

Additional Commissioner of Vs. Hughes Services (Far East) (P.)

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SooperKanoon Citation : sooperkanoon.com/72463

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Feb-24-2003

Reported in : (2003)87ITD137(Delhi)

Judge : K Singhal, K Prasad

Appellant : Additional Commissioner of

Respondent : Hughes Services (Far East) (P.)

Judgement :

1. The only issue which is common to all the appeals relates to the interpretation of the provisions of Section 9(1)(11) of Income-tax Act, 1961 (in short Act).
2. Briefly stated, the facts are these: The assessee is a non-resident company which has been assessed as an agent of various foreign technicians, who are non-residents. The assessee-company entered into an agreement with Oil & Natural Gas Commission (ONGC) for cementing services of off-shore rigs. For executing such contract, the assessee-company employed expatriate personnel of various nationalities under the terms of agreements, specimen copy of which is placed on record. Such technicians were required to work on off-shore rigs continuously for 28 days period and thereafter they were allowed leave for 28 days during which such employees were required to go back to their respective countries (place of origin). The salary for leave period was to be paid outside India in foreign currency. The claim of the assessee was that off-period salary paid outside India was not taxable in India. This contention of assessee did not find favour with the

Assessing Officer and accordingly the same was taxed under Section 9(1)(ii). However, on appeal, the claim of the assessee was allowed by the CIT(A). Aggrieved by the same, the revenue is in appeal in all these cases.

3. The learned DR. Mr. Salil Gupta has vehemently assailed the order of CIT(A) by contending that off-period salary is taxable in view of the provisions of Explanation to Section 9(1)(ii) as substituted by Finance Act, 1999 which, according to him, is retrospective in operation, being clarificatory/declaratory in nature. It was emphasized by him that the words "for removal of doubts, it is hereby declared" used by the legislature show that the amendment was made to clarify the legal position and the amendment was declaratory in nature and, therefore, the same is applicable to earlier years also. In support of this contention, reliance has been placed on the Supreme Court judgment in the case of CIT v. Podar Cement (P.) Ltd. [1997] 226 ITR 625 : 92 Taxman 541. Alternatively, it was contended by him that even the old provisions, prior to above amendment, included the off-period salary within its ambit. Reliance was placed on certain decisions of the Tribunal.

4. The above contentions of the learned DR have been strongly opposed by the learned Sr. Counsel of the assessee Shri Ganeshan by contending that the Explanation as substituted by the Finance Act, 1999 has actually expended the scope of Section 9(1)(ii) by including new item of income i.e., the off-period salary and consequently, it cannot be considered either as declaratory or clarificatory. He also drew our attention to the judgment of Hon'ble Gujarat High Court reported as CIT v. S.G. Pgnatale [1980] 124 ITR 391 : 4 Taxman 79 to illustrate the meaning of the words 'earned in India' used in Section 9(1)(ii). He also relied on number of decisions of the Tribunal wherein it has been held that off-period salary paid outside India was outside the scope of Section 9(1)(ii). Reliance was also placed on the Board's Circular No.779 dated 14-9-1999 which vide paras 5.1 to 5.3 has clearly stated that the amendment shall be effective from 1-4-2000 and, therefore, apply to assessment year 2000-01 and subsequent assessment years.

5. Rival submissions of the parties have been considered carefully. The question for consideration is whether the remuneration for the off-period received by the

non-resident foreign expatriate employees outside India is taxable under Section 9(1)(ii) of the Act. The income of the non-resident is taxable under Section 5(2) of the Act which provides that income of non-resident is taxable in India if (a) it is received or is due to be received in India; or (b) it accrues or arises or is deemed to accrue or arise to him in India. There is no dispute that condition (a) mentioned above is not attracted to the present cases since payments were made outside India. It is also not the case of the revenue that such income accrues or arises in India. The only case of revenue is that such salary is taxable under the deeming provisions of Section 9(1)(ii). It is the settled legal position that deeming provisions are to be construed very strictly and nobody can be taxed unless his case squarely falls within four concerns of the taxing provisions.

