# IN THE HIGH COURT AT CALCUTTA
# SPECIAL JURISDICTION (INCOME TAX)
# ORIGINAL SIDE

**Before:**
**The Hon'ble Justice T. S. Sivagnanam**
**and**
**The Hon'ble Justice Hiranmay Bhattacharyya**

## ITAT/338/2016
## IA No.GA/2/2016 (Old No.GA/2607/2016)

**PRINCIPAL COMMISSIONER OF INCOME TAX-4, KOLKATA**
**Versus**
**M/S. LINDE INDIA LIMITED**

| | |
|---|---|
| For the Appellants | : Mr. Om Narayan Rai,<br>Mr. Prithu Dudheria .....advocates |
| For the Respondent | : Mr. J. P. Khaitan, Sr. Adv.,<br>Mr. Akhilesh Gupta,<br>Mr. A. K. Dey .....advocates |
| Heard on | : 02.08.2022 |
| Judgment on | : 05.09.2022 |

**Hiranmay Bhattacharyya, J.:-**

1. This appeal under Section 260A of the Income Tax Act, 1961 (for short "the Act") is at the instance of the revenue and is directed against an order dated February 17, 2016 passed by the Income Tax Appellate Tribunal, B Bench, Kolkata (for short "the Tribunal")

in ITA no. 806/Kol/11 and ITA no. 872/Kol/2011 both relating to the assessment year 2007-2008.

2. The assessee company is engaged in the business of manufacture and sale of various industrial and mechanical gases, cryogenic and non-cryogenic plants and vessels. A show cause notice was issued to the assessee alleging that tax was not deducted at source in terms of the provisions of Section 40(a)(ia) of the Act in respect of the advances lying on 31-03-2007 for import of capital goods.

3. In the reply to the show cause notice, the assessee contended that the said advances was made towards import of capital goods on FOB basis at foreign sea ports, leading to transfer of title to the goods outside India and hence there is no income chargeable to tax in India and therefore the provisions of Section 195 of the Act are not attracted. It was also contended that such advances to suppliers have also not been charged to Profit and loss Account for the relevant assessment year.

4. The Assessing Officer completed the assessment under Section 143(3) of the Act by passing an order dated December 30, 2010. While completing the assessment, the Assessing Officer made disallowances aggregating to Rs.128,48,02,479/- under Section 40(a)(ia) of the Act. The Assessing Officer also enhanced the long term capital gain on sale of Chennai land by invoking the provisions of Section 50C of the Act.

5. The order under Section 143(3) dated December 30, 2010 was rectified by the Assessing Officer on January 27, 2011 under the provisions of Section 154 of the said Act and the total income was revised at Rs.172,19,20,000/-. In the order passed under Section 143(3)/154 dated 27.01.2011 the disallowance under Section 40(a)(ia) was restricted to the extent of Rs.72,89,71,972/-.

6. The Assessee Company preferred an appeal before the Commissioner of Income Tax (A)-XII, Kolkata challenging the order dated December 30, 2010 passed under Section 143(3) of the said Act. The first appellate authority by an order dated March 30, 2011 allowed the said appeal in part. By the said order the first appellate authority held that the Assessing Officer was not justified in making the disallowance of Rs.72,89,71,972/- and directed deletion of the amount disallowed by the Assessing Officer on such account. With regard to the enhancement of long term capital gain by the Assessing Officer, the first Appellate Authority directed the Assessing Officer to recompute the long term capital gain by adopting the fair market value as determined by the District Valuation Officer (for short "DVO") and not as per the value determined by the Stamp Valuation Authorities.

7. Both the assessee and the revenue challenged the order dated March 30, 2011 passed by the first appellate authority by preferring separate appeals being ITA No. 806/Kol/2011 and ITA No. 872/Kol/2011 respectively.

8. The learned Tribunal by an order dated February 17, 2016 allowed the appeal of the assessee in part and dismissed the appeal of the revenue. The learned Tribunal was pleased to hold that no disallowance could be made under Sections 40(a)(i)/ 40(a)(ia) of the Act. On the issue of capital gains the learned Tribunal directed Assessing Officer to rework the capital gains by adopting Rs. 861 per square feet being guideline value in the same manner in which the learned DVO had carried out the valuation.

9. Being aggrieved against the order dated March 30, 2011 passed by the Tribunal as aforesaid, the Revenue preferred this appeal under Section 260A of the Act.

