Bj Services Company Middle East Ltd. vs Asstt. Cit (Osd), Range-1, Dehradun on 30 September, 2005

Equivalent citations: [2005]4SOT633(DELHI)

ORDER

By the Court

1. This is a bunch of 15 appeals by the assessee as an agent of the employees mentioned in the caption of this order filed against separate orders of the learned CIT(A)-I, Dehradun for the assessment year 2003-04. Since the issue involved in these appeals is identical, these were heard together and are being disposed of by this consolidated order for the sake of convenience.

2. In all these appeals, the assessee has raised the following identical ground :

> "That the learned CIT(A) erred in law and on facts in upholding tax perquisite grossing up to be on multiple stage and not on single-stage grossing up."

3. The facts common to all the cases are that the assessee had filed original returns of income in all the cases on 19-9-2003 as agent of the persons mentioned in the caption of the order who were employees of the assessee and in the returns of income the assessee had declared income from salary. As per employment agreements made with the employees, the assessee had undertaken to pay tax on the remuneration paid to the employees in India. In the original returns of income filed, the assessee had declared salary income on the basis of multiple grossing up of tax as per provision of section 195A. Subsequently the assessee revised the returns in all the cases on 2-12-2003 reducing the total income on the basis of single stage grossing up. During the course of assessment proceedings, the assessing officer called upon the assessee to explain the reasons for reducing income in all the cases by filing revised returns. The assessee submitted that revised returns have been filed on the basis of the judgment of jurisdictional High Court of Uttaranchal in the case of CIT v. ONGC as an agent of Cooper Services Intl. Inc. (2004) 265 ITR 129 (Uttaranchal). It was submitted that income was revised by applying single stage grossing up while original returns were filed on the basis of multiple grossing up of tax. However, the assessing officer observed that the judgment of Uttaranchal High Court in the case of ONGC (supra) was not applicable to the facts of the present cases as in the case relied upon by the assessee, profit was to be computed as per deeming provisions of section 44BB of the Income Tax Act, 1961 (in short 'the Act'). In the present case, the income was admittedly taxable under the head 'salary'. The assessing officer also relied on the decision of Delhi High Court in the case of Frank Beaton v. CIT (1985) 156 ITR 161 (Del) and observed that in a case where agreement for employment provided that employer shall pay all taxes in respect of salary paid to employees, the entire tax calculated in accordance with the provisions of section 195A will form part of the salary income. Accordingly, the assessing officer held that cost on account of tax on tax required to be added to the income by applying multiple grossing up of tax. He also referred to provisions of section 198 as per which all sums of tax deducted at source shall, for

the purpose of computing the income of assessee, be deemed to be income received. He observed that in the present case the assessee had deducted the tax at source on the salary income paid to aforesaid employees and, therefore, such sums of TDS formed part of the salary income of the assessee. Accordingly, the assessing officer included tax paid on salary income by an employer in the total income by applying multiple grossing up of tax.

4. Being aggrieved, the assessee filed appeals in all the above cases. The submissions made before assessing officer were reiterated. Reliance was also placed on the judgment of Uttaranchal High Court in the case of ONGC (supra). However, the learned CIT(A) decided the appeals in a summary manner by adopting the reasoning given by the assessing officer that the judgment of jurisdictional High Court in the case of ONGC (supra) was not applicable to the facts of the present cases. Accordingly he upheld the orders of the assessing officer for including the tax on tax in the salary income on the basis of multiple grossing up of tax. Aggrieved further, the assessee has now filed these present appeals.