6. Before coming to the contention of Id. DR regarding retrospective operation of Explanation substituted by Finance Act, 1999, let us first consider the scope of Section 9(1)(ii) as originally enacted and amended from time to time in the light of judicial interpretation. Such provisions as originally enacted read as under: Section 9(1): The following incomes shall be deemed to accrue or arise in India- (ii) income which falls under the head "salaries", if it is earned in India.

The interpretation of this Section came up for consideration before the Hon'ble Gujarat High Court in the case of S.G. Pgnatale (supra). Since the words "earned in India" were not defined in the Act, their Lordships referred to Corpus Juris Seccondum Volume 28 page 69 where the word "earned" has been construed as "entitled to a sum of money under the terms of contract, implies that wages are owing and may carry the meaning of unpaid but does not necessarily imply that they are due and payable." They further referred to the judgment of Hon'ble Supreme Court in the case of E.D. Sassoon & Co. Ltd. v. CIT [1954] 26 ITR 27 wherein their Lordships observed at page 51 as under: The word 'earned' even though it does not appear in Section 4 of the Act has been very often used in the course of the judgments by learned judges both in the High Courts as well as the Supreme Court (vide CIT v. Ahmedbhai Umarbhai & Co. [1950] 18 ITR 472 (SC) and CIT v. K.R.M.T.T. Thiagaraja Chetty & Co. [1953] 24 ITR 525 (SC). It has also been used by the Judicial Committee of the Privy Council in Commissioner of Taxation v. Kirk (1900) AC 588. The concept, however, cannot be divorced from

that of income accruing to the assessee. If income has accrued to the assessee it is certainly earned by him in the sense that he has contributed to its production or the parenthood of the income can be traced to him. But in order that the income can be said to have accrued to or earned by the assessee it is not only necessary that the assessee must have contributed to its accruing or arising by rendering services or otherwise but he must have created a debt in his favour. A debt must have come into existence and he must have acquired a right to receive the payment. Unless and until his contribution or parenthood is effective in bringing into existence a debt or right to receive the payment or in other words a debitum in praesenti, solvendum in futuro it cannot be said that any income has accrued to him. The mere expression 'earned' in the sense of rendering the services etc., by itself is of no avail.

In view of the above judicial interpretation of the word "earned", their Lordships of Gujarat High Court held that the words "earned in India" in Section 9(1)(ii) included only that income in respect of which debt has been created in India for the services rendered in India and mere rendering of service in India by itself was of no avail. If the liability to pay arises outside India and the payment is also made outside India then the provisions of Section 9(1)(ii) could not be invoked. Hence, the salary payable and paid outside India by his foreign employer for the services rendered in India was held not to be taxable under Section 9(1)(ii).

7. To nullify the application of the above judgment of Gujarat High Court, the legislature inserted Explanation to Section 9(1)(ii) by Finance Act, 1983 w.e.f. 1-4-1979. The Section after amendment reads as under: Section 9(1): The following incomes shall be deemed to accrue or arise in India- (ii) income which falls under the head "salaries", if it is earned in India.

Explanation : For the removal of doubts, it is hereby declared that income of the nature referred to in this clause payable for service rendered in India shall be regarded as income earned in India.

8. By insertion of the Explanation, the scope of Section 9(1)(ii) was enlarged so as to include remuneration payable for services rendered in India which otherwise was not includible. Such income became taxable even though it was paid outside

India. However, another dispute arose as to whether the salary payable and paid outside India to non-resident for the period for which no services were rendered in India and during which such non-resident was away from India to avail leave period could be taxed under Section 9(1)(ii). Some benches of the Tribunal took the view that remuneration payable for the off-period could not be equated with salary payable for services rendered in India and, therefore, non-resident could not be taxed under Section 9(1)(ii). However, contrary view has also been expressed by some benches. This dispute no more exists now in view of the amendment made by the legislature by substituting the Explanation to Section 9(1)(ii) by Finance Act, 1999 w.e.f 1-4-2000. Section 9(1)(ii) effective from 1-4-2000 reads as under: Section 9(1): The following incomes shall be deemed to accrue or arise in India:- (ii) income which falls under the head "Salaries", if it is earned in India.

