Court No. - 39

Case :- INCOME TAX APPEAL No. - 111 of 2018

Appellant :- The Commissioner Of Income Tax (Tds) And Another

Respondent :- Lalitpur Power Generation Co. Ltd.

Counsel for Appellant :- Gaurav Mahajan

Counsel for Respondent :- Dev Kaushik,Rahul Agarwal,Piyush Kaushik

With

Case :- INCOME TAX APPEAL No. - 104 of 2018

Appellant :- The Commissioner Of Income Tax (Tds) And Another

Respondent :- M/S Bajaj Energy Pvt. Ltd.

Counsel for Appellant :- Gaurav Mahajan

Counsel for Respondent :- Dev Kaushik,Rahul Agarwal,Piyush Kaushik

With

Case :- INCOME TAX APPEAL No. - 105 of 2018

Appellant :- The Commissioner Of Income Tax(Tds), Kanpur And Another

Respondent :- Lalitpur Power Generation Co. Ltd.

Counsel for Appellant :- Gaurav Mahajan

Counsel for Respondent :- Dev Kaushik,Rahul Agarwal,Piyush Kaushik

With

Case :- INCOME TAX APPEAL No. - 106 of 2018

Appellant :- The Commissioner Of Income Tax (Tds) And Another

Respondent :- M/S Bajaj Infrastructure Development Co. Ltd.

Counsel for Appellant :- Gaurav Mahajan

Counsel for Respondent :- Dev Kaushik,Rahul Agarwal,Piyush Kaushik

Hon'ble Saumitra Dayal Singh,J.

Hon'ble Shiv Shanker Prasad,J.

1. Heard Mr. Gaurav Mahajan, learned counsel for the revenue-appellant and Mr. Rahul Agarwal and Mr. Dev Kaushik, learned counsel for the assessee-respondent.

2. The above Income Tax Appeals have been filed under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the “Act”) against

the order dated 20th February, 2018 passed by the Income Tax Appellate Tribunal, Delhi Bench “C” New Delhi.

3. The facts are more or less identical in all the above appeals. For the sake of convenience, all appeals have been clubbed and heard together with the consent of the parties and are being decided by this common order. Learned counsel for the parties have been heard on the facts obtaining in Income Tax Appeal No. 111 of 2018 (Assessment Year 2013-2014).

4. Earlier, the appeal was admitted on Question nos. 1 and 2, as framed in the memo of appeal. Today, with the consent of the parties, those questions have been refined as below:

Question No. 1

Whether the Tribunal has erred in annulling the assessment order and reaching to a conclusion that Tax Deduction at Source (for short “TDS”) was required to be made under Section 194C of the Act and not under Section 194J of the Income Tax Act, 1961 without first dealing with the reasons and findings recorded by the assessing authority, as affirmed in first appeal?

Question No.2

Whether, in absence of proper books maintained to establish the exact expenditure incurred by the assessee in availing technical services, the Tribunal has erroneously granted relief to the assessee?

5. The facts found by the Tribunal are, the assessee was engaged in business of generation of power. It set up a 3 x 660 MW (Mega Watt) Super Critical Thermal Power Plant at District-Lalitpur, Uttar Pradesh. For that purpose, the assessee was incorporated as a Special Purpose Vehicle (for short “SPV”) by the State Government of Uttar Pradesh. Later, its ownership was transferred to a private company.

6. To set up that thermal power plant, the assessee entered into two sets of contracts. First, with Bharat Heavy Electric Ltd. (for short “BHEL”) to set up a Boiler Turbine Generator (for short “BTG”) and the second with

Carbery Infrastructure Pvt. Ltd. (for short “CIPL”) to set up Balance of Plant (for short “BOP).

7. The contract entered into between the assessee and the BHEL involved services of Transportation, Insurance, Erection, Installation, Testing and Commissioning of BTG, for consideration Rs. 689/- crores. Similarly, the contract with CIPL involved Erection, Installation and Commissioning of BOP for Rs. 197 crores.

