

In Re: the Population Council Inc.

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SooperKanoon Citation : sooperkanoon.com/53640

Court : Authority for Advance Rulings

Decided On : Sep-08-2006

Judge : S S Quadri, A Narang, A Sinha

Appellant : In Re: the Population Council Inc.

Advocate for Pet/Ap. : Mr. Manohar Lal

Judgement :

Syed Shah Mohammed Quadri, J. (Chairman), A.S. Narang and A. Sinha, Members Income Tax Act, 1961 - Sections 2(17), 4, 5, 5(2), 10(23C), 11, 12AA, 13(7), 28, 29, 30 to 43D, 115BBC, 115W, 115WA, 115WA(1), 115WA(2), 115WB, 115WC and 245Q(1); Finance Act, 2005 Warburton v. Loveland (1832) 2D. & Cl. 480; The Duke of Buccleuch (1889) 15 P.D. 86; Becke v. Smith (1836) 2M & W. 191; Steel Authority of India Ltd. v. National Union Waterfront Workers (2001) 7 SCC 1; CIT v. Justice R.M. Dutta (1989) 180 LTR 86 (Cal); Ganji Krishna Rao v. CIT (1996) 136 CTR (AP) 98 : (1996) 220 LTR 654 (AP); CIT v. Dorr Oliver (India) Ltd. (1994) 116 CTR (Bom) 428 : (1994) 209 ITR 691 (Bom) 1. This is an application under Section 245Q(1) of the IT Act, 1961 (for short "the Act"). The applicant, 'The Population Council, Inc., USA is a non-resident. It was founded in 1952 and was incorporated under the New York Membership Corporation Law. It is a resident of USA. It is an international non-profit, non-Governmental organization. The objects of the applicant include the following: Doing studies to improve the quality of services relating to family planning, HIV/AIDS and reproductive health, causes and consequences of population growth.

Strengthening professional resources in developing countries through collaborative research, awards and fellowships, etc.

A board of trustees headed by a chairman is the governing body of the applicant. Its head office is located in New York, USA. It has a regional office and a country office in India among four regional offices and 14 country offices located elsewhere in various parts of the globe. The funds of the applicant come from Government, individuals and internal sources. The applicant carries on charitable, scientific and educational activities for population. The activities of the applicant in India fall within the approved objects for the purpose of granting exemption under the USA Law. It enjoys tax exemption from federal income-tax under Section 501(c)(3) of the Internal Revenue Code of USA (for short "the USA Law"). The expenses incurred in India by the applicant which include fringe benefits provided to the employees, falling under the heads travel, workshop/conference, entertainment/hospitality, etc., are met by remittances from the head office in New York. In regard to fringe benefit tax (FBT) levied under Section 115WA of the Act, it is submitted that it is chargeable when the employer is chargeable to income-tax under the Act and not otherwise; this follows if Sub-section (2) thereof is read along with Sub-section (1) thereof. As the applicant is not chargeable to income-tax under the Act in India for the activities in India in view of Article 1(2) of the DTAA, Sub-section (2) of Section 115WA would not apply because Sub-section (1) is not attracted. Therefore, the question of chargeability of FBT would not arise.

The Government of Republic of India and the Government of United States of America entered into an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, which was notified on 20th Dec, 1990 (referred to in this ruling as "the DTAA").

On these facts the applicant seeks advance ruling of the Authority on the following question: Whether the applicant is not liable to pay FBT, under Section 115WA of the IT Act, by virtue of the provisions of the DTAA between India and USA on the fringe benefits available to its employees working in India.

2. The jurisdictional CIT (for short "the CIT) submitted the following comments to the application: It is stated that as per Section 2(17)(ii) of the Act, the status of the

applicant is that of a company incorporated by the laws of the country outside India. It is also covered by the definition of company within the meaning of Article 3(f) of the DTAA between India and USA. Article 1(2) of the DTAA does not create new tax liability and it cannot be interpreted to mean that the other Contracting State is also bound to grant tax exemption under its domestic laws to a tax exempted resident of a Contracting State. It is not disputed that the FBT levied under Section 115WA of the Act could be considered as identical or substantially similar tax referred to in Article 2(2) of the DTAA and it is pleaded that neither the same provides for exemption of an organization like the applicant from the charge of FBT nor the provisions thereof have any relevance to the question raised by the applicant. The applicant is clearly covered by the definition of employer for the purpose of FBT under Section 115WA(1) of the Act. Though the applicant can claim exemption of its income under Section 10(23C) or under Section 12AA of the Act, the applicant is not claiming to have been notified or approved for the purpose of exemption under the said provisions.

Further, from the annual report, it is noted that the provisions of Sections 13(7) and 115BBC of the Act, anonymous donations are chargeable to income-tax even if they enjoy exemption under Section 10(23C) or 11 of the Act. The applicant maintains a PE in the form of regional office in India and receives funds from internal sources whether from investments or from publication or other business activities, which is chargeable. The CIT has referred to Circular No. 8 of 2005 dt. 29th Aug. 2005 clarifying the provisions relating to FBT.³ In the rejoinder filed by the applicant, it is admitted that the status of the applicant for purposes of the Act is that of "AOP".