Explanation - For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for- (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, The perusal of the above Explanation shows that income of non-resident which is to be included in Section 9(1)(ii) has now been divided into two categories - (i) services rendered in India; and (ii) rest period or leave period, which is preceded and succeeded by services rendered in India. That clearly shows that one more item of income has been included in deeming provisions i.e., off-period salary w.e.f. 1-4-2000.

At this stage, it would be useful to refer para 5.3 of CBDT Circular No. 779 dated 14-9-1999 reported as 240 ITR page 3 (Statute) wherein it has been clarified that the amendment by Finance Act, 1999 in Section 9(1)(ii) would apply to assessment year 2000-01 and subsequent assessment years. The legislature has not said that salary for services rendered in India would include salary for the off-period. On the contrary it has added a fresh item of income. That means that both types of incomes are different and independent and consequently, it cannot be said that the salary payable for services rendered in India would include salary for off-period. In our considered opinion, the legislature has clearly enlarged the scope of Section 9(1)(ii) by including a new item of income which was not includible earlier. One could possibly interpret the amended provisions otherwise if the

legislature had clarified the meaning of the words "services rendered in India" but the legislature in its wisdom has used the word "and" after the words "services rendered in India" and added another item of income in a separate Clause (b). That, in our opinion, only means that both types of income are separate and independent income and the legislature has intended to tax, w.e.f. 1-4-2000, the new item of income i.e., salary for the rest period or the leave period payable outside India which was not includible prior to this amendment.

9. Now let us examine the contention of the learned DR whether the amendment by Finance Act, 1999 was clarificatory/declaratory and, therefore, retrospective in operation. Such contention cannot be accepted for the reason that the said amendment, in our opinion, cannot be considered either as declaratory or clarificatory since it has enlarged the scope of the main Section by including new item of income.

Normally, the Explanation is inserted either to explain the meaning of the words in the main Section or to clarify the confusion regarding the meaning of such words. In such cases, no doubt, the Explanation can be said to be declaratory or clarificatory having retrospective effect. In principle, to that extent, we are in agreement with the learned DR. But where the amendment seeks to expand the scope of the main Section and affects the rights and obligation of the parties, then such amendment cannot be given retrospective effect unless specifically so provided.

Reference can be made to the decision of Delhi High Court in the case of Engineers Impex (P.) Ltd. v. D.D. Sharma [2000] 244 ITR 247 wherein it has been held as under: An Explanation is appended to a Section to explain the meaning of the words contained in the Section and normally it is to be read to harmonize with and to clear up any ambiguity in the main Section.

However, the Explanation to Sub-section (1) of Section 194A of the Income-tax Act, 1961, was inserted by the Finance Act, 1987, with effect from June 1, 1987 and had widened the scope of the main Section and had created an obligation, breach of which entailed penalty and criminal prosecution. The Explanation obviously is prospective and not retrospective.