10. The revenue suggested the following substantial questions of law in this appeal:-

> "
>
> *(a) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, "B" Bench Kolkata erred in law as well as on facts in upholding the order of CIT Appeal in Holding that provision of Section 5, Section 9, Section 195 of the Income Tax Act, 1961 that withholding of tax from payment made by the Assessee to the Foreign Company, Offshore, is not attracted under Section 195 of the Income Tax Act, 1961, whereas the technical services extended by the said Foreign Company was having sufficient territorial and economic nexus with India as there was commonness of Interest between the Assessee and Foreign Company and therefore, payment of composite contract price including the cost of Technical Contract Service was covered under Section 9(1) (vii) of the Income Tax Act, 1961 and the Assessee company was liable to deduct tax on all payments made to the Foreign Company including*

*advances in the light of provision of Section 196 of the Income Tax Act, 1961?*

*(b) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, "B" Bench Kolkata is a competent authority to judge the Valuation of Department of Valuation Officer who is an expert in the area of valuation of assets and without giving any opportunity for revaluation of assets?*

*(c) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, "B" Bench Kolkata was justified to hold its jurisdiction of for revaluation of assets against the valuation adopted by the DVO in view of the fact that the Assessee company neither raised any objection against reference of valuation of Capital Assets by the DVO nor disputed the value adopted by Stamp Duty Authority before nor challenge the valuation made by the DVO before any Appellate Authority? "*

11. Mr. Om Narayan Rai, learned Senior Standing Counsel representing the revenue drew the attention of the court to the order passed by the Assessing Officer wherein the Assessing Officer has quoted several terms and conditions of the agreement dated 20th July 2006 and submitted that the Assessing Officer after carefully analyzing the said provisions held that the performance of technical service i.e., designing, drawing, engineering, commissioning, testing etc. including supply of machines and equipments is an inseparable part of the contract and the same constitutes a composite contract between BOC India Ltd. and Linde, the German Company for installation of a Gas Plant in India and the amount paid is nothing but fees for technical services under Section 9(i)(vii) of the Act and the said amount shall be deemed to be the income under the said

Act. He further submitted that the assessee company did not deduct tax from the payment made to the foreign company though Section 195 of the said Act casts an obligation upon every person in this country to deduct tax at the prevailing rate from the amount of payment to a nonresident/ foreign company against execution of such a contract. He relied upon a decision of a Division Bench of the High Court of Madras in the case of *Regan Powertech (P.) Ltd. vs. Deputy Commissioner of Income-tax, (International Taxation)-2(1)* reported at (2019) 416 ITR 95 (Madras)(04.07.2019) in support of his contention that amount on account of fees for technical service paid to a nonresident shall be deemed to be the income that had arisen in India under Section 9(1)(vii) of the Act for which the assessee ought to have deducted TDS under Section 195 of the Act.

12. Mr. Rai further contended that the first appellate authority as well as the learned Tribunal proceeded to decide the issue regarding disallowance of amount under Section 40(a)(ia) of the Act by approaching the said issue from a wrong angle. He contended that the first appellate authority and the Tribunal directed deletion of the disallowance made by the assessing officer under Section 40(a)(ia) of the Act only on the ground that the said amount was not debited to the profit and loss account by totally misreading the provisions laid down under Section 40(a)(ia) of the said Act.

13. On the issue regarding computation of long term capital gains, Mr. Rai contended that the learned Tribunal ought not to have interfered with the order passed by the first appellate authority in

as much as the assessee did not challenge the valuation made by the DVO before the first appellate authority.

14. Mr. Khaitan, learned Senior counsel appearing for the assessee respondent seriously disputed the contentions raised by Mr. Rai. He placed reliance upon the decision of the Punjab and Haryana High court in the case of *Commissioner of Income-Tax vs. Mark Auto Industries Ltd.* reported at (2013) 358 ITR 43 (P&H) and a decision of the Karnataka High court in the case of *Principal Commissioner of Income-Tax and anr. vs. Tally Solutions Pvt. Ltd.* reported at (2021) 430 ITR 527 (Karn) and contended that the provisions contained in Section 40(a)(ia) cannot be invoked if the assessee had not claimed deduction for the amount paid. He further contended that the learned Tribunal after taking into consideration various factors returned a factual finding that it was not correct on the part of the DVO to add towards 15% frontage on both sides of the rate in order to arrive at the total rate of Rs. 990 per square feet which need not be interfered with by this court in an appeal under Section 260(A) of the Act.

15. Heard the learned advocates for the parties and perused the materials placed.

16. Section 29 of the Act provides that the income chargeable to income tax under the head profits and gains of business and profession shall be computed in accordance with the provisions contained in Sections 30 to 43 B of the Act.

17. Section 40 starts with a non obstante clause. It provides that certain amounts which are otherwise allowable as deductions under Sections 30 to 38 of the Income Tax Act shall not be deducted in computing the income charging under the head profits and gains of business or profession unless tax has been deducted at source or after deduction has not been paid within the due date for filing the return of income in case tax is deductible at source on such amount.

18. The object behind incorporation of non obstante clause in a section is to give the enacting part of such section an overriding effect either over all provisions of the Act or upon some provisions in case of conflict between statutory provisions. The object behind incorporation of the non obstante clause in the beginning of section 40 of the Act is to give it an overriding effect over Section 30 to 38 of the Act in case of any conflict.

19. The effect of the non obstante clause in Section 40 of the Income Tax Act is to restrict the operation of Section 30 to 38 in cases where the conditions mentioned in Section 40 are not complied with. In other words, the amounts mentioned under Section 40, on which tax is deductible at source, shall not be deducted unless tax is deducted at source or after deduction has not been paid within the stipulated time frame.

