$~**S-21**

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 204/2022 & CM APPL.31445/2022**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2

..... Appellant

Through: Mr.Sanjay Kumar, Sr.Standing Counsel with Ms.Easha Kadian, Advocate.

versus

M/S ERA INFRASTRUCTURE (INDIA) LTD. ..... Respondent

Through: None.

% Date of Decision: 20th July, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J: (ORAL)

1. Present Income Tax Appeal has been filed challenging the Order dated 10th March, 2021 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.798/Del/2018 for the Assessment Year 2013-14.

2. Learned Counsel for the Appellant states that ITAT has erred in law in deleting the disallowance of Rs.3,61,53,268/- made by the Assessing Officer under Rule 8D of Income Tax Rules, 1962 read with Section 14A of the Income Tax Act, 1961 ('the Act').

3. He submits that the ITAT erred in relying on the decision of this Court in ***PCIT vs. IL & FS Energy Development Company Ltd., 2017 SCC Online Del 9893*** (wherein it has been held that no disallowance under Section 14A of the Act can be made if the assessee had not earned any exempt income), as the revenue has not been accepted the said decision and has preferred an SLP against the said decision.

4. Learned counsel for the petitioner also submits that in view of the amendment made by the Finance Act, 2022 to Section 14A of the Act by inserting a non obstante clause and an explanation after the proviso, a change in law has been brought about and consequently, the judgments relied upon by the authorities below including ***PCIT vs. IL & FS Energy Development Company Ltd*** (supra) are no longer good law. The amendment to Section 14A of the Act is reproduced hereinbelow:-

> *"Amendment of section 14A.*
> *In section 14A of the Income-tax Act, -*
> *(a) in sub-section (1), for the words "For the purposes of", the words "Notwithstanding anything to the contrary contained in this Act, for the purposes of" shall be substituted;*
> *(b) after the proviso, the following Explanation shall be inserted, namely:-*
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> *"[Explanation.—For the removal of doubts, it is hereby clarified that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where the income, not forming part of the total income under this Act, has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such income not forming part of the total income.]"*

5. However a perusal of the Memorandum of the Finance Bill, 2022 reveals that it explicitly stipulates that the amendment made to Section 14A will take effect from 1st April, 2022 and will apply in relation to the assessment year 2022-23 and subsequent assessment years. The relevant extract of Clauses 4, 5, 6 & 7 of the Memorandum of Finance Bill, 2022 are reproduced hereinbelow:

> *"4. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert an Explanation to section 14A of the Act to clarify that notwithstanding anything to the contrary contained in this Act, the provisions of this section shall apply and shall be deemed to have always applied in a case where exempt income has not accrued or arisen or has not been received during the previous year relevant to an assessment year and the expenditure has been incurred during the said previous year in relation to such exempt income.*
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> ***5. This amendment will take effect from 1st April, 2022.***
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> *6. It is also proposed to amend sub-section (1) of the said section, so as to include a non-obstante clause in respect of other provisions of the Income-tax Act and provide that no deduction shall be allowed in relation to exempt income, notwithstanding anything to the contrary contained in this Act.*
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> ***7. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years."***
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> (emphasis supplied)

6. Furthermore, the Supreme Court in ***Sedco Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717*** has held that a retrospective provision in a tax act which is "*for the removal of doubts*" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. The relevant extract of the said judgment is reproduced herein below:

"***9.*** *The High Court did not refer to the 1999 Explanation in upholding the inclusion of salary for the field break periods in the assessable income of the employees of the appellant. However, the respondents have urged the point before us.*

10*. In our view the 1999 Explanation could not apply to assessment years for the simple reason that it had not come into effect then. Prior to introducing the 1999 Explanation, the decision in CIT v. S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] was followed in 1989 by a Division Bench of the Gauhati High Court in CIT v. Goslino Mario [(2000) 241 ITR 314 (Gau)] . It found that the 1983 Explanation had been given effect from 1-4-1979 whereas the year in question in that case was 1976-77 and said: (ITR p. 318)*

> *"[I]t is settled law that assessment has to be made with reference to the law which is in existence at the relevant time. The mere fact that the assessments in question has (sic) somehow remained pending on 1-4-1979, cannot be cogent reason to make the Explanation applicable to the cases of the present assessees. This fortuitous circumstance cannot take away the vested rights of the assessees at hand."*

11. *The reasoning of the Gauhati High Court was expressly affirmed by this Court in CIT v. Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] . These decisions are thus authorities for the proposition that the 1983 Explanation expressly introduced with effect from a particular date would not effect the earlier assessment years.*

12. *In this state of the law, on 27-2-1999 the Finance Bill, 1999 substituted the Explanation to Section 9(1)(ii) (or what has been referred to by us as the 1999 Explanation). Section 5 of the Bill expressly stated that with effect from 1-4-2000, the substituted Explanation would read:*

> *"Explanation.—For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—*
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> *(a) service rendered in India; and*
>
> *(b) the rest period or leave period which is preceded and*

succeeded by services rendered in India and forms part of the service contract of employment, shall be regarded as income earned in India."

