IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI YOGESH KUMAR U.S, JUDICIAL MEMBER

ITA No. 2759/DEL/2023 [A.Y. 2020-21]

Ms. Padma Rao A – 34, Anand Niketan Ground Floor, New Delhi	Vs.	The C.I.T Ward – 61(1) New Delhi
PAN – ADMPR 3343 L		
(Applicant)		(Respondent)

Assessee By : Shri Ajay Vohra, Sr. Adv
Ms. Saumya Meehrotra, Adv
Shri Vivek Sharma, Adv

Department By : Shri V. K Dubey, Sr. DR

Date of Hearing : 16.01.2024
Date of Pronouncement : 30.01.2024

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 07.08.2023 by NFAC, Delhi pertaining to A.Y. 2020-21.

2. Though the assessee has raised as many as 27 grounds of appeal, but the substantive grievance is two-fold and the same read as under:

> "3. The impugned order has erred both on facts and in law, in making an addition of Rs. 3,00,00,000/- u/s 28(ii)(e) of the Act. The impugned order has wrongly applied section 28(ii)(e) of the Act in respect of the amount received which is a capital receipt.
>
> 17. That the 'either-or' approach adopted against the Appellant by the Income Tax Department [Le. invocation of section 28(ii)(e) against the Appellant or alternatively, section 56(2)(xi)against the Appellant] is against fundamental prudence of Income tax laws. It is settled law that heads of income are mutually exclusive (i.e. if an Assessee cannot be brought under a particular head of income and is not taxable by operation of the provisions for that head, she cannot be simultaneously/consecutively brought to tax under another head) [refer Nalinikant Ambalal Mody v. S.A.L. Narayan Row, CIT 1966 (61) ITR 428 (Se)]. That the present matter Is not covered under section 28(ii)(e) of the Act. Hence, the same cannot be then brought to tax under 56(2)(xi) of the Act by adopting an 'either! or' approach as done against the Appellant."

3. Representatives of both the sides were heard at length. Case records carefully perused. Relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules.

4. Briefly stated, the facts of the case are that the assessee is an individual who filed her Return of Income declaring an income of Rs. 18,51,090/- on 19.12.2020. Return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee. The main reason for scrutiny is that the assessee has claimed substantial amount of refund which needs verification.

5. During the course of scrutiny assessment proceedings, the Assessing Officer came to know that the assessee has received compensation from M/s Spiegel Verlag, Spiegel Publishers amounting to Rs. 3 crores which was claimed to be exempt by her u/s 4 of the Income-tax Act, 1961 [the Act, for short].

6. The Assessing Officer notice that the said compensation is not reflected in the profit and loss account submitted for the year under consideration. The Assessing Officer was of the firm belief that the said compensation is taxable u/s 28(ii)(e) of the Act read with the Board Circular No. 8/2018 dated 26.12.2018 and, accordingly, issued show cause notice asking the assessee to show cause as to why exemption claimed in respect of the said receipt on termination of contract amounting to Rs. 3 crores should not be treated as taxable receipt and be added back to the total income.

7. The assessee filed a detailed reply strongly contending that the compensation received is in the nature of capital receipt.

8. Reply of the assessee did not find any favour with the Assessing Officer who strongly relied upon the provisions of section 28(ii)(e) of the Act. The Assessing Officer also drew support from the provisions of section 56(2)(xi) of the Act and made addition of Rs. 3 crores.

9. Assessment was challenged before the ld. CIT(A) but without any success.

10. Before us, the ld. counsel for the assessee reiterated that the said compensation is not taxable under the Act. The ld. counsel for the assessee drew our attention to the relevant provisions of section 28(ii)(e) of the Act and vehemently contended that the said provision is not applicable on the facts of the case. Similarly, provisions of section 56(2)(xi) of the Act are also not applicable on the facts of the case. References were made to several judicial decisions placed in the case law paper book.

