Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 4 OF 2024

The Assistant Commissioner of Income Tax
Central Circle, Pundalik Niwas,
Rua de Qurem, Panaji Goa. … Appellant

Versus

Sociedade de Fomento Industrial Pvt. Ltd.,
Villa Flores de Silva, Erasmo Carvalho Street,
Margao Goa 403 601.
PAN: AABCS8860Q …Respondent

Ms Susan Linhares, Standing Counsel for the Appellant.
Mr Nishant Thakkar with Ms Linette Rodrigues and Ms J. Amalsadvala, Advocates for the Respondent.

CORAM: M. S. KARNIK &
VALMIKI MENEZES, JJ

DATED : 18th JUNE 2024

JUDGMENT (Per M. S. Karnik, J)

1. This appeal challenges the order dated 12.09.2022 passed by the Income Tax Appellate Tribunal (Tribunal for short) Panaji Bench, in ITA No.105/PAN/2018 for Assessment Year 2010-2011. The decision is assailed by the Appellant-Revenue.

2. The Respondent Company e-filed its return of income on 14.10.2010 declaring a total income of Rs.570,13,34,020/-. The same was processed under Section 143(1) of the Income Tax Act, 1961 (IT Act) on 19.05.2011. The case of the Respondent was selected for

scrutiny under CASS. Accordingly, a notice under Section 143(2) dated 24.08.2011 was issued and served on the Respondent. In response, the Respondent filed details called for by the notice.

3. The Assessment Order under Section 143(3) of the IT Act, came to be passed on 13.03.2013 determining the income of the Respondent at Rs.596,87,21,240/- *inter alia* making the following additions/disallowances:

(a) STCCG treated as business income Rs.191,11,60,784/-;

(b) Disallowance under Section 14A r/w 8D… Rs.105,21,316/-;

(c) Disallowance of expenditure incurred abroad on account of supervision charges amounting to Rs.117,09,419/- and incurred abroad on professional & consultancy fees amounting to Rs.5,77,23,014/-;

(d) Disallowance of exchange loss of Rs.8,65,74,413/- being conversion of US Dollar currencies to Indian currency;

(e) Disallowance of Rs.31,92,000/- being expenditure incurred on the purchase of two ambulances and donation of Rs.20,00,000/-;

(f) Disallowance of Rs.81,16,257/- being expenditure incurred on repair & renovation of two temples;

(g) Disallowance of Rs.30,28,002/- being enhancement of value of closing stock.

4. Aggrieved by the order dated 13.03.2013, the Respondent preferred appeal before the Commissioner of Income Tax (Appeals). The Commissioner (Appeal) vide order dated 29.12.2017 upheld the order of the Assessing Officer (AO for short) on the following issues:-

(i) STCG treated as business income Rs.191,11,60,784/-;

(ii) The second issue of disallowance under Section 14A r/w 8D Rs.105,21,316/-, the CIT (A) upheld the disallowance under Rule 8D(2)(iii) in principle but directed the AO to reduce the amount of investment in Sesa Goa Ltd shares from the average investment and rework the disallowance under Section 14A r/w 8D and thereby partly allowed the Respondent's claim;

(iii) On the third issue of expenditure incurred abroad on account of supervision charges, Rs.117,09,419/- and Rs.5,77,23,014/-, the CIT (A) upheld the order of the AO;

(iv) On the fourth issue of disallowance of exchange loss of Rs.8,65,74,413/-, the

addition made by AO was deleted holding that the loss being revenue is an allowable expenditure under Section 37(1) of the Act;

(v) On the fifth & sixth issue of disallowance of Rs.31,92,000/- being expenditure incurred on purchase of two ambulance and donation of Rs.20,00,000/- and Rs.81,16,257/- being expenditure incurred on repair and renovation of two temples, the CIT (A) upheld the addition of donation of Rs.20,00,000/- and Rs.81,16,257/- and deleted the balance addition of Rs.31,92,000/-;

(vi) The seventh issue of disallowance of Rs.30,28,002/- being enhancement of value of closing stock, the CIT (A) directed the AO to enhance the opening stock by the amount for AY 2011-12 and allowed the Respondent's ground.

