

Mahindra and Mahindra Ltd. Vs. Additional Director of Income Tax

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jul-28-2006

Reported in : (2007)106ITD521(Mum.)

Judge : P Kumar, R Yadav

Appellant : Mahindra and Mahindra Ltd.

Respondent : Additional Director of Income Tax

Judgement :

1. On these appeals coming up for hearing, we noticed that there were no orders passed by the AO in these cases and the CIT(A) had actually adjudicated upon the correctness of certificates issued by a firm of chartered accountants, certifying certain rates as the rates at which taxes were required to be deducted at source from the remittances made by the assessee tax deductor.

2. An interesting preliminary issue, therefore, arises. We have to first determine whether it was indeed open to the CIT(A) to entertain an appeal, under Section 248 of the IT Act, 1961, against a chartered accountant's certificate holding that tax at a particular rate is required to be deducted by an assessee tax deductor, from a particular remittance to a non-resident, where that assessee tax deductor is of the view that no such tax is required to be deducted by him. The certificate in question is issued by a chartered accountant under CBDT Circular No. 759, dt. 18th Nov., 1997 (1997) 143 CTR (St) 290 as modified by CBDT Circular No. 10 of 2002, dt. 9th Oct., 2002 (2002) 177 CTR (St) 41.

3. We have heard the rival contentions on this issue. We have also perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

4. In view of the provisions of Section 195, it is obligatory for a person making any payments to any non-residents that income-tax thereon in connection with the same is deducted at source. It was with a view to ensure compliance with this requirement that the RBI requirement was to obtain a 'no objection certificate' from the AO for each such remittance, so as to ensure that all remittances were examined by the AO. This procedure resulted in inordinate delays in making the remittances because on many occasions the process of determining tax deductions by the AO took long time. It was in this backdrop and in the light of, to our mind commercial realities, as also increased measure of faith in taxpayers and professionals, that the system was simplified in 1997. The CBDT has, vide Circular No. 759, dt. 18th Nov., 1997 [(3097; 143 CTR (St) 290], dispensed with the requirement of obtaining a no objection certificate from the AO before making a foreign remittance. Under the new scheme set out in the aforesaid circular, which has been subsequently modified by the CBDT Circular No. 10 of 2002, dt. 9th Oct., 2002 [(2002) 177 CTR (St) 41], it is not necessary for an assessee to obtain prior determination of tax withholding liability. The assessee could, under the new scheme, approach any independent chartered accountant for determining his withholding tax liability from a remittance, and make a remittance on the basis of this certification, as long as the assessee tax deductor gave an undertaking to the AO on the following lines: I/We.... (Name, address and PAN Number) propose to make a remittance of... being (nature of payment)... to.... (Name and complete address of the person to whom the remittance has been made) after deducting a sum of Rs....being tax @ ...which is the appropriate rate of TDS on the said amount of remittance.

2. A certificate from the accountant, as defined in Explanation below Section 288 of the IT Act, certifying the nature and amount of income, amount of tax payable and the amount actually paid is also annexed.

3. In case it is found that the tax actually payable on the amount of remittance made, has either not been paid or has not been paid in full, I/we undertake to pay the said amount of tax along with interest found due, in accordance with the IT Act.

4. I/We will also be subject to provisions for penalty and prosecution for the said default as per the IT Act.

5. I/We also undertake to submit the requisite documents etc. for enabling the IT Department to determine nature and amount of income and tax, interest, penalty etc. payable thereon. Date : -----Place : Name and Signature

In our humble understanding, so far as TDS under the revised procedure of making remittances to non-residents is concerned, the position is now like this. In case a person has to make a remittance to a non-resident, and he is of the view that the no TDS is warranted or tax is required to be deducted at a certain rate, he can approach an independent chartered accountant for certifying, in the prescribed format, the rate at which tax is to be deducted or that tax is not to be deducted, and make the remittance on the basis of such a certificate. Even this remittance on the basis of the chartered accountant's certificate is at assessee's own risk of consequences which follow the short deduction or non-deduction of tax at source. The assessee has to give an undertaking to that effect. However, as long as assessee's stand is at least supported by a chartered accountant's certificate, the assessee is at least allowed to make the remittance on that basis. Contrast this with the old procedure of prior certification of withholding tax requirement by the AO, in which, the assessee has to first pay the tax and then make the remittance. Under the revised scheme, the assessee can, subject to the support of a chartered accountant's certificate and furnishing of an undertaking extracted earlier in this order, first make the remittance and the finalization of withholding tax liability follows.