8. It may be further noted, those two contracts included description and execution of other work as well, inasmuch as the contract with BHEL for BTG involved supply of BTG package equipments of value Rs. 5,311/- crores, whereas the contract for BOP with CIPL involved procurement and supply of equipments and civil constructions, structural works, engineering, information, design and drawings and project management of value Rs. 2008/- crores. The supply component under the two contracts entered into by the assessee with BHEL and CIPL do not form subject matter of dispute in these appeal proceedings.

9. On 19th June, 2014, individual orders came to be passed under Section 201 of the Act describing the assessee to be in default of deduction of TDS required to be made by it at the higher rate of 10% (under Section 194J of the Act) against the lower rate of 2% (under Section 194C of the Act) applied by the assessee, to the payments made by the assessee in each year, against the two contracts for the works done under the head of “services of Transportation, Insurance, Erection, Installation, Testing and Commissioning of BTG”, awarded to BHEL and also the work done under the head of “Erection, Installation and Commissioning of BOP”, awarded to CIPL.

10. Thus, under the assessment order dated 15th January, 2015 passed by the Assistant Commissioner of Income Tax (TDS), Noida for the Assessment Years 2012-2013, 2013-2014 and 2014-2015, demand of short deduction of TDS and the corresponding demand of interest were raised. The Assessment Orders were confirmed in appeal by common order dated 16th March, 2016, passed by the Commissioner of Income Tax (Appeals)-I, Noida.

11. Upon further appeal, the Income Tax Appellate Tribunal (for short "Tribunal"), vide its common order dated 20th February, 2018, has allowed the appeals preferred by the assessee. It has followed (*in toto)*, the order of a division bench of the Punjab and Haryana High Court in the case of **Pr. Commissioner of Income Tax, TDS-II, Chandigarh Vs. The Senior Manager (Finance), Bharat Heavy Electricals Ltd., Jhajjar, (2017) 390 ITR (P&H).**

12. Submission of the learned counsel for the revenue is, the assessing authority had made a detailed consideration of facts. He found that the assessee had not maintained any account to establish the actual payment made to BHEL for the work of Testing and Commissioning of BTG. Similarly, the assessee had not maintained separate account to establish the payment made to CIPL for Installation and Commissioning of BOP. Since payments for those works performed by the BHEL and CIPL fell under the head "fees for technical services" as defined under clause (b) of sub-section (1) of Section 194J of the Act, read with Explanation [2] to clause (vii) to sub-section (1) of Section 9 of the Act, the assessee was liable to deduct the Tax at Source/TDS, at the rate of 10% in terms of Explanation (b) to section 194J of the Act.

13. Relying on the reasoning given by the assessing authority, it has been vehementally urged, it cannot be denied that BHEL had performed Testing and Commissioning of BTG and similarly, CIPL had performed the work of Installation of Commissioning of BOP.

14. Since the payments made to BHEL and CIPL were "fees for the technical services", rendered to the assessee by BHEL and CIPL, the Assessing Officer had not erred in determining the default in deduction of TDS by the assessee. Insofar as the Tribunal has not recorded its independent reasoning to reverse the findings recorded by the assessing authority, the end conclusion drawn by the Tribunal is stated to be unsustainable in the eyes of law.

15. On the otherhand, learned counsel for the assessee would submit, the contracts awarded to the assessee to BHEL and CIPL were exactly identical to that awarded to BHEL, as was considered by the Punjab and

Haryana High Court in **Pr. Commissioner of Income Tax, TDS-II, Chandigarh Vs. The Senior Manager (Finance), Bharat Heavy Electricals Ltd., Jhajjar (supra).** Referring in *extenso* to discussion contained in the above report, heavy reliance has been placed on the fact similarity, in that case and the present.

