective.

15.A statutory provision, unless otherwise expressly stated to be retrospective or by intendment shown to be retrospective, is always prospective in operation. Finance Act 2012 shows that the second proviso to Section 40 (a)(ia) has been introduced with effect from 01.04.2013. Reading of the second proviso does not show that it was meant or intended to be curative or remedial in nature, and even the appellants did not have such a case. Instead, by this proviso, an additional benefit was conferred on the assessees. Such a provision can only be prospective as held by this Court in Prudential Logistics and Transports (supra). Therefore, this contention raised also cannot be accepted.

16.Relying on the Apex Court judgment in Commissioner of Income Tax v. Hindustan Coca Cola Beverages Pvt. Ltd. [(2007) 293 ITR 226], learned Senior Counsel for the appellants contended that the recipients of the

amounts paid by the appellants, the firms of which they are partners, have already paid tax and that therefore, it is illegal to disallow the interest paid. First of all, Section 40(a)(ia) is in very categoric terms and the provision is automatically attracted, on the failure of an assessee to deduct tax on the interest paid by him. Therefore, going by the language of Section 40(a)(ia), once it is found that there is failure to deduct tax at source, the fact that the recipient has subsequently paid tax, will not absolve the payee from the consequence of disallowance. In so far as the judgment in Hindustan Coca Cola case (Supra) is concerned, that was rendered in the context of section 201(1), the object of which being compensatory in nature, cannot be of any assistance to the appellants to resist a proceeding under Section 40(i)(ia) of the Act. This contention, therefore, is only to be rejected.

17. Another contention that was pressed into service was that the appellants had already paid the amount and therefore, the provisions of Section 40(a)(ia), applicable only in respect of the amount which

remains to be payable on the last day of the financial year, is not attracted. Therefore, according to the appellants, disallowance cannot be sustained. This contention was sought to be substantiated by relying on the judgment of the Allahabad High Court in Commissioner of Income Tax v. Vector Shipping Services (P) [(2013) 357 ITR 642 (All)]. Primarily, this contention should be answered with reference to the language used in the statutory provision. Section 40(a)(ia) makes it clear that the consequence of disallowance is attracted when an individual, who is liable to deduct tax on any interest payable to a resident on which tax is deductible at source, commits default. The language of the Section does not warrant an interpretation that it is attracted only if the interest remains payable on the last day of the financial year. If this contention is to be accepted, this Court will have to alter the language of Section 40(a) (ia) and such an interpretation is not permissible. This view that we have taken is supported by judgments of the Calcutta High Court in Crescent Exports Syndicate and another [ITAT 20 of

2013] and the Gujarat High Court in the case of Commissioner of Income Tax v. Sikandadarkhan N Tunvar [ITA Nos.905 of 2012 & connected cases], which have been relied on by the Tribunal.

Resultantly, we do not find any merit in the contentions and questions of law are answered against the assessees. Appeals are only to be dismissed and we do so.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
SHAJI P. CHALY, Judge.

kkb.