11. Supporting the assessment order and the order of the NFAC, the ld. DR strongly stated that the assessee has been changing her stand right from the assessment proceedings. It is the say of the ld. DR that

during the assessment proceedings, the assessee claimed exemption u/s 4 of the Act and took a different stand before the ld. CIT(A). Though the assessee had paid self-assessment tax on the said compensation, yet later on, she changed her stand and claimed refund. The ld. DR further stated that even before this Tribunal, the assessee is claiming to be a professional and yet the said compensation is not claimed as professional receipt.

12. We have given thoughtful consideration to the rival contentions. The root cause of the quarrel is clause (vi) of the Agreement place at page 118 of the Paper Book which, inter alia, provides:

> **"This agreement can be terminated by both sides through a notice of six weeks at the end of an annual quarter. If not renewed by January 31,2000, the agreement will end of April 30, 2000."**

13. Vide letter dated 22.02.2012, placed at pages 130 and 131 of the Paper Book, the assessee was informed as under:

DER SPIEGEL

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SPIEGEL-Verlag 20454 Hamburg

To:
Ms. Padma Rao
101, Golf Links
New Delhi - 110013
India

By Registered Post

22 February 2012

Sub.: Expiry of Contract dated April 9, 1998 (as amended by amendment agreement dated February 24, 2011) with effect from May 1, 2012