16. Insofar as it is undisputed to the revenue-appellant (in the present case) that the contract awarded to BHEL was for BTG and that awarded to CIPL was for BOP, the reliance placed by learned counsel for the revenue to non-specification or quantification of value of sub-components or parts of the contracts awarded to the BHEL and CIPL is inconsequential. In the first place, those contracts remained indivisible or composite. The revenue authorities being obligated to assess income tax payable by the assessee, they could not have broken down that indivisible contract for wholly artificial reasons-to discover on assumptive basis, the alleged component of “fees for technical services”. In any case, it being undisputed to the assessing authority that the work awarded to the BHEL was for commissioning of BTG and that awarded to CIPL was for BOP, the contract clauses should have been read in light of that main object. In absence of any internal tool arising therefrom and in absence of any legal provision allowing the assessing authority to break down the indivisibility or composite nature and character of the contract, the exercise carried out by the assessing authority is described as erroneous and impermissible in law.

17. To that extent reliance has been placed on the decision of the division bench of the Karnataka High Court in the case of **Commissioner of Income Tax Vs. Bangalore Metro Rail Corporation Ltd., (2022) 449 ITR 431 (Karnataka)**.

18. Last, it has been submitted, the assessee was only a payer. The payees i.e. BHEL and CIPL were subjected to tax. Upon completion of their assessment, those payers were also issued certificates of full payment of tax due. Therefore, if at all the assessee may only be liable for delay in payment of TDS. Yet, liability of short deduction of TDS could not be imposed.

19. Having considered the submissions advanced by learned counsel for the parties and having gone through the records of the present appeal, in first place, it has not been disputed by learned counsel for the revenue that the essence the contract involved in the present case and that involved in the case of **Pr. Commissioner of Income Tax, TDS-II, Chandigarh Vs. The Senior Manager (Finance), Bharat Heavy Electricals Ltd., Jhajjar (supra)** were similar-to set up a thermal power plant. In both cases, the dispute arose upon a survey. That inconsequential similarity apart, it is undisputed that in both cases, the element of testing and commissioning of technical works etc. were part of the main contract-to set up a thermal power plant including therein the work of Transportation, Insurance, Erection, Installation, Testing and Commissioning of BTG and also Commissioning of BOP.

20. In view of the undisputed similarity between two cases, we find that the reasoning given by the division bench of Punjab and Haryana High Court in the case of **Pr. Commissioner of Income Tax, TDS-II, Chandigarh Vs. The Senior Manager (Finance), Bharat Heavy Electricals Ltd., Jhajjar (supra)** is relevant to the present facts as well.

21. Here we may take note of the reasoning of division bench of the Punjab and Haryana High Court in the case of **Pr. Commissioner of Income Tax, TDS-II, Chandigarh Vs. The Senior Manager (Finance), Bharat Heavy Electricals Ltd., Jhajjar (supra),** which is extracted herein below:

> *"21. These are usual clauses in such contracts. The testing, pre-commissioning, commissioning and post-commissioning are required to be carried out by a contractor to satisfy the customer that the work has been executed in a proper manner; that the equipment has been installed as required and that its performance meets the parameters specified in the contract. The personnel that are required to test and commission the plant and equipment perform their functions not under a contract for the supply of technical services to the customer, but to satisfy the customer on behalf of the contractor that the plant and equipment has been duly supplied as per the contractual specifications. Indeed, this entire exercise would require the deployment of technical personnel, but what is important to note is that the technical personnel are deployed not for and on behalf of the*

customer, but for and on behalf of the contractor itself with a view to ensuring that the contractor has supplied the equipment as per the contractual specifications. Everything done in this regard-id to this end and not to supply technical services to the customer.

22. The contract entered into between the respondent and each of the contractors, therefore, did not involve the supply of professional or technical services at least within the meaning of section 194J. The consideration paid under the contracts, therefore, was hot for the professional or technical services rendered by the contractors to the respondent. Section 194J is, therefore, not applicable to the present case.

