The Pr. Commissioner Of Income Tax-9 vs Unision Hotels Ltd on 10 April, 2024

Author: Yashwant Varma

Bench: Yashwant Varma, Purushaindra Kumar Kaurav

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ ITA 1118/2017 & CM APPL. 44424/2017 (227 Days Delay)
   THE PR. COMMISSIONER OF INCOME
   TAX-9 ..... Appella

   Through:
   versus
   UNISION HOTELS LTD. ..... Respon
   Through: Mr. Siddharth Garg, Adv.
   CORAM:
   HON'BLE MR. JUSTICE YASHWANT VARMA
   HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV
   ORDER

% 10.04.2024

1. We had in terms of our order dated 06 December 2017 admitted the appeal on the following question of law:

> "(i) Whether the Assessee was bound to deduct tax under Section 195(1) of the Income Tax Act, 1961 and in case it is failure to do so, it warranted disallowance under Section 48(a) (i) of the Act? "

2. While passing the aforesaid order, we had also taken note of an identical question which forms subject matter of ITA 180/2014. The said appeal has since then come to be decided in terms of the judgment rendered on 16 February 2024 and in favour of the assessee.

3. Dealing with the question which stands posited, the Court in The Commissioner of Income Tax-II v. Mitsubishi Corporation India P. Ltd. [2024:DHC:1179] had held as follows:

> "19. Given this position, as correctly argued on behalf of the respondent/assessee, it was not obliged to deduct TAS from payments made to MC Metal (Thailand) and Metal One (Singapore). Chargeability to tax is the paramount condition for triggering the obligation to deduct TAS. The plain language of sub- section (1) of Section 195 brings this aspect of the matter to the fore. The said section reads as follows:

 "195. (1) Any person responsible for paying to a non-

resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) [or section 194LD] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") 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 the 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 in the case of interest payable by the Government or a public sector bank within the meaning of Clause (23D) of section 10 or a public financial institution within the meaning of that Clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O. Explanation 1.--For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.--For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has--

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India."

19.1 This is also the dicta of the judgment rendered by the Supreme Court in GE India Technology, as is evident from a perusal of the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 16/04/2024 at 21:26:21 following extract:

"7. Under Section 195 (1), the tax has to be deducted at source from interest (other than interest on securities) or any other sum (not being salaries) chargeable under the Income-tax Act in the case of non residents only and not in the case of residents. Failure to deduct the tax under this section may disentitle the payer to any allowance apart from prosecution under section 276B. Thus, Section 195 imposes a statutory obligation on any person responsible for paying to a non resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the Income-tax Act, to deduct Income-tax; at the rates in force unless he is able to pay income-tax thereon as an agent. The most important expression in Section 195(1) consists of the words "chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Income-tax Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the Income-tax Act. It may be noted that Section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to 'the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, □chargeable under the provisions of the Act . It is for this reason that vide Circular No. 728 dated 30-10-1995 that the CBDT has clarified that the tax deductor can take into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS. It may also be noted that Section 195(1) is in identical terms with Section 18(3B) of the 1922 Act The application of Section 195 (2) presupposes that the person responsible for making the payment to the non- resident is in no doubt that tax is payable in respect of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 16/04/2024 at 21:26:23 some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the ITO (TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the ITO (TDS) that the question of making an order under Section 195 (2) will arise. While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195...

8. If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in section 195(1). The said expression in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not as assessable, there is no question of TAS being deducted.

9. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions, however, the expression □sum chargeable under the provisions of the Act is used only in Section 195. Therefore, section 195 has to be read in conformity with the charging provisions, i.e., sections 4, 5 and 9. This reasoning flows from the words □sum chargeable under the provisions of the Act in section 195(1). The fact that the revenue has not obtained any information per se cannot be a ground to construe section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if, the Contention of the Department was accepted it would must obliteration of the expression "sum chargeable under the provisions of the Act" from section 195(1) Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the Income-tax Act. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the income- tax Act by which a payer can obtain refund. Section 237 read with section 199 implies that only the recipient of the sum, i.e., the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax As stated hereinabove, Section 195(1) uses the expression "sum chargeable under the

provisions of the Act." We need to give weightage to those words. Further, section 195 uses the word „payer and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under Section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The abovementioned contention of the Department is based on an apprehension which is ill founded. The payer is also an assessee under the ordinary provisions of the Income tax Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income-tax Act for the said sum as an "expenditure". Under section 40(a) inserted vide Finance Act, 1988 with effect from 1- 4-1989, payment in respect of royalty, fees for technical services or other sums chargeable under the Income-tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the Income-tax Act. This This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 16/04/2024 at 21:26:24 provision ensures effective compliance of section 195 of the Income-tax Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the Income-tax Act. In a given case where the payer is an assessee he will definitely claim deduction under the Income-tax Act for such remittance and on inquiry if the Assessing Officer finds that the sums remitted outside India comes within the definition of royalty or fees for technical service or other sums chargeable under the Income-tax Act then it would be open to the Assessing Officer to disallow such claim for deduction.

[Emphasis is ours] 19.2. The reliance on the judgment rendered by the Supreme Court in Transmission Corporation of AP Ltd. v. CIT is misplaced, as that was a case involving a composite transaction where the trading receipt was embedded with a component of income. This is evident upon perusing the following extracts from G.E. India Technology, whereby the said aspect has been discussed:

"Applicability of the judgment in the case of Transmission Corporation (supra)

10. In Transmission Corpn. of AP Ltd.'s case (supra) a non- resident had entered into a composite contract with the resident party making the payments. The said composite contract not only comprised supply of plant, machinery and equipment in India, but also comprised the installation and commissioning of the same in India. It was admitted that the erection and commissioning of plant and machinery in India gave rise to income taxable in India. It was, therefore, clear even to the payer that payments required to be made by him to the non-resident included an element of income which was exigible to tax in India. The only issue raised in that case was whether TDS was applicable only to pure income payments and not to composite

> payments which had an element of income embedded or incorporated in them. The controversy before us in this batch of cases is, therefore, quite different. In Transmission Corpn. of AP Ltd.'s case (supra) it was held that TAS was liable to be deducted by the payer on the gross amount if such payment included in it an amount which was exigible to tax in India. It was held that if the payer wanted to deduct TAS not on the gross amount but on the lesser amount, on the footing that only a portion of the payment made represented "income chargeable to tax in India", then it was This is a digitally signed order.

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[Emphasis is ours]

4. Accordingly and for reasons assigned therein, we dismiss the instant appeal.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

APRIL 10, 2024/p This is a digitally signed order.

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