20. The interpretation of the word “deducted” assumes significance in order to decide the applicability of Section 40 of the Income Tax Act.

21. The Oxford Advanced Learner's Dictionary defines the word "deduct" which when used as a verb shall mean to take away money, points etc. from a total amount. The synonym of deduct is subtract.

22. The word "deduction" has been defined in the said dictionary to mean the process of taking an amount of money away from a total. An amount can be deducted in computing the business or professional income by taking away the said amount from the total profits and gains of such business and profession. While computing the income chargeable to tax under the head profits and gains of business or profession an amount may be deducted from the profits and gains of business and profession in order to take away the said amount from the total chargeable amount under the said head.

23. While preparing the profit and loss account of a business or profession an amount can be deducted from the professional and/or business income by debiting the profit and loss account prepared in connection with such profession or business with such amount. Such amount may also be deducted while computing the profits and gains of business or profession for the purpose of arriving at the business or professional income chargeable to tax. Therefore, if the disputed amount is neither debited from the profit and loss account of the business or profession nor has been deducted while computing the profits and gains of business or profession, Section 40 of the Income Tax Act do not come into

operation as such amount cannot be said to have been deducted in computing the income chargeable under such head.

24. Therefore, if an assessee has paid any amount on account of fees for technical services outside India or in India to a non-resident but has not debited such amount to the profit and loss account and has also not been claimed as deduction in computing the income chargeable under the head profits and gains of business or profession, this Court is of the considered view that, no disallowance in respect thereof can be made by invoking the provisions of Section 40a(ia) of the Act.

25. It is not in dispute that during the course of assessment proceedings the assessee company has filed complete details of work in progress and also filed the party wise details. The first appellate authority specifically held that the payment of Rs.84, 40,14,000/- which is a part of capital advance and appearing in the capital work in progress includes a sum of Rs.72, 33, 40, 648/- made to Linde AG and there was a payment of Rs.56, 31 324/- to the said German Company which was appearing under the head loans and advance. The sum of Rs.72, 33, 40, 648/- was part of the capital work in progress and not charged to profit and loss account and the sum of Rs.56, 38, 324/- was shown in the balance sheet under the head loans and advance and such amount was also not charged to the profit and loss account. The first appellate authority further observed that the total payment aggregating to Rs.72, 89, 71, 972/- has not been charged to the profit and loss account

which has been disallowed by the assessing officer by invoking the provisions of Section 40(a)(ia) of the act. The first appellate authority held that since the aforesaid amount has not been debited in the profit and loss account and has also not been claimed as expenditure while computing the total taxable income under the head income from business or profession, the assessing officer was not justified in making the disallowance of Rs.72, 89, 71, 972/- and accordingly directed deletion of the said disallowance. The learned Tribunal affirmed the said finding of the first appellate authority.

26. The first appellate authority and the Tribunal rightly interpreted the provisions of Section 40 of the said Act.

27. The Punjab and Haryana High Court in the case of *Mark Auto Industries* (supra) did not interfere with the findings of the learned Tribunal holding that the provisions contained in Sections 40(a)(i) were not attracted in case the assesseee had not claimed deduction for the amount paid for technical knowhow. The Karnataka High Court in *Tally Solutions* (supra) also held that when no amount was claimed as revenue expenditure, no disallowance under Section 40(a)(i) and (ia) of the Act would be made. The aforesaid decisions also support the view of this Court on the issue as to applicability of the provisions of Section 40a(ia) of the Act.

28. The decision in the case of *Regan Powertech Pvt. Ltd.* (supra) do not have any manner of application to the case on hand as the substantial questions of law raised therein was whether the

assessee is an assesseee in default in respect of payment made towards the rent for leasing a crane when the entire transaction occurred outside India which is not the issue involved in the case on hand.

29. For the reasons as aforesaid, this court is of the considered view that the first appellate authority was justified in deleting the disallowance made by the assessing officer by involving the provisions of Section 40(a)(i) and the Tribunal cannot be said to have faulted for not interfering with the finding of the first appellate court.

30. On the issue of long term capital gain, the learned Tribunal did not interfere with the guideline value rate determined by the DVO and directed the Assessing Officer to rework the capital gains by adopting the said guideline value in the same manner in which the DVO had carried out the valuation. The Tribunal being the final fact finding authority was justified in scrutinising the materials on record and to arrive at a finding in respect thereof. Since the said finding is entirely factual no substantial question of law arises therefrom.

31. For the reasons as aforesaid this court is of the considered view that no substantial question of law is involved in this appeal, the instant appeal being ITAT No. 338 of 2016 stands dismissed without, however, any order as to costs. The application being GA 2 of 2016 also stands disposed of accordingly.

32. Urgent photostat certified copy of this judgment be given to the parties upon compliance of all formalities.

**I agree.**

**(T.S. Sivagnanam, J.)** **(Hiranmay Bhattacharyya, J.)**

(P.A.-Sanchita)