Article 1(2) of the DTAA, submits the applicant, is a peculiar feature of the DTAA to which USA is a party. Only in the absence of such a clause India could levy tax on that part of income arising in India though the same is exempted in USA, and not otherwise. No income is generated in India and the expenses of its operations in India are met by foreign inward remittances as per certificate (Annex. J). It is refuted that the applicant is liable to pay FBT. As the applicant is not chargeable to income-tax in the absence of any generating source in India or applicability of Article 1(2) of the DTAA, therefore, the question of charging FBT or additional tax

would not arise. It is explained that the word "donor" in the report refers to a person who provides service without being identified and that the expression "internal sources" refers to internal sources located in USA. The circular referred to by the Revenue is of no consequence on the facts of this case.

4. Mr. Manohar Lal, learned Counsel for the applicant, gave up the submission made in the application on the basis of the provisions of DTAA and has confined his contentions to the interpretations of Section 115WA of the Act. The learned Counsel concedes that FBT is chargeable in addition to the income-tax as is evident from Sub-section (1) of Section 115WA of the Act; the FBT is the liability of the employer and that the value of fringe benefits is only the measure to compute his additional tax liability. However, he argues that if a person is not charged to income-tax, there can be no additional tax liability calculated on fringe benefits but this is subject to the exception contained in Sub-section (2) of Section 115WA of the Act which does not apply to the applicant. The words used in Sub-section (2) of Section 115WA of the Act, namely, "on his total income computed in the accordance with the provisions of this Act", contends Mr. Manohar Lai, are of great significance and restrict the scope of Sub-section (2) of Section 115WA of the Act. They apply to a case where the employer has total income, which is required to be computed in accordance with the provisions of the Act, Where there is no income of a non-resident within the meaning of Sub-section (2) of Section 5 of the Act, the question of computation of total income would not arise and to such a case the exception in Sub-section (2) of Section 115WA of the Act would not apply; if the Sub-section is given the same meaning with or without the words quoted above, they would become meaningless. Summing up he submits that as in the case of the applicant the computation machinery cannot be pressed into service, Sub-section (2) of Section 115WA of the Act would not be attracted and therefore the charge under Sub-section (1) of Section 115WA would fail.

5. Mr. T.N. Chopra, learned Counsel appearing for the CIT, has contended that the FBT as defined in Section 115WA of the Act, is payable by the applicant who is an employer within the meaning of that section. Only an employer who is eligible for exemption under Section 10(23C) of the Act or who is registered under Section 12AA of the Act, is entitled to claim exemption from the FBT and admittedly the

applicant does not claim to fall under that category so it is liable to pay FBT. It is submitted that as long as an employer has employees in India and provides benefits or incurs on them expenses of the nature specified in Section 115WB of the Act, he would be liable to pay the FBT in India. The proper interpretation of Sub-section (2) of Section 115WA of the Act is that the liability to pay the FBT under Sub-section (1) of Section 115WA of the Act exists even if no income-tax is payable by the employer in India. The Central Board of Direct Taxes (CBDT) has explained the scope of FBT in Circular No. 8 of 2005 dt. 29th Aug., 2005 and it has been provided therein that foreign companies if they have employees based in India, are liable to pay the FBT even if their income is exempt under DTAA. Thus in short, it is contended that even if the applicant's income is not chargeable to income-tax in India, the applicant is liable to pay FBT as per the clear provisions of Sections 115WA and 115WB of the Act.

On the basis of the contentions of the learned Counsel of the parties, the short question that arises for consideration is: 'whether on a true interpretation of Section 115WA of the Act the applicant is liable to pay the FBT'.

6. Here it will be of interest to note that by Finance Act, 2005, Chapter XII-H (containing Sections 115WA and 115WB) is inserted in the Act w.e.f. 1st April, 2006. The caption of the Chapter is "Income-tax on fringe benefits". Section 115W of the Act defines the expressions 'employer' and 'FBT'. There is a common ground that the applicant falls within the meaning of expression 'employer' as defined in clause (a) of Section 115W of the Act. The expression 'FBT' is defined in clause (b) of Section 115W of the Act to mean the tax chargeable under Section 115WA of the Act, which is quoted hereunder: Section 115WA. Charge of fringe benefit tax.-(1) In addition to the income-tax charged under this Act, there shall be charged for every assessment year commencing on or after the 1st day of April, 2006, additional income-tax (in this Act referred to as fringe benefit tax) in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year at the rate of thirty per cent on the value of such fringe benefits.

(2) Notwithstanding that no income-tax is payable by an employer on his total income computed in accordance with the provisions of this Act, the tax on fringe benefits shall be payable by such employer.