5. Aggrieved by the CIT (A)'s order dated 29.12.2017, the Revenue as well as the Respondent preferred further appeal before the Tribunal.

6. The Tribunal vide order dated 12.09.2022 treated STCG as business income and upheld the decision of the AO. The Tribunal dismissed the Respondent's ground by relying on the Supreme Court's decision in the case of ***Raja Bahadur K. N. Singh, 77 ITR 253 SC.*** The disallowance of Rs.105,21,316/- under Section 14A r/w 8D was upheld and the AO was directed to re-compute the disallowance as per the directions of the CIT (A). The Tribunal held that the Respondent was not liable to deduct tax at that time and thereupon opined that the disallowance under Section 40(a)(ia) could not be made thereby allowing the Respondent's ground of appeal. The ground of contribution/donation towards the construction of the school building was allowed. The Revenue's appeal on the issue of exchange loss was dismissed.

7. According to Ms Susan Linhares, learned counsel for the Revenue, the order dated 12.09.2022 passed by the Tribunal is contrary to the provisions of the IT Act. The present appeal is therefore preferred under Section 260A of the IT Act, 1961 on the following substantial questions of law:

> 1. Whether on the fact and in the circumstances of the case and in law, the Hon'ble ITAT erred in deleting the addition of Rs. 6,94,32,433/- made on account of disallowance under Section 40(a)(ia) of the IT Act, 1961 as the applicability of the

amendment is retrospective in nature and the legislative intent from the beginning, much before the explanation to Sec. 9(1)(vii) introduced in the Finance Act, 2010 was that the income of a non-resident shall be deemed to accrue or arise in India and shall be included in his total income.

2. Whether on the fact and in the circumstances of the case and in law, the Hon'ble ITAT erred in deleting the addition of Rs. 81,16,257/- made on disallowance of expenditure on account of renovation of temples incurred for establishing cordial relations with the villagers as there is nothing on record to suggest that the same is allowable business expenditure of revenue nature.

3. Whether on the fact and in the circumstances of the case and in law, the Hon'ble ITAT erred in deleting the addition of Rs. 20,00,000/- made on disallowance of donation given to school for building construction for establishing cordial relations with the villagers as there is nothing on record to suggest that the same was allowable business expenditure of revenue nature.

8. Assailing the impugned order, Ms Susan Linhares submitted that the Tribunal erred in appreciating Explanation 2 to Section 9(1)(vii) of the Act in its correct perspective, which is retrospective in nature and the Legislative intent from the beginning much before the Explanation was introduced in Finance Act, 2010. According to learned counsel, the Legislative intent always was that the income of the non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) of Section 9 and the same shall be included in his total income, whether or not (a) the non-resident has a residence or place of business or business connection in India or (b) the non-resident has rendered services in India.

9. It is then submitted by the learned counsel for the Revenue that the Tribunal erred in deleting the additions towards contribution given to the construction of the school. According to the learned counsel, if any bogus or false claim is made, the same would not have any bearing on determining whether the expenditure is capital or revenue in nature. Further, the acquisition/creation of capital is not a pre-condition for expenditure to be classified as capital in nature.

10. Learned counsel for the Revenue invited our attention to the order passed by the CIT (A). She relied upon the reasons given by

the CIT (A) in the order dated 29.12.2017 in support of her submissions to contend that the Appeal involves substantial questions of law.