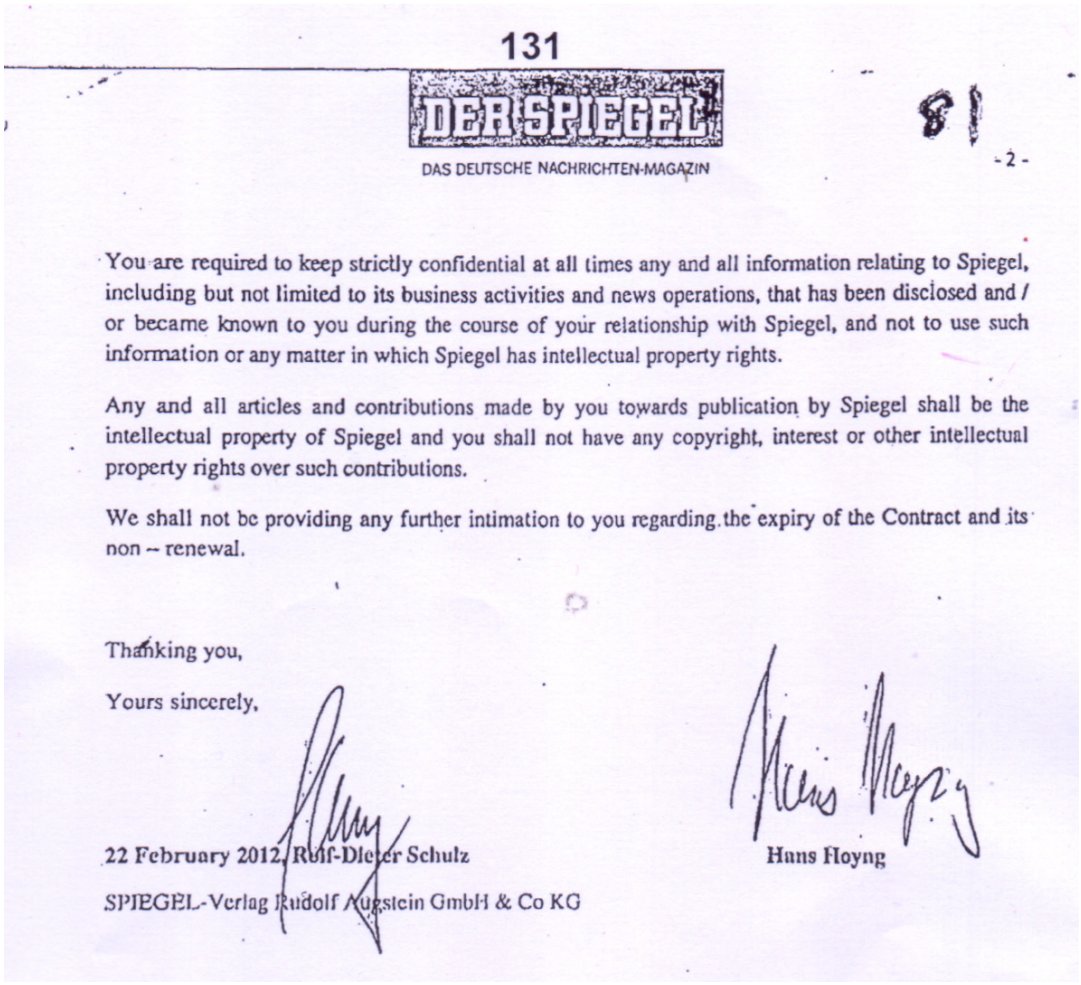
Dear Ms. Rao,

You have been engaged as a freelancer by SPIEGEL-Verlag Rudolf Augstein GmbH & Co. KG ("**Spiegel**") with effect from May 1, 1998 under an agreement dated April 9, 1998 ("**Agreement**"). The Agreement was amended by an amendment dated February 24, 2011 ("**Amendment Agreement**"). The Agreement and the Amendment Agreement are hereinafter collectively referred to as the "**Contract**".

Under the aforesaid Amendment Agreement, the term of the Agreement was extended upto April 30, 2012. The Amendment Agreement states that the Agreement terminates, without a notice being required, on April 30, 2012, unless an amendment has been agreed by January 31, 2012. In light of above, it is apparent that the Contract shall expire with effect from May 1, 2012 without any notice being required for the same. Spiegel has decided not to renew the Contract and hence your engagement as a "freelancer" for Spiegel shall end with effect from May 1, 2012.

For the avoidance of doubt, we would like to reiterate that with effect from May 1, 2012, you shall not be entitled to any monthly salary or fee as may have been payable to you under the Contract. Further, with effect from May 1, 2012, you shall not be entitled to any monthly rent allowance for the premises being presently used by you in New Delhi.

Further, with effect from May 1, 2012, all of Spiegel's obligations (if any) towards you in respect of any rights that may have arisen or accrued in your favour on account of your having rendered services as a "freelancer" to Spiegel from May 1, 1998 shall stand discharged. This shall include without limitation payment for coverage of any newsworthy events in India for Spiegel, reimbursement of any out-of-pocket expenses incurred by you and any and all other payments and benefits of any kind whatsoever.



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DER SPIEGEL

DAS DEUTSCHE NACHRICHTEN-MAGAZIN

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You are required to keep strictly confidential at all times any and all information relating to Spiegel, including but not limited to its business activities and news operations, that has been disclosed and / or became known to you during the course of your relationship with Spiegel, and not to use such information or any matter in which Spiegel has intellectual property rights.

Any and all articles and contributions made by you towards publication by Spiegel shall be the intellectual property of Spiegel and you shall not have any copyright, interest or other intellectual property rights over such contributions.

We shall not be providing any further intimation to you regarding the expiry of the Contract and its non – renewal.

Thanking you,

Yours sincerely,

22 February 2012, Rolf-Dieter Schulz

SPIEGEL-Verlag Rudolf Augstein GmbH & Co KG

Hans Hoyng

14. Non renewal of the contract was challenged by the assessee in the Labour Court at Hamburg for declaration of her status as permanent employee of Spiegel Verlag. The Labour Court at Hamburg dismissed the claim as "not admissible" holding that there was no legitimate interest to take legal action.

15. A writ was filed before the Hon'ble High Court of Delhi by Spiegel Verlag. The terms of reference as formulated in the order of the reference read as under:

"*Whether the action of management, terminating the services of work lady, Ms. Padma Rao, D/o late Dr. V.V. S.K. Rao w.e.f 30.04.2012 by not renewing the contract agreement dated 01/05/1998 is legal and justified, and if no, to what relief is she entitled and what directions are necessary in this respect?*"

16. Referring to the decision of the Labour Court at Hamburg, the Hon'ble High Court dismissed the writ petition by an order of Single Judge of the Hon'ble High Court of Delhi which was subsequently challenged before the Division Bench of the Hon'ble High Court of Delhi and before the Hon'ble High Court of Delhi, the ld. Counsels for both the parties submitted that the parties have arrived at an amicable settlement in as much as, Spiegel Verlag shall pay an amount of Rs. 3 crores in full and final settlement and the dues arising out of the Labour dispute raised by Ms. Padma Rao.