5. The learned AR Shri R. Ganeshan submitted that the issue involved in the present appeals is fully covered by the following decisions of ITAT Delhi Bench :

> 1 . ITO, Special Ward-I, Dehradun v. ONGC as agent of Mr. V.T. Arasenko, ONGC Dehradun [IT Appeal No. 4723 (Delhi) of 1990] for the assessment year 1988-89 (copy placed at pages 1 to 5 of the paper book).
>
> 2. Hughes Services (EE) (P.) Ltd as Representative of assessee of Mr. Agmedio J. Tumanda v. Asstt. CIT, Dehradun [IT Appeal No. 1924 (Delhi) of 1997] for the assessment year 1993-94 (copy placed at pages 6 to 9 of the paper book).
>
> 3. M/s Hughes Services (Ear East) (P.) Ltd. as representative of assessee for Mr. Nahmedo Allan v. Asstt. CIT, Dehradun [IT Appeal No. 1918 (Delhi) of 1997] for the assessment year 1993-94 (copy placed at pages 10 to 13 of the paper book).
>
> 4. ITO, Special Ward (Asstt.) Range-I, Dehradun v. Hughes Services (EE) (P.) Ltd as agent of Mr. Edgar David Mark [IT Appeal No. 2111 (Delhi) of 1994] for the assessment year 1992-93 (copy placed at pages 14 to 16 of the paper book).
>
> 5. Huges Services (EE) (P.)Ltd as representative assessee of Mr. Stephen J. Strickland v. Asstt. CIT/Dy. CIT (Asstt.) Range, Dehradun [IT appeal No. 1926 (Delhi) of 1997] for the assessment year 1993-94 (copy placed at pages 17 to'20 of the paper book).
>
> 6. He drew our attention to copy of employment agreement placed at pages 21-22 of the paper book. He referred to clause 2 on page 22 of the agreement, as per which it was the responsibility of the assessee to pay tax on the salary paid to the employee. However, he submitted that taxes on income were to be included in the income of the assessee of single stage basis and not on multiple grossing up basis. However, he fairly conceded before us that the judgment of Uttaranchal High Court in the case of

ONGC (supra) was not applicable to the facts of the present cases as the issue involved in that case related to computation of profit under the deeming provisions of section 44BB i.e. income derived by non-resident company from oil exploration contracts etc. But in the present cases there is no doubt that the assessee was the agent of the employees for which assessee had undertaken the responsibility of paying tax on the salary income as per terms of the Agreement. Moreover provisions of section 195A were not applicable. in the case before Uttaranchal High Court but in the present cases section 195A is applicable. However, he submitted that tax has to be computed by applying single stage grossing up of income and not multiple grossing up of income. Thus, he submitted that the orders of the CIT(A) may be set aside the claim of the assessee for grossing up of income on single stage basis should be accepted as already decided by the Tribunal in the aforesaid case.

7. The learned Departmental Representative, Shri B.P. Mishra, on the other hand heavily relied on the orders of the authorities below. He submitted that in these cases, the assessee had filed original returns of income on the basis of multiple grossing up of tax. Subsequently, these returns were revised on the basis of the judgment of the Uttaranchal High Court in the case of ONGC (supra). He submitted that the learned counsel has himself conceded before the Bench that the judgment of the Uttaranchal High Court in the case of ONGC (supra) is not applicable to the present cases. He submitted that none of the decisions of the Tribunal relied upon by the learned counsel is applicable to the facts of the present cases. He submitted that in all these cases, the issue related to income, which was exempt under section 10(6)(viia) of the Act. Unlike the present cases, such income was not taxable. But in the present cases, assessee had itself declared income from salary and was liable to tax in the hands of the assessee as an agent of the above-mentioned employees. He further submitted that as per provisions of section 195A, tax paid by the employer as, per terms of agreement is liable to be included in the income of the assessee in such a manner that after deduction of tax thereon, the income should be equal to the net amount payable under such agreement. This necessarily includes multiple grossing up of income. He relied on the decision of Delhi High Court in the case of Frank Beaton v. CIT (1985) 156 ITR 16 (Del). He particularly drew our attention to sub-para (ii) of para 4 on page 3 of the assessment order. Thus, he has submitted that the orders of the CIT(A) do not merit any interference.