11. On the other hand, Mr Nishant Thakkar, learned counsel for the Respondent Company argued in support of the impugned order. Our attention is invited to the findings recorded by the Tribunal. It is submitted that the findings cannot be said to be perverse or contrary to law and as such no substantial question of law arises in the present appeal. Reliance is placed on the decision of the Supreme Court in ***Engineering Analysis Centre of Excellence (P.) Ltd., Vs Commissioner of Income Tax [2021] 125 Taxmann. com 42 (SC)*** to contend that the Respondent cannot be obligated to do the impossible i.e. to apply a provision of a statute when it was not actually and factually in the statute book. Reliance is also placed on the decision of this Court in ***Principal Commissioner of Income Tax, Panaji Goa Vs Ajit Ramakant Phatarpekar [2021] 124 Taxmann.com 124 (Bombay***) in support of his submission. It is contended that if in a similar case, the decision has been accepted by the Revenue, then it is not open for the Revenue to lay a challenge to the impugned order on the same question which is squarely answered against the Revenue.

12. Heard the learned counsel for the parties. We have perused the paper book.

13. We find that during the previous year 2009-2010 (relevant to Assessment Year 2010-2011) the Respondent Assessee made payments aggregating Rs.6,94,32,433/- to the non-residents towards the charges for sampling and analysis of cargo at the destination port as well as for professional and consultancy fees. The Respondent Assessee was of the view that since the amounts were not taxable under the provisions of the IT Act, 1961 [as also under the provisions of the relevant Double Tax Avoidance Agreements (DTAA)], it was not obligated to deduct tax at source from the payments made thereto. The belief of the Respondent Assessee was based on the following premise:

(a) the aforesaid services were analytical and professional in nature and did not fall within the meaning of the phrase "*fees for technical services*" and

(b) in any case, since the services were rendered outside India, they would neither accrue or arise nor be deemed to accrue or arise in India as held by the Supreme Court in ***Ishikawajma – Harima Heavy Industries Ltd., Vs DIT [2007] 288 ITR 408 (SC)***.

14. The AO and CIT (A) rejected the aforesaid contentions of Respondent Assessee. While dealing with the submission of the Respondent Assessee that services were analytical and professional in nature and did not fall within the meaning of the phrase "*fees for technical services*", the AO and CIT (A) placed reliance on Explanation to Section 9(1)(vii) of the IT Act and held that analytical and professional services would fall within the purview of the phrase as defined therein. In answer to the submission that since the services were rendered outside India they would neither accrue or arise nor be deemed to accrue or arise in India, the AO and CIT (A) placed reliance on the retrospectively inserted Explanation to Section 9 of the Finance Act, 2010 with effect from 01.06.1976 to hold that in view of the retrospective amendment, the decision of *Ishikawajma* (supra) would no longer be of assistance to the Respondent Assessee. It therefore held the amounts paid to the non-resident service providers to be taxable in India and the Respondent Assessee was found to have defaulted in its obligation of deducting tax at source; consequently, disallowance of the entire expenditure aggregating to Rs.6,94,32,433/- was made by the AO under Section 40(a)(ia) of the IT Act and affirmed by the CIT (A).

15. The Respondent Assessee in its appeal before the Tribunal reiterated that the Explanation to Section 9 was inapposite in as

much as the Finance Act, 2010 (inserted Explanation retrospectively w.e.f. 01.06.1976) had received the Hon'ble President's assent only on 08.05.2010 i.e. after the end of the Financial Year and therefore, Explanation was factually not on the statute when the payments were in fact made during the previous year 2009-2010. It was therefore, urged that expecting the Respondent to deduct tax at source from the payments which were not taxable on the date on which the payments were made, but became taxable by virtue of retrospective amendment would be expecting it to do the impossible. In support of this contention, the Respondent Assessee relied upon the decision of the coordinate Bench of the ITAT in ***ACIT Vs Ajit Ramakant Phatarpekar [2015] 56 Taxmann.com 357 (Panaji)***, wherein the Assessee therein had made identical payments during the previous year 2009-2010 and the ITAT held that Assessee could not be expected to deduct tax at source from the payments which became taxable owing to the retrospective amendment.

