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

INICOME TAX APPEAL NO. 53 OF 2016

Thyrocare Technologies Limited, Mumbai ... Appellant
Vs.
The Income Tax Officer (TDS) 3(4), Mumbai ... Respondent

WITH
INICOME TAX APPEAL NO. 54 OF 2016

Thyrocare Technologies Limited, Mumbai ... Appellant
Vs.
The Income Tax Officer (TDS) 3(4), Mumbai ... Respondent

WITH
WRIT PETITION NO. 730 OF 2016

Thyrocare Technologies Limited, Mumbai ... Petitioner
Vs.
The Assistant Registrar representing the
Income Tax Appellate Tribunal & Ors. ... Respondents

WITH
WRIT PETITION NO. 847 OF 2016

Thyrocare Technologies Limited, Mumbai ... Petitioner
Vs.
The Assistant Registrar representing the
Income Tax Appellate Tribunal & Ors. ... Respondents

.....

Mr. R. Murlidhar a/w Mr. T. J. Pandian for the Appellant in ITXA/53/2016 and ITXA/54/2016 and for the Petitioner in WP/730/2016 and WP/847/2016.

Mr. Suresh Kumar a/w Ms. Samiksha Kanani for the Respondent in WP/730/2016 and WP/847/2016.

Mr. Prakash C. Chhotaray for the Respondent in ITXA/53/2016 and ITXA/54/2016.

.....

CORAM : S. C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.

DATE : SEPTEMBER 11, 2017.

P.C. :

1. The assessee has filed these Appeals aggrieved and dissatisfied with the order of the Income Tax Appellate Tribunal, Bench at Mumbai, dated 31st March, 2015.

2. The Income Tax Appellate Tribunal decided two Appeals of the Revenue bearing ITA Nos. 5389 & 5390/Mum/2013 for the assessment years 2009-2010 and 2010-2011.

3. These Appeals were directed against the order of the First Appellate Authority, Mumbai, dated 29th May, 2013.

4. Mr. Murlidhar, learned counsel appearing on behalf of the assessee in support of these Appeals would submit that the manner in which the Tribunal decided these Appeals raises substantial questions of law.

5. He would submit that the questions (i), (v) and (vi) proposed by the assessee are all substantial questions of law.

6. Mr. Murlidhar would submit that the Tribunal has completely misread and misinterpreted the facts placed on record. The Assessing Officer in this case was of the view that the assessee was obliged to deduct tax at source while making payment to the parties who brought the samples for testing and reports at the assessee's door steps. In fact, when such samples are tested by the assessee, it is the assessee who renders services to those sample collectors and who are distinct third parties. They are not obliged to hand over all their samples for testing to the assessee alone. These sample collectors can approach any of the laboratories for testing of their samples and submitting the final reports. In the circumstances, and in any event, when the assessee hands over the report of the testing, it is the assessee who receives payment. The Tribunal assumes by terming the whole arrangement as a principal to agent relationship, that it is the appellant/assessee who is paying the money and therefore, for such services for which money is paid, the assessee is obliged to deduct tax at source.

7. Mr. Murlidhar would submit that this understanding of the Tribunal is entirely faulty. Apart from that, in the entire order of the Commissioner which is upholding the stand of the assessee, there is reference to the very documents which the Assessing Officer looked into. It is based on these very documents that the Commissioner/First Appellate Authority held that there was a principal to principal relationship and not a principal to agent

relationship. The Tribunal, without adverting to these findings and conclusions of the Commissioner, has reversed his order and in reversing the same, the Tribunal totally misdirected itself. It refers to a so called questionnaire and addressed to the appellant/ assessee and which, the Tribunal feels, has not been satisfactorily answered. However, and in the process, the Tribunal has reproduced the entire assessment order which is set aside by the First Appellate Authority, but has not made any reference to the order of the First Appellate Authority and the view taken by him. That view of the First Appellate Authority is based on a decision of the Tribunal's Bench at Delhi. It is urged that there is a view taken and specifically on the point. That view was taken by considering an identical arrangement/agreement. That view of the Tribunal was taken by its Delhi Bench in the case of ***SRL Ranbaxy Ltd. vs. Assistant Commissioner of Income Tax***, reported in ***(2012) 143 TTJ 265***. The Tribunal has made no reference to this decision and made no attempt to distinguish it.