8. We have heard both the parties and given our thoughtful consideration to the rival contentions, examined the facts, evidence and material placed on record. We have also gone through the orders of the authorities below. The undisputed facts of these cases are that the assessee was an agent of the aforesaid employees and as per terms of agreement, the employees were entitled to tax free remuneration in India and it was the responsibility of the assessee to pay tax on such remuneration. There is also no dispute that in the returns of income filed, the assessee had declared income under the head 'salary' as an agent of the above-mentioned persons. There is also no dispute of the quantum of salary income computed in the present cases except

whether the cost of tax paid by the assessee is to be included in the income of employees on the basis of single stage grossing up or on multiple grossing up of tax i.e. by including the tax on tax. Whatever the method is applied, i.e., by multiple grossing up or single stage grossing up, the responsibility for payment of such tax is also undisputedly of the assessee. The provisions of the section 195A were inserted in the statute by the Finance Act, 1987 with effect from 1-6-1987. It shall be relevant to reproduce hereunder the provisions of section 195A which read as under :

"195A. Income payable 'net of tax'[In a case other than that referred to in sub-section (1A) of section 192, where under an agreement] or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement."

9. From the bare reading of the aforesaid section, it is obvious that these provisions are applicable to all cases where the person has undertaken to bear tax payable on income of a person under an agreement. The section provides that for the purposes of deduction of tax under those provisions, income shall be increased to such amount as would, after deduction of tax thereon at the rate in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement. The section does not say that in such a case income is to be increased to the extent of tax deducted at source. The section says that income shall be increased to such amount as after deduction of tax thereon at the rates in force applicable to the income be equal to the net amount payable under such agreement or arrangement. In the case of Emil Webber v. CIT (1993) 200 ITR 483 (SC), the facts before the Hon'ble Apex Court were that assessee was not employee of Indian concern. He was a foreign personnel whose services were provided for setting up plant in India and as per agreement, salary paid to such person was to free of tax. The assessee had claimed that tax paid on income of such person was not integral part of salary income and hence not taxable. The assessing officer included tax on such income as part of salary and taxed the same. On these facts, it was held that since the person was not an employee of the assessee, such tax paid by the assessee could not be taxed under the head 'salary'. Nevertheless, the same was income under section 2(24) of the Act liable to tax under the head 'Income from other sources'. The issue whether cost of tax is to be computed on the basis of single stage or multiple basis was not before the Supreme Court. The court held that the tax paid by an Indian concern pursuant to agreement with foreign concern was income of assessee taxable under the head 'Income from other sources'. In the present case undoubtedly the income as declared and as assessed falls under the head ,salary' and, therefore, the tax paid by an assessee under an agreement forms part of the salary income liable to tax in the hands of the assessee.

10. This issue also came to be considered by the Delhi High Court in the case of Frank Beaton (supra). The facts of the case before the Delhi High Court were that an assessee a non-resident was the Area Manager of an Australian Airways Company wholly owned by the Government of Australia.

As per terms of agreement, tax on the salary and allowance paid to the Manager was the responsibility of the company. The issue before the Hon'ble High Court was to determine liability of an Indian Company in respect of tax-free salary paid to a non-resident employee. On these facts it was held that the scope of company's liability to pay tax had to be determined on an interpretation of the agreement between the assessee and the company. First of all it was to be determined, what was the taxable salary of the assessee as if it was not tax-free? On this amount so determined, the tax had to be calculated and only this amount of tax the company had to pay. Any additional tax due, as a result of addition of the tax payable by the company, had to be paid by the assessee, as there was no agreement on the part of the company to pay tax on tax. However, in the present case as per terms of agreement, the entire tax payable on the income of employee is to be borne by the assessee itself. Now the question that requires to be decided is that the income of the assessee's is required to be increased by including tax on income or also tax on tax on the income of the employee.

11. From the facts mentioned above, it is seen the main plea of the assessee before the authorities below was that case of the assessee was covered by the decision of Uttaranchal High Court in the case of ONGC (supra). The learned CIT(A) has summarily decided the appeals without passing a reasoned order. Be that as it may, the learned counsel has conceded before us that provisions of section 195A are different from the provisions of section 44BB. Section 44BB provides for profit under the deeming provisions at the rate of 10 per cent though in reality the net result in the case of recipient could be a loss. But section 195A deals with cases of real income and not under the deeming provisions of the Act. The object of insertion of section 195A was explained by Circular No. 495 dated 22-9-1987. As per this Circular, it was explained that section 195A provided for grossing up of tax only if it formed part of the income. In case of royalty etc. paid to a foreign company the same was not treated as part of the income of the foreign recipient, under section 10(6A) of the Act and therefore, the same did not form part of the total income. Grossing up of tax was not applicable in respect of payments covered under section 10(6A) of the Act. Similarly, the tax portion of the employer to the extent, it is exempt under section 10(6)(viia), was not to be grossed up for the purpose of tax deduction at source. Thus it is clear that section 195A which provides for grossing up of income wholly if it forms part of the total income as in the case. Therefore, we agree with the learned AR that the judgment of Uttaranchal High Court in the above case is not applicable to the facts of the present case. Now it is to be seen whether the cases are covered by the decisions of ITAT, Delhi Bench cited above which were neither cited before the authorities below nor considered by them.