At this stage, we may usefully refer to the observations of their Lordships of Hon'ble Supreme Court in the case of *Aphali Pharmaceuticals Ltd. v. State of Maharashtra* AIR 1989 SC 2227 wherein in para 32 they have summarized the nature and scope of any Explanation. The said para reads as under: 32. An Explanation, as was found in *Bihta Marketing Union v. Bank of Bihar* AIR 1967 SC 389 : (1967) SCR 848, may only explain and may not expand or add to the scope of the original Section. In *State of Bombay v. United Motors*, AIR 1953 SC 252 : (1953) SCR 1069, it was found that an Explanation could introduce, a fiction or settle a matter of controversy. Explanation may not be made to operate as "exception" or "proviso". The construction of an Explanation, as was held in *Collector of Customs v. G. Dass & Co.* AIR 1966 SC 1577, must depend upon its terms and no theory of its purpose can be entertained unless it is to be inferred from the language used. It was said in *Burmah Shell Oil Ltd. v. Commercial Tax Officer*, AIR 1961 SC 315 : (1961) 1 902, that the Explanation was meant to explain the Article and must be interpreted according to its own tenor and it was an error to explain the Explanation with the aid of the Article to which it was annexed. We have to remember what was held in *Dattatraya Govind Mahajan v. State of Maharashtra*, AIR 1977 SC 915 (928): (1977) 2 SCR 790, that mere description of certain provision, such as "Explanation" is not decisive of its true meaning. It is true that the orthodox function of an explanation is to explain the meaning and effect of the main provision to which it is an explanation and to clear up any doubt or ambiguity in it, but ultimately it is the intention of the legislature which is paramount and mere use of a label cannot control or deflect such intention.

State of Bombay v. United Motors (supra) laid down that the interpretation must obviously depend upon the words used therein, but this must be borne in mind that when the provision is capable of two interpretations, that should be adopted which fits the description. An explanation is different in nature from a proviso for a proviso excepts, excludes or restricts while an explanation explains or clarifies. Such explanation or clarification may be in respects of matters whose meaning is implicit and not explicit in the main Section itself. In *Hiralal Ratanlal v. State of UP.* [1973] 1 SCC 216 (225) : AIR 1973 SC 1034 (1040), it was ruled that if on a true reading of an Explanation it appears that it has widened the scope of the main Section, effect be given to legislative intent notwithstanding the fact that the

Legislature named the provision as an Explanation. In *D.G. Mahajan v. State of Maharashtra* (supra) this Court said that legislature has different ways of expressing itself and in the last analysis the words used alone are repository of legislative intent and that if necessary an Explanation must be construed according to its plain language and 'not on any a priority consideration.

The legal position as summarized above clearly shows that label given to a statute is not relevant but it is the intent of the legislature which is relevant. So, depending upon the intent of the legislature, an Explanation may or may not be declaratory or clarificatory. It may sometimes expand or restrict the scope of the main Sections. Therefore, the contention of the learned DR that the Explanation of Section 9(1)(ii) should be construed as declaration or clarificatory merely because the legislature has used the words "For removal of doubts, it is declared", cannot be accepted.

10. Let us now examine the scope of the Explanation to Section 9(1)(ii). At this stage, we may directly refer to the judgment of Hon'ble Kerala High Court in the case of *CIT v. S.R. Patton* [1992] 193 ITR 49 : 65 Taxman 472 where the Explanation as originally inserted by Finance Act, 1983 was considered and it was held that such Explanation was neither declaratory nor clarificatory as it had widened the scope of Section 9(1)(ii) since the nature of income included was never within the ambit of main Section. Accordingly, retrospective effect could not be given to such Explanation. Since the legislature had given retrospective effect only from 1-4-1979, it could not be given prior to 1-4-1979. Hence, such Explanation could not be applied to Assessment year 1978-79 or any earlier years. The relevant portion of the above judgment is reproduced as under: We shall proceed to consider the larger question argued before us regarding the scope and impact of an Explanation. The mere use of the label "Explanation" is not decisive of the true meaning and scope of the provision. Ordinarily, the purpose of an Explanation in a statute is to clarify or explain or settle any doubt or ambiguity or controversy. It may even widen the scope of the main provision in rare cases. The words used along can reflect the true intent and they should be construed on their own terms. In this regard the context, background and history of the legislation may be looked into - See *Aphali Pharmaceuticals Ltd. v. State of Maharashtra*, AIR 1989 SC 2227; 4 SCC 378; p. 393, paragraph 33 - wherein the Supreme

Court has analysed the entire law on the point.