8. On the other hand, Mr. Chhotaray would submit that this order of the Tribunal raises no substantial question of law. He would submit that independently the Tribunal has considered the relationship. It is held that all the service providers of the appellant are indeed their agents. This is not a genuine arrangement but it is the assessee who has created it and by demonstrating purportedly that they are sample collectors and they bring the samples and the samples are only tested by the

appellant. The projection is that the patients do not directly go to the assessee/appellant before us, but that is incorrect. That is how the Tribunal directed the Assessing Officer to examine the records again so as to determine the relationship between the parties. However, according to Mr. Chhotaray, in doing so and in directing the Assessing Officer to act on these lines, the Tribunal has discussed the case of both sides and perused carefully the materials on record. Hence, the impugned order does not raise any substantial question of law.

9. After hearing both sides and perusing the order of the Tribunal, we are of the opinion that these Appeals raise substantial questions of law. They are admitted on question nos. (i), (vi) and (vii) which read thus:

> (i) Whether on the facts and in the circumstances of the case and in law the findings / observations of the Tribunal that the Appellant has not "satisfactorily explained the queries", "not produced any document to substantiate the contention" and "not discharged the burden" is perverse, contrary to the facts on record and such that no reasonable person properly instructed as to the facts and law could come to in the light of the fact that (a) there was no such grievance raised by the Respondent, (b) the Appellant had filed voluminous evidence in support of its contentions and the Tribunal never indicated during the hearing that it was not satisfied with the evidence, (c) the Tribunal appears to have totally lost sight of the said evidence and has not even made a reference to it in the impugned order leave alone discussing it?

(vi) Whether on the facts and in the circumstances of the case and law the Tribunal is justified in completely ignoring the two grounds raised by the Appellant under Rule 27 of the Income-tax Rules 1962?

(vii) Whether on the facts and in the circumstances of the case and in law the Tribunal is justified in totally ignoring the binding judgment of the Delhi Bench of the Tribunal in SRL Ranbaxy Ltd. v/s ACIT (2012) 143 TTJ 265 which is similar on facts and also the other judgments cited by the Appellant?

10. We have carefully perused the order of the Tribunal impugned in these Appeals. The Tribunal seems to be unaware of the fact that the entire order of the Assessing Officer reproduced by it in the impugned order had been set aside by the Commissioner of Income Tax (Appeals). The Tribunal completely overlooked the fact that there is a version of the assessee which was accepted by this First Appellate Authority. The version goes like this. The appellant/assessee says that it is a sample testing laboratory. The samples are not collected from the patients directly by the appellant/assessee. Instead, the assessee renders services to those sample collectors who visit the patients and thereafter, the samples are brought for testing by such sample collectors to the appellant/assessee. There is no privity of contract between the appellant and the patients. Secondly, the sample collectors do not collect samples exclusively for the appellant and they are free to send the samples collected by them for testing to any other laboratories. Therefore, this is a principal to principal relationship. The decision of the co-ordinate Bench of the Tribunal

at Delhi in the case of ***SRL Ranbaxy Ltd.*** (supra) would therefore, bind the authorities.

11. On the other hand, the version of the Assessing Officer was that this is nothing but a eye-wash. It is the appellant/assessee who is representing to the world that it is a famous lab and that patients can have their samples collected as advised and thereafter, those samples would be tested and the report would be handed over to them. Therefore, the samples collectors are not independent persons but agents of the principal, namely, the assessee. The argument of the assessee that it is receiving money rather than paying it is therefore, without substance. It is a clear arrangement so as to avoid the obligation to deduct the tax at source.