12. We have referred to the decisions of ITAT Delhi Bench in the cases relied upon by the learned AR. In the case of Hughes Services (EE) (P.) Ltd. v. Asstt. CIT [IT Appeal No. 1924 (Delhi) of 1997] for the assessment year 1993-94, the issue involved was whether the perquisite value of boarding was liable to tax as income from other source. Tribunal decided the matter in favour of the assessee and against the revenue by relying on the decision on ITAT Delhi (Special Bench) in the case of SAIPEM Spa v. ITO (2001) 76 ITD 101 (Del-HC)(SB). It was held that boarding provided to the assessee in steel bunker which the employee could not claim as the matter of right could not be considered as benefit or perquisite. Similar view was taken in Hughes Services (Ear India) (P.) Ltd. v. Asstt. CIT [IT Appeal No. 1918 (Delhi) of 1997] for the assessment year 1993-94, in the same case by ITAT Delhi Bench (SMC) where the matter was decided by relying on the decision of ITAT Delhi

(Special Bench) in the case of SAIPEM Spa v. ITO (2001) 76 ITD 101 (Del-HC)(SB). But this is not the issue before us.

13. However, the issue regarding grossing up i.e., whether it should be on the basis of single stage grossing up or multiple grossing up also came to be considered in the above-mentioned cases and also in the case of ITO, Special Ward 1, Dehradun v. ONGC as agent of Mr. V T Arasenko [IT Appeal No. 4723 (Delhi) of 1990] for the assessment year 1988-89. The Tribunal by relying on the earlier decision of the ITAT, Delhi Bench in IT Appeal No. 4758 (Delhi) of 1990 etc, held that grossing up was to be done on single stage basis and not on multiple grossing up basis. However, a copy of this decision, where reasoning has been given for taking this view, has not been placed before us. It is also not known whether the provisions of section 195A were considered in that order or income fell in the category of section 10(6) of the Act. As stated above, provisions of section 195A, which provide for grossing up are not applicable to income of the category under section 10(6). Further, we also do not know whether the decision of Delhi High Court in the case of Frank Beaton (supra) was cited by the parties and considered by the Tribunal or not. On the other hand the main plank of the assessee's argument before the authorities below was that the case was covered by the decision of Uttaranchal High Court in the case of ONGC (supra). This plea no longer survives because the learned counsel himself conceded before us that the decision is not applicable to the facts of the present cases. Besides the learned CIT(A) has also decided the appeals in a summary manner without passing a reasoned orders. The decisions of the Tribunal now cited before us were not cited before the learned CIT(A) and the order of the Tribunal where detailed reasoning was given has not been placed before us. In the light of these facts and circumstances of the case, we consider it fair and appropriate to set-aside the orders of CIT(A) and restore the appeals to his file for deciding the same afresh as per law and after allowing proper and reasonable opportunity to both the parties. While re-deciding the appeals, the learned CIT(A) shall consider the decisions of ITAT relied upon by the learned counsel in the light of provisions of section 195A of the Act and assessee shall also furnish a copy of the order of the Tribunal in the IT Appeal No. 4758 (Delhi) of 1990 etc. where reasoning was given for applying single stage grossing up. We order accordingly. The respective ground of appeals in " the cases is treated as allowed for statistical purpose.

14. In the result all the appeals are treated as allowed for statistical purposes.

15. This decision was announced in the open court on 30-9-2005.