16. The Tribunal, in so far as the submission that the services were analytical and professional in nature and did not fall within the meaning of the phrase "*fees for technical services*" agreed with the view expressed by the AO and CIT (A). The alternative plea of the Respondent Assessee was that since the services were rendered outside India they would neither accrue or arise nor be deemed to

accrue or arise in India. The Tribunal agreed with the view expressed by the coordinate Bench in the case of *Ajit Ramakant Phatarpekar* (supra) and held that the Respondent Assessee could not be expected to deduct tax at source from payments which became taxable owing to a retrospective amendment.

17. Having carefully perused the order of the Tribunal and upon considering the materials on record, we do not find favour with the submission of learned counsel for the Revenue that "since the amendment made by the Finance Act, 2010, was retrospective, the payments made by the Respondent Assessee were taxable in the hands of the recipients and consequently, the Respondent Assessee was obliged to deduct tax at source from the payments made". It is not disputed that the decision of the coordinate Bench of the Tribunal in *Ajit Ramakant Phatarpekar* (supra) has been accepted by the Department, which held that an Assessee could not be expected to deduct tax at source from payments that became taxable owing to retrospective amendment. The order of this Court in ***PCIT Vs Ajit Phatarpekar [2020] 429 ITR 319 (Bom.)*** is an indicator that the order passed by the Tribunal in the case of *Ajit Phatarpekar* (supra) has been accepted by the Department.

18. It is significant to note that the Supreme Court in *Engineering Analysis Centre of Excellence (P) Ltd.* (supra) has

dealt with two latin maxims, lex non cogit ad impossibilia, i.e. the law does not demand the impossible and impotentia excusat legem, i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of law is excused. The relevant portion of Para 81 of the decision in *Engineering Analysis Centre of Excellence (P) Ltd.* (supra) which is material reads thus:

> *"81. This question is answered by two latin maxims, lex non cogit ad impossibilia, i.e., the law does not demand the impossible and impotentia excusat legem, i.e., when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused. Recently, in the judgment in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, [Civil Appeal No.20825 of 2017, dated 14.07.2020] delivered by this Court, this Court applied the said maxims in the context of the requirement of a certificate to produce evidence by way of electronic record under section 65B of the Evidence Act, 1872 and held that having taken all possible steps to obtain the certificate and yet being unable to obtain it for reasons beyond his control, the respondent in the facts of the case, was relieved*

of the mandatory obligation to furnish a certificate……..."

19. Their Lordships referred to previous judgments dealing with the doctrine of impossibility in the aforesaid decision. In Paras 82 and 85, the Supreme Court observed thus:

"82. As a matter of fact, even under the Income Tax Act, the High Court of Bombay has taken a view, applying the aforestated maxims in the context of the provisions of the relevant DTAAs, to hold that persons are not obligated to do the impossible, i.e., to apply a provision of a statute when it was not actually and factually on the statute book.

85. It is thus clear that the "person" mentioned in section 195 of the Income Tax Act cannot be expected to do the impossible, namely, to apply the expanded definition of "royalty" inserted by Explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment years in question, at a time when such explanation was not actually and factually in the statute."

20. We are satisfied that the Tribunal has rendered a finding which cannot be said to be perverse as it based on second principle enunciated by the Supreme Court.

21. We now deal with substantial question of law Nos. 2 and 3 regarding disallowance of expenditure on temple repairs and construction of school. During the previous year 2009-2010, the Assessee incurred the following community development expenses:

Sr. No.	Particulars	Amount
1	Major Renovation work of Mallikarjun Temple at Kavrem	51,52,568
2	Major renovation work of Sri Shantadurga Temple at Colombo	29,63,689
3	Purchase of Ambulance supplied to Emergency Management and Research Institute	15,96,000
4	Purchase of Ambulance supplied to Curchorem Community Centre	15,96,000
5	Donation paid to New English High School, Digas-Panchwadi for construction of school building	20,00,000
	Total	1,33,08,257