7. Before entering upon interpretation of the abovequoted provision, it is appropriate to point out that the principles of interpretation of statutes are too well settled to justify an elaborate discussion on this aspect. Nevertheless, it would be of advantage to recapitulate the basic rules in interpreting a statute. Quoting the dicta of Tindal in *Warburton v. Loveland* (1832) 2D. & Cl. 480 at p. 489 Maxwell on the Interpretation of Statutes (Twelfth Edn., p. 1) the learned author notes, "if the language is clear and explicit the Court must give effect to it for in that case words of the statute speak the intention of the legislature".

A modification of the literal rule is referred to as the golden rule of interpretation which is the words of Parke B in *Becke v. Smith* (1836) 2M & W. 191, at p. 195 which reads as: It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.

Quoting the observation of Lindley L.J. in *The Duke of Buccleuch* (1889) 15 P.D. 86, 96, the rule is stated in *Craie on Statute Law Seventh Edn.* (Craie on Statute Law) thus, You are not so to construe the Act of Parliament as to reduce it to rank absurdity. You are not to attribute to general language used by the legislature in this case, any more than in any other case, a meaning which would not carry out its object, but produce consequences which, to the ordinary intelligence, are absurd. You must give it such a meaning as will carry out its objects. In *Steel Authority of India Ltd. v. National Union Waterfront Workers*, the Constitution Bench of the Hon'ble Supreme Court summed up the proposition as follows: It is a well-settled proposition of law that the function of the Court is to interpret the statute to ascertain the intent of the legislature-Parliament. Where the language of the statute is clear and explicit the Court must give effect to it because in that case

words of the statute unequivocally speak of the intention of the legislature. This rule of literal interpretation has to be adhered to and a provision in the statute has to be understood in its ordinary natural sense unless the Court finds that the provision sought to be interpreted is vague or obscurely worded in which event the other principles of interpretation may be called in aid.

8. Mr. Manohar Lal relied upon the decision of Punjab and Haryana High Court in CIT v. Justice R.M. Dutta (1989) 180 LTR 86 (Cal) for the proposition that when the words are precise and unambiguous, they must be accepted as declaring the express intention of the legislature and on the Judgment of the Andhra Pradesh High Court in Ganji Krishna Rao v. CIT (1996) 136 CTR (AP) 98 : (1996) 220 LTR 654 (AP) to which one of us (Syed Shah Mohammed Quadri, Judge) was a party for the proposition that a provision of law should be interpreted in its grammatical meaning. He has also relied on the decision of the Bombay High Court in the case of CIT v. Dorr Oliver (India) Ltd. and argued that each and every word in a statute should be considered to get the exact import of the statute.

In the light of the decisions cited above, there can be no dispute in respect of the well settled propositions.

9. We shall now proceed to construe 115WA of the Act. It may be seen that Sub-section (1) of Section 115WA of the Act, quoted above, provides that: (i) there shall be charged for every assessment year commencing on or after the 1st day of April, 2006 additional income-tax (in this Act referred to as FBT); (ii) the tax is in respect of fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year; (iii) the tax is leviable on the value of such fringe benefits @ 30 per cent; and (iv) this is in addition to the income-tax charged under the Act. There is no dispute with regard to this Sub-section. The expression "fringe benefits" is defined in Section 115WB of the Act and the "value of fringe benefits" which is the basis of levy of tax is to be arrived at as provided in Section 115WC of the Act. We are not concerned with the rest of the provisions of the chapter here. Now, reverting to Sub-section (2) of Section 115WA of the Act, it commences with a non obstante clause and states that notwithstanding that no income-tax is payable by an employer on his total income

computed in accordance with the provisions of the Act, the tax on fringe benefits shall be payable by such employer. This provision is clarificatory in nature. Inasmuch as Sub-section (1) of Section 115WA of the Act mandates that FBT shall be charged for every assessment year in addition to the income-tax charged under this Act, Sub-section (2) thereof clarifies that even when no income-tax is payable by an employer on his total income computed in accordance with the provisions of this Act, the tax on fringe benefits shall be payable by such employer. The words "total income computed in accordance with the provisions of this Act" are used to amplify the first limb of Sub-section (1) and not to destroy it. They have to be understood in the light of Sections 5, 28 and 29 of the Act. It is needless to point out that the charge of income-tax under Section 4 of the Act is in respect of the total income of the previous year of every person and the scope of the total income of a non-resident is defined in Section 5(2) of the Act which is an inclusive provision. Section 28 of the Act enumerates the categories of income falling under the heading "Profits and gains of business or profession" and as per Section 29 of the Act such income has to be computed in accordance with the provisions contained in Sections 30 to 43D of the Act. When the Section 115WA of the Act says that FBT is in addition to income-tax and even when no income-tax is payable by an employer on his total income computed in accordance with the provisions of this Act, it will be futile to contend that if there is no total income which can be computed in accordance with the provisions of the Act, no FBT would be payable by the employer. Such an interpretation would be contrary not only to the intention of the Parliament but also the plain language of the provision and the basic principles of interpretation.

Inasmuch as the learned Counsel for the applicant has given up reliance on DTAA between India and USA, we decline to express any opinion on the second limb of the question, referred to above.

10. For the above reason, we rule on the first limb of the question thus: (i) the applicant is liable to pay FBT under Section 115WA of IT Act.