17. This compensation of Rs. 3 crores is the subject matter of the present dispute.

18. Provisions of section 28(ii)(e) of the Act applied by the Assessing Officer for making the impugned addition read as under:

> "**any compensation due or received by any person, by whatever name called, at or in connection with the termination or the modification of the terms and conditions, as the case may be, of any contract relating to his business shall be chargeable to tax under the head "Profits and gains of business or profession."**

19. A perusal of the above shows that any compensation received by any person on termination or modification of the terms and conditions of any contract relating to his business is taxable under the head "Profits and gains of business or profession". The question that needs to be addressed now is whether reference to "business" includes "profession".

20. In our considered opinion, wherever the Legislature thought of referring to both "Business" and "Profession", it has used both the words in the enactment which means that wherever the word only "Business" is used, it does not include "Profession". Section 28(va) of the Act is point in reference which provides as under:

> "any sum, whether received or receivable in cash or kind, under an agreement for –
>
> (a) not carrying out any activity in relation to any business; or profession -------."

21. The phrase “or profession” has been inserted by the Finance Act, 2016 w.e.f 01.04.2017 which makes the intent of the Legislature absolutely clear that the Legislature wanted the insertion of the word “Profession” alongwith “Business”.

22. Our view is fortified by the decision of the Hon'ble Supreme Court in the case of G.K. Choksi & Co. 295 ITR 376 wherein the facts were as under:

> **“The assessee, a firm of Chartered Accountants constructed a building for the purpose of residence for its low paid employees and claimed initial depreciation @ 40% under Section 32(1)(iv) of the Act. The Income Tax Officer (ITO) vide its order dated 15.1.1985 rejected the claim of the assessee-appellant on the ground that the said provision is applicable to an assessee carrying on "business" and the same is not available to a professional.**
>
> **On appeal, the Commissioner [Appeals] allowed the claim of the assessee. On further appeal, the Tribunal restored the order of the Assessing Officer. On reference the High Court upheld the same”**

23. And the Hon'ble Supreme Court held as under:

Section 32(1) of the Act does not help the appellant in any way to construe the word "business" appearing in sub-section 32(1)(iv) to include "profession" as well. The legislature intended to have different scope for business and profession in Section 32(1). If the legislature had intended to include "profession" in the word "business", then there was no need to mention two different words, i.e., "business" or "profession" in Section 32(1) of the Act.

13. Section 32(1) stipulates that on buildings, machinery, plant or furniture which is owned by an assessee and used for the purposes of "business or profession", depreciation shall be available by way of deduction. Section 32(1) uses the phrase "the following deductions shall", therefore it is apparent that the said sub-section is laying down general conditions or basic requirements, on fulfillment of which, an assessee shall become eligible for deductions as provided in the various clauses which follow. The learned counsel appearing for the Revenue has rightly contended that from the Scheme of the Section it is discernible that various clauses shall operate on further specific conditions laid down in each individual clause. Clause (i) deals with case of ships other than ships ordinarily plying on inland waters, clause (ii) pertains to buildings, machinery, plant or furniture, other than ships and is applicable to both business and profession in regard to the claim for depreciation in respect of the building , machinery, plant or furniture. In clause (iv) the legislature has used the word "business" only. It means that the legislature was conscious of the fact that the business and profession are different and separate

and they cannot be used interchangeably. It is a pointer to the fact that the Legislature under clause (iv) intended to restrict the benefit to the assessees carrying on business only.

Section 32(1) lays down the general conditions or basic requirements on fulfillment of which an assessee shall become eligible for deduction as provided under various clauses which follow. Clauses (i), (ii) and (iv) operate in different fields and deal with different set of assessees for the purposes of claiming depreciation.