23. It is not necessary to consider Mr. Putney's submission that the con tracts do not fall under section 194C. The submission if accepted would be self destructive of the Revenue for then the assessee would not have been liable to deduct tax at source at all and would, therefore, be entitled to a refund. As we mentioned earlier, section 194J is not a residuary clause. In other words, it is not that if a contract does not fall within the ambit of section 194C, it must be deemed to fall within the ambit of section 194J. Sections 194C and 194J are independent provisions. In view of our finding that the contract does not fall within section 194J, the dismissal of the appeal would follow in any event. The respondent has not denied that the present case falls under section 194C. Had the respondent contended that section 194C is also not applicable, it would have been necessary to consider whether the contract falls within the ambit of section 194C. As the respondent has accepted that it falls within section 194C and has complied with its obligations thereunder, we refrain from deciding the issue as to whether it falls within section 194C."

22. For the facts noted above, we are unable to persuade ourself to express any other opinion. We are in respectful agreement with the opinion of the Punjab and Haryana High Court in the case of **Pr. Commissioner of Income Tax, TDS-II, Chandigarh Vs. The Senior Manager (Finance), Bharat Heavy Electricals Ltd., Jhajjar (supra)** that the work of testing etc. had to be performed by the contractor not by way of independent work awarded to it but by way of execution of the whole contract that was to set up a thermal power plant.

23. Thus, Punjab and Haryana High Court has principally reasoned that the primary/dominant object of the contract would govern or subsume the

other object/clause therein. In absence of any internal tool shown to exist (in the contract), we are unable to reach an inference that the contracting parties i.e. assessee on one hand and BHEL and CIPL on the other, had intended to treat the work of Testing and Commissioning, separate/independent of the contract to set up BTG and BOP by those contracting parties. Further, in absence of any enabling law, it never became open to the taxing authorities to overlook the dominant object of the contract and reach to a conclusion, because part of the contract involved Testing, Commissioning etc., necessarily, there would exist component of “fees for technical services”, by necessary implication.

24. Then, the Karnataka High Court in **Commissioner of Income Tax Vs. Bangalore Metro Rail Corporation Ltd. (supra)** has further reasoned that an indivisible/composite contract may not be bifurcated to cull out any indivisible component of such contract, to make a higher deduction of tax at source.

25. Thus, that Court applied the principle of indivisibility of a composite contract. It may not be bifurcated to subject a part of the contract to higher TDS. Thus, that Court applied the principle of indivisibility of a contract, that may not be artificially dissected at the hands of a taxing authority, to the prejudice of the assessee.

26. On both principles noted above, we find ourself in agreement with the views expressed by the Punjab and Haryana High Court and Karnataka High Court in the cases of **Pr. Commissioner of Income Tax, TDS-II, Chandigarh Vs. The Senior Manager (Finance), Bharat Heavy Electricals Ltd., Jhajjar (supra)** and **Commissioner of Income Tax Vs. Bangalore Metro Rail Corporation Ltd. (supra).** Unless an external (legal tool) was available to the assessing authority under any of the provisions of the Act as may have allowed it the luxury to dissect an otherwise indivisible contract and/or unless an internal tool was seen to exist to allow that exercise to be made, a composite contract could not dissected by the assessing authority .

27. On plain reading, the contracts executed by the assessee with BHEL and CIPL were indivisible contracts for BTG and BOP, respectively. The

taxing authorities exist to apply the taxing statute to the proven facts of a case. Such facts are not for the taxing authority to imagine or presume or assume. Therefore, the burden existed on the revenue authorities to establish that they were enabled in law and also that the proven facts of the case permitted them divide an otherwise indivisible/composite contracts executed by the assessee with the BHEL and CIPL. Unless that exercise had been carried out by the assessing authority, no presumption was available in law.

28. Accordingly, the first question of law framed above is answered in negative i.e. in favour of the assessee and against the revenue.

29. In view of the above, question no.2 is left unanswered, at this stage.

30. The present appeal is **dismissed.**

31 There shall be no order as to costs.

(Shiv Shanker Prasad, J.) (Saumitra Dayal Singh, J.)

Order Date :- 16.11.2023

Sushil/-