The Finance Act, 1999 which followed the Bill incorporated the substituted Explanation to Section 9(1)(ii) without any change.

13. *The Explanation as introduced in 1983 was construed by the Kerala High Court in CIT v. S.R. Patton [(1992) 193 ITR 49 (Ker)] while following the Gujarat High Court's decision in S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] to hold that the Explanation was not declaratory but widened the scope of Section 9(1)(ii).* ***It was further held that even if it were assumed to be clarificatory or that it removed whatever ambiguity there was in Section 9(1)(ii) of the Act, it did not operate in respect of periods which were prior to 1-4-1979. It was held that since the Explanation came into force from 1-4-1979, it could not be relied on for any purpose for an anterior period.***

14. *In the appeal preferred from the decision by the Revenue before this Court, the Revenue did not question this reading of the Explanation by the Kerala High Court, but restricted itself to a question of fact viz. whether the Tribunal had correctly found that the salary of the assessee was paid by a foreign company. This Court dismissed the appeal holding that it was a question of fact. (CIT v. S.R. Patton [(1998) 8 SCC 608] .)*

15. *Given this legislative history of Section 9(1)(ii), we can only assume that it was deliberately introduced with effect from 1-4-2000 and therefore intended to apply prospectively [See CIT v. Patel Bros. & Co. Ltd., (1995) 4 SCC 485, 494 (para 18) : (1995) 215 ITR 165] . It was also understood as such by CBDT which issued Circular No. 779 dated 14-9-1999 containing Explanatory Notes on the provisions of the Finance Act, 1999 insofar as it related to direct taxes. It said in paras 5.2 and 5.3.*

"5.2 The Act has expanded the existing Explanation which states that salary paid for services rendered in India shall be regarded as income earned in India, so as to specifically provide that any salary payable for the rest period or leave period which is both preceded and succeeded by service in India and forms part of the service contract of employment will also be regarded as income earned in India.

> ***5.3 This amendment will take effect from 1-4-2000, and will accordingly, apply in relation to Assessment Year 2000-2001 and subsequent years****."*
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> ***16.*** *The departmental understanding of the effect of the 1999 Amendment even if it were assumed not to bind the respondents under Section 119 of the Act, nevertheless affords a reasonable construction of it, and there is no reason why we should not adopt it.*
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> ***17.*** *As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139 : 1980 SCC (Tax) 67] .) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24]* ***. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24 (para 44); Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352, 354; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482, 506] . But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts".****"*
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> (emphasis supplied)

7. The aforesaid proposition of law has been reiterated by the Supreme Court in ***M.M Aqua Technologies Ltd. V. Commissioner of Income Tax, Delhi-III, 2021 SCC OnLine SC 575***. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"22. Second, a retrospective provision in a tax act which is "****for the removal of doubts****" cannot be presumed to be retrospective, even where such language is used, if it alters or changes the law as it earlier stood. This was stated in Sedco Forex International*

Drill. Inc. v. CIT, (2005) 12 SCC 717 as follows:

> *17. As was affirmed by this Court in Goslino Mario [(2000) 10 SCC 165] a cardinal principle of the tax law is that* ***the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication****. (See also Reliance Jute and Industries Ltd. v. CIT [(1980) 1 SCC 139].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [See Sonia Bhatia v. State of U.P., (1981) 2 SCC 585].* ***If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force*** *[See Shyam Sunder v. Ram Kumar, (2001) 8 SCC 24; Brij Mohan Das Laxman Das v. CIT, (1997) 1 SCC 352; CIT v. Podar Cement (P) Ltd., (1997) 5 SCC 482].* ***But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts****".*
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> *18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in S.G. Pgnatale [(1980) 124 ITR 391 (Guj)] by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".*
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> *19.* ***When the Explanation seeks to give an artificial meaning to "earned in India" and brings about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively****."*
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> *(emphasis supplied)*

8. Consequently, this Court is of the view that the amendment of Section 14A, which is "*for removal of doubts*" cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood.

9. Though the judgment of this Court has been challenged and is pending adjudication before the Supreme Court, yet there is no stay of the said judgment till date. Consequently, in view of the judgments passed by the Supreme Court in ***Kunhayammed and Others vs. State of Kerala and Another, (2000) 6 SCC 359*** and ***Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras (1992) 3 SCC 1***, the present appeal is dismissed being covered by the judgment passed by the learned predecessor Division Bench in ***PCIT vs. IL & FS Energy Development Company Ltd*** (supra) and ***Cheminvest Limited vs. Commissioner of Income Tax-VI, (2015) 378 ITR 33***.

10. Accordingly, the appeal and application are dismissed. However, it is clarified that the order passed in the present appeal shall abide by the final decision of the Supreme Court in the SLP filed in the case of ***PCIT vs. IL & FS Energy Development Company Ltd*** (supra).

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

JULY 20, 2022
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