22. The AO disallowed the entire amount of expenditure of Rs.1,33,08,257/- by holding that the aforesaid expenditure is capital in nature. The CIT (A) allowed the expenses to the extent they were incurred for the purchase of ambulances i.e. amounting

to Rs.31,92,000/- -- item No.3 and 4 in the table above. The CIT (A) however, upheld the disallowance of the remaining expenses on the footing that they were "*huge*" i.e. disallowed items 1, 2 and 5 in the table above amounting to Rs.51,52,568/-, Rs.29,63,689/- and Rs.20,00,000/- respectively. The CIT (A) distinguished the decision of the Tribunal in ***Infrastructure Logistics Pvt. Ltd. Vs JCIT (196 ITD 153)*** relevant to Assessment Year 2009-2010 observing that the expenses incurred in the case of *Infrastructure Logistics Pvt. Ltd. (*supra) were "*small*".

23. Before the Tribunal, the Respondent Assessee submitted that the expenditure incurred was out of business exigencies in order to create and maintain good/cordial relations with the villagers residing around the mining and business activity area of the Assessee, that no capital asset came to be acquired and that the quantum of expense is an irrelevant consideration for determining the allowability of the said expenditure as the Act did not lay down any such restriction. It was submitted that so long as it has been incurred for the purposes of the business, the expenditure ought to be allowed.

24. The Tribunal found that as a matter of fact, the expenses were incurred by the Respondent Assessee on schools and temples situated in the villages surrounding the mining area, the expenses

were incurred out of business exigencies i.e. when the Assessee has to conduct the mining activity in the deep forest and village areas, the Assessee needs to maintain healthy relations with such villagers and create cordial relations with the villagers residing in the surrounding locality of the mining and business area, so that smooth business and mining activity can be undertaken; and in order to do so, the Assessee was required to incur such expenditure in the locality surrounding the mining and business area of the Assessee. The Tribunal found that no capital asset has been acquired by the Respondent Assessee by incurring the expenditure. The Tribunal, therefore, held that the expenditure was allowable as revenue expenditure.

25. The learned counsel for the Revenue urged that since the quantum of expenditure was huge, therefore, the expenditure ought to be treated as capital in nature and in view of the restriction against allowance of capital expenditure contained in Section 37(1) of the IT Act, the disallowance made by the AO ought to be reinstated. We do not find any merit in this submission of the learned counsel for the Revenue. We are of the opinion that no substantial question of law arises out of such a challenge. The findings of the Tribunal in Paras 33 and 34 of the impugned order deal with the submissions made by the Revenue exhaustively while concluding that the expenditure was for business/commercial

expediency, which is a finding of fact that does not raise any substantial question of law. The Tribunal in the facts of the present case, according to us, did not commit any error in holding that the quantum of expenses incurred is a wholly irrelevant consideration for the purpose of determining whether the expenses incurred are of capital or revenue in nature. The decision of the CIT (A) as regards the allowance of the expenditure incurred on the purchase of ambulances has been accepted by the Revenue and has not been agitated further. The expenditure incurred on the purchase of ambulances was allowed. However, the expenditure incurred on renovation and construction of temples/schools was disallowed. In the facts of the present case, we are inclined to agree with the Tribunal that it is not open for the Revenue to take a divergent stand with respect to the expenditure incurred on renovation and construction of temples/schools when it has allowed the expenditure on purchase of ambulances only based on the reason that the expenditure on schools/temples was huge. Factually, the Respondent Assessee has incurred expenses on the renovation and construction of schools/temples situated in the villages surrounding the mining area. The expenses were incurred out of business exigencies, the details of which are set out earlier. The Tribunal, therefore, committed no error in holding that the expenditure was the allowable business expenditure of a revenue

nature having found no capital asset had been acquired by the Respondent Assessee by incurring the expenditure.

26. We do not find any perversity with the findings of the Tribunal. No substantial question of law arises in the present appeal. Consequently, this appeal is liable to be dismissed and is hereby dismissed. There shall be no order as to costs.

VALMIKI MENEZES, J **M. S. KARNIK, J**