It is evident that the Gujarat High Court did not accept the views of text book writers regarding the scope of Section 9(1)(ii) of the Act as it stood, before the addition of the Explanation. It was, perhaps, due to the above controversy regarding the scope of Section 9(1)(ii) of the Act that the Legislature intervened and added the Explanation to Section 9(1)(ii) of the Act w.e.f April 1, 1979. In the circumstances, the purpose behind the addition of the Explanation was only to clarify and settle the controversy. The Explanation was to have effect only from April 1, 1979. We are, therefore, of the view that the Explanation to Section 9(1)(ii) of the Act cannot be considered to be declaratory nor can it apply to any period anterior to April 1, 1979.

Similarly, the Explanation as substituted by Finance Act, 1999 cannot be considered as declaratory or clarificatory. The Explanation, originally enacted remains the same and one more item of income, i.e., off-period salary has been added. This clearly shows that scope of main Section has been further widened. Further, any statute which saddles any person with liability to pay tax cannot be considered as declaratory statute. Therefore, in our considered opinion, the Explanation to Section 9(1)(ii) cannot be considered as declaratory or clarificatory. This view is also fortified by the fact that even the Board Circular (supra) says that amendment is to expand the scope of Section 9(1)(ii). That is why the circular specifically says that such amendment would apply to assessment year 2000-2001 and subsequent years.

11. It is the settled legal position that there is legal presumption that retrospective effect cannot be given to a statute unless specifically provided by the Statute itself. However, this presumption is not applicable to declaratory or clarificatory statutes as held by the Hon'ble Supreme Court in the case of Podar Cements (P.) Ltd. 's case (supra). So, where the Explanation is not declaratory/clarificatory but expands the scope of main Section, retrospective effect cannot be given to such Explanation unless specifically provided. The Hon'ble Delhi High Court judgment in the case of Engineers Impex (P.) Ltd. (supra) supports its proposition. We have already noted that legislature itself given retrospective effect to the original

Explanation from a particular date because it was not declaratory. Otherwise there was no need to give retrospective effect.

Had the legislature intended to give retrospective effect to the Explanation substituted by Finance Act, 1999, it could do so.

Therefore, it has to be given prospective effect. The Board circular rather fortifies this conclusion. Even otherwise, if construction of a provision is susceptible of two possible views, the view favourable to assessee should be adopted as held by Supreme Court in the case of CIT v. Vegetable Products Ltd. [1973] 88 ITR 192 and in case of Union of India v. Onkar S. Kanwar 12. The judgment of the Hon'ble Supreme Court in the case of Podar Cement (P.) Ltd. (supra) relied upon by the learned DR does not help the revenue. In that case the Apex Court ruled that the amendment of Section 27 by insertion of Clause (iii) simply declared the meaning of the word "owner" which was always there even before the amendment. But in the present case before us, the meaning of the words "earned in India" was quite different in view of the judicial pronouncements as is given by Supreme Court in the case of E.D. Sassoon & Co. Ltd. (supra), by Gujarat High Court in the case of S.G. Pgnatale (supra) as well as judicial cognizance by Corpus Juris Seccondum. Therefore, the present case is a case where Explanation has not declared the existing meaning but has enlarged the scope of the main Section and, therefore, retrospective effect cannot be given to the amendment made to the Finance Act, 1999.

13. In view of the above discussion it is held that prior to amendment by the Finance Act, 1999, the words 'earned in India' never included the remuneration payable for the rest period or the leave period and, therefore, such salary, if paid outside India were not taxable under Section 9(1)(ii). Hence, alternate contention of Id. DR is also without force. However, it is clarified that if such salary is paid in India then the same would become taxable under Section 5(2)(a). In the present case, undisputedly such salary was payable and paid outside India. Accordingly, the same are not taxable in India. The orders of the CIT(A) are, therefore, upheld.