Part D consists of Sections 28 to 43 of the Act which deals with profits and gains of business or profession. Though the phrase has been used in certain sections as "business or profession", but nowhere has the phrase been used as the "business and profession". In fact, wherever the legislature intended that the benefit of a particular provision should be for both business or profession, it has used the words "business or profession" and wherever it intended to restrict the benefit to either business or profession, then the legislature has used the word either "business" or "profession", meaning thereby that it intended to extend the benefit to either "business" or "profession", i.e., the one would not include the other.

The word "business" occurring in clause (iv) of Section 32(1), by no stretch of imagination, can be said to include "profession" as well. If the expression "business" is interpreted as including within

its scope "profession", it would not mean that the lacuna has been made good by giving a wider interpretation to the word business. There is nothing in Section 32(1)(iv) which envisages the scope of word "business" to include in it "profession" as well. If the expression "business" is interpreted to include within its scope "profession" as well, it would be doing violence to the provisions of the Act. Such interpretation would amount to first creating an imaginative lacuna and then filling it up, which is not permissible in law. The contention of the counsel for the appellant that Section 32(1)(iv) should be given purposive interpretation to include "profession", has thus to be rejected."

24. Thus, the Hon'ble Supreme Court made it clear that the word "business" occurring in clause (iv) of section 32(1) of the Act, by no stretch of imagination, can be said to include profession as well. By the same analogy, reference to business in section 32(ii)(e) of the Act would not amount to reference to profession.

25. The second aspect of this quarrel is the impugned compensation whether received on termination or modification of terms and conditions of any contract.

26. The word “termination” is used in reference to any on-going contract whereas the case of the assessee is non renewal of contract. In our humble opinion, non renewal does not mean termination. The assessee is a freelance journalist. She is not under employment of Spiegel Verlag. Therefore, there is no employer-employee relationship.

27. The relevant clauses of the agreement mentioned elsewhere refer to renewal of the agreement which, if not renewed by 31.01.2000, will end on 30.04.2000. Since the contract was not renewed, it came to an end. Compensation received by the assessee is by way of mutual agreement between Spiegel Verlag and the assessee.

28. When the dispute was subjudiced before the Hon'ble High Court of Delhi, and the Division Bench of the Hon'ble High Court in its order dated 19.09.2019 in LPA No. 537/2019 disposed the appeal on finding that a settlement has taken place between Spiegel Verlag and the assessee on a payment of agreed sum of Rs. 3 crores.

29. It would be pertinent to refer to section 2(zh) of the Industrial Relations Code, 2020 which inter alia, provides :

"retrenchment" means the termination by the employer of the service of a worker for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

(i)

(ii)

(iii) termination of the service of the worker as a result of the non-renewal of the contract of employment between the employer and the worker concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

…….."

30. Thus, it can be seen from the above that non renewal of any contract does not amount to retrenchment.

31. Considering the facts of the case in totality, we are of the considered view that provisions of section 28(ii)(e) do not apply on the given facts and therefore, the orders of the lower authorities are erroneous in law.

32. Now coming to the applicability of the provisions of section 56(xi) of the Act, the same read as under:

"Any compensation or other payment due to or received by any person by whatever name called in connection with termination of his employment or modification of the terms and conditions relating thereto."

33. Here also, reference is termination of employment. For our detailed reasons given in hereinabove, we are of the opinion that this section is also not applicable on the given facts.

34. Considering the facts of the case from all possible angles, we do not find any merit in the impugned addition. Therefore, the Assessing Officer is directed to delete the same.

35. Before parting, the allegation of the ld. DR that the assessee is taking contradictory stand before the lower authorities is factually incorrect. Firstly, the assessee has never shown the compensation of Rs. 3 crores in her profit and loss account and only out of abundant precaution and to avoid future levy of interest, the assessee has paid self assessment tax. But the assessee has never taken a stand that the said compensation is taxable in her return of income. She has been consistently claiming that the said compensation, being a capital receipt, is not taxable.

36. In the result, the appeal of the assessee in ITA No. 2759/DEL/2023 is allowed.

The order is pronounced in the open court on 30.01.2024.

Sd/-	**Ssd/-**
[YOGESH KUMAR U.S**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 30th JANUARY, 2024

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	