12. Mr. Chhotaray may rely on paragraphs 2.1 and 2.4 to 2.6 of the Tribunal's order to submit that the Tribunal has applied its mind to what it terms as a question going to the root of the case, however, it did not decide it itself, but directed that it should be re-decided by the Assessing Officer and there is no error in the said approach of the Tribunal. The manner of deciding the Appeal, is therefore, not unsatisfactory.

13. We are not in agreement with Mr. Chhotaray for more than one reason.

14. The Tribunal had before it the entire order of the Assessing Officer as also of the Commissioner of Income Tax (Appeals).

15. What the Tribunal did was that it set out common points which arose for its consideration. Those points are summarized as under:

I. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in not correctly appreciating the nature of the payment made to TSPs that there is a principal and agent relationship between the assessee company and TSPs.

II. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in not correctly appreciating the nature of the payment made to TSPs as the same is in the nature of commission or brokerage which is evident from the affidavit cum undertaking executed by the TSPs and their application forms for appointment as TSPs.

III. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in not correctly appreciating the nature of the payment made to TSPs as the same is in the nature of commission or brokerage which is evident from the statements recorded during the course of Survey u/s 133A of the Income Tax Act, 1961, on 14/10/2011.

IV. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in deleting the interest levied u/s 201(1A) of the Income Tax Act, 1961.

16. Strangely then, the Tribunal, during the hearing of the Appeals, refers to the crux of the argument on behalf of the

Revenue and that is in support of the assessment order. The Revenue argued that the First Appellate Authority did not correctly appreciate the nature of payments made to the service providers and that there is a principal to agent relationship between the assessee company and these service providers. The Revenue argued that the payment is in the nature of commission or brokerage and in that process, the Revenue relied upon the statements recorded during the survey under Section 133A of the Income Tax Act, 1961. These Statements were recorded on 14th October, 2011. The statements are then briefly referred to and at the same time, the argument of the assessee who defended the conclusion in the First Appellate Authority's order.

17. However, the Bench raised some six queries on the assessee. Thereafter, it purports to consider the rival submissions, the observations in the assessment order and the conclusions of the First Appellate Authority. The Tribunal holds that the assessee did not satisfactorily explain the queries raised by the Bench. The Assessing Officer, nor the Commissioner of Income Tax has examined the aforesaid points which go to the root of the matter.

18. Then, from paragraph 2.1 to paragraph 2.4, all that is reproduced are the statements or the extracts thereof. We do not see how relying on these statements, which may or may not be referred by the Assessing Officer or the First Appellate Authority, can the Tribunal make a comment or an observation and

thereafter render a conclusion that both authorities have not examined the matter on the points which occurred to the Tribunal. The Tribunal feels that they go to the root of the matter. In the whole process, we find that the Tribunal, unmindful of its position as a last fact finding authority, failed to make any reference to the observations, findings and conclusions in the order of the Assessing Officer and that of the First Appellate Authority. Pertinently, it lost sight of the fact that the Assessing Officer's order was not upheld but set aside by the First Appellate Authority, and the Revenue was in Appeal against the same. The Tribunal terms certain facts as undisputed, whereas, those are very much disputed. The assessee is not admitting that the service providers are its agents. It is not admitting that the service providers are allowed to collect necessary charges from the assessee's clients for collecting samples and delivering its report. We do not see from where such admission is derived by the Tribunal which admission has completely escaped the attention of the First Appellate Authority. From where the Tribunal derived the facts and termed them as undisputed, that there is a sharing of charges between the assessee and the service providers and that is so arranged so as to give it a colour distinguishable from commission or brokerage as envisaged under Section 194H of the IT Act. Then, in paragraph 2.6 (at running pages 65 to 67) the Tribunal holds as under:

> *"2.6. During the course of hearing, the Ld A.R. vehemently contended that the relationship between the assessee and*

TSPs/collectors/aggregators are that of Principal to Principal basis, yet no document was produced before us to substantiate those contentions. Further, we notice that the test results given by the assessee directly benefit the patients and in that case the TSPs/collectors/aggregators appear to act as mere agents of the assessee in collecting the samples from the patients and giving the results to them. When this factual matrix was put before the ld A.R., he tried to convince the Bench that these activities are akin to the traders of goods, wherein the traders are also supplying the goods to the ultimate consumers. However, we are not convinced with the said arguments of Ld A.R. In trading of goods, the title to the goods passes from the manufacturer to the wholesaler and from the wholesaler to the retailer and then from the retailer to the ultimate consumers, i.e., each of the parties mentioned above become owners of the goods in their independent capacities and they are entitled to deal with the goods in any manner as he likes. However, in the case of lab results, the TSPs/collectors/aggregators are not going to be benefited by the test results and it is the patient who is going to be benefited by the lab results. Hence, we are of the view that the traders of the goods cannot be compared with the TSPs/collectors/aggregators, as they provide only agency services as explained earlier. In our view, the assessing officer should exhaustively examine the relationship between the parties in the light of discussions made supra. The assessee is also directed to extend full co-operation to the assessing officer. In view of these facts, the Assessing Officer is directed to examine the issues afresh, collect the details from such TSPs/collectors/aggregators/assessee and if necessary examine them and decide the issue in accordance with law. We are of the view that the assessee has certainly not discharged the burden and the ld. Commissioner of Income Tax (Appeals) granted relief to the assessee ignoring the true facts and observation made in the assessment order, therefore, the impugned orders are set aside. The Assessing Officer is directed to examine the case afresh with different angles including the observations made by us. The assessee be given opportunity of being heard, so that no grievance is caused to either side."

19. We do not see how it is possible for us to uphold the order of the Tribunal and when it purports to decide two Appeals of the

Revenue by this single paragraph conclusion. There is absolutely no discussion of the law and why the co-ordinate Bench decision rendered at Delhi is either distinguishable on facts or inapplicable. There is no discussion, much less any finding and conclusion that the order of the First Appellate Authority is perverse or is contrary to law. There are no infirmities, much less serious errors of fact and law noted by the Tribunal in the order of the Commissioner, which the Tribunal is obliged to and which order is therefore interfered by the Tribunal. Why the Tribunal feels it is its duty and obligation to interfere with the order of the First Appellate Authority, therefore, should be indicated with clarity. We have also not seen a reference to any communication or to any document which would indicate that the six queries raised by the Tribunal on the assessee have not been answered, much less satisfactorily. The Tribunal should have, independent of the statements, referred to such of the materials on record which would disclose that the assessee has entered into such arrangements so as to avoid the obligation to deduct the tax at source. If the arrangements are sham, bogus or dubious, then such a finding should have been rendered. Therefore, we are most unhappy with the manner in which the Tribunal has decided these Appeals. We have no alternative but to set aside such order and when the last fact finding authority misdirects itself totally in law. It fails to perform its duty. It has also not rendered a complete decision. Once the Tribunal was obliged in law to examine the matter and reappraise and reappreciate all the factual materials,

then it should have performed that duty satisfactorily and in terms of the powers conferred by law.

20. Once this duty is not performed, we can safely come to the conclusion that the Tribunal's order is vitiated by not only total non-application of mind but also misdirection in law. We accordingly conclude and proceed to set aside the impugned order. We direct the Tribunal to hear the Appeals afresh on merits and in accordance with law after giving complete opportunity to both sides to place their versions and arguments. The Tribunal shall frame proper points for its determination and consideration and render specific findings on each of them. The Tribunal should carry out this exercise uninfluenced by any observations or conclusions in the impugned order which we have quashed and set aside. We clarify that beyond emphasizing what is the real controversy and which question goes to the root of the matter, we have not expressed any opinion on the rival contentions. All of them are open for being raised before the Tribunal. Once the two Appeals succeed and the Tribunal's order is set aside, nothing survives in the Writ Petitions and the same are disposed of.

(PRAKASH D. NAIK, J.) **(S. C. DHARMADHIKARI, J.)**