5. The revised scheme of ascertainment of withholding tax liability thus shows the faith that the Revenue administration has reposed in the taxpayers and also in the professionals. It is commendable step, displaying this faith in the taxpayers and the professionals, as also ensuring that the tax procedures do not hamper the normal business activities. The real time control mechanism to ensure revenue collections from foreign remittance at the point of remittance, which was in the

nature of steering control, is given up, though naturally with the right to take suitable remedial measures when any loss of revenue is caused by the tax-deductors. Nothing more than this paradigm shift in approach needs to be read into this scheme of things. It is not, as Mr. Mahajani perhaps wants us to believe, abandonment of the institution of AO (TDS) in favour of the professionals in accountancy practice. It is an act of emerging faith in the taxpayers and professionals, not an act of abandonment of duties and powers of the AO (TDS).

6. It is important to take note of a clarification issued by the CBDT. As clarified by the CBDT, vide Circular No. 767, dt. 22nd May, 1998 [(1998) 147 CTR (St) 1] "if an order under Section 195(2) has been obtained by the person responsible for deducting tax, the new procedure of filing an undertaking along with the certificate prescribed in Circular No. 759 would not be applicable." It is thus clear that the new scheme of remittances being allowed on the basis of chartered accountant's certificate is not in substitution of the scheme of things envisaged under Section 195(2) of the Act, but merely to supplement the same.

7. The CIT(A) appears to have proceeded on the fallacy that the question of withholding tax liability of an assessee tax deductor, in respect of a foreign remittance, is to be settled by a chartered accountant. If we are to uphold CIT(A)'s stand, whenever an assessee tax deductor is aggrieved of the stand taken by a chartered accountant, while certifying the withholding tax liability of the assessee tax deductor, the assessee can file an appeal against the said certificate, on the ground of 'denying liability to deduct tax at source', under Section 248 of the Act. The office of the AO is thus completely bypassed. Section 248 of the Act does provide that, "any person, having in accordance with the provisions of Sections 195 and 200, deducted and paid tax in respect of any sum chargeable under this Act, other than interest who denies his liability to make such deduction, may appeal to the CIT(A) to be declared not liable to make such deduction", but to deny a legal liability, there has to be a legal liability first. The legal remedies cannot be sought in vacuum or on the basis of an opinion held by a person other than the authority concerned. If X is someone's AO (TDS), it is X's opinion about that person's withholding tax liability, which alone can give rise to a cause of action for appeal.

What an independent professional may have to say on that issue may or may not be relevant for determining the withholding tax liability, but it is certainly not decisive for the purpose of giving rise to cause of action for appeal. The certificates issued by the chartered accountants have no role to play so far as determination of withholding tax liability is concerned. These certificates cannot, and do not, impose any tax deduction liability on the assessee tax deductors. The only role these certificates play is that when an assessee has to make a remittance to non-residents, based on assessee's own understanding of the withholding tax requirements and at his risk of consequences for short deduction of tax at source or non-deduction of tax at source, such a remittance has to be supported by a chartered accountant's certificate in support of assessee's contention. Even a cursory look at the format for assessee's undertaking, extracted in para 4 above, would show, that it is in support of assessee's stand to the effect "tax ... which is the appropriate rate of TDS on the said amount of remittance" that the certificate by a chartered accountant is obtained and filed by the assessee tax deductor. In our understanding, unless the AO (TDS), or other appropriate legal authority, takes a stand that the assessee has a tax withholding liability, there cannot be any cause of action for the assessee tax deductor to go in appeal before the CIT(A). We are of the considered opinion that in the present case, in which the assessee filed an appeal directly against the chartered accountant's certificate and has not taken the matter for the consideration by the AO (TDS) at all, the GIT(A) clearly erred in entertaining the appeal.

8. There is one more aspect of the matter which needs to be dealt with.

There is a judicial precedent by this Tribunal in the case of Hindustan Construction Co. Ltd. v. Asstt. CIT (ITA No. 5595/Bom/1995, Mumbai 'A' Bench; asst. yr. 1995-96; order dt. 31st Oct., 2000). In this case, the co-ordinate Bench was in seisin of a case in which the assessee tax deductor had deducted and deposited the tax at source and then moved applications to the AO for holding that the assessee be declared as not liable to deduct tax at source. In assessee's application, inter alia, it was stated that "we have deducted tax at source on above, without prejudice to our contention that withholding tax is not applicable on these types of payments." However, the AO merely issued 'no objection certificate' without dealing with the

contention of the assessee to the effect that no tax is deductible at all. Aggrieved by the action, or rather inaction, of the AO, the assessee carried the matter in appeal before the CIT(A) but without any success, The CIT(A) dismissed the appeals filed by the assessee on the ground that these appeals are infructuous since the AO has not passed any order against which the assessee can be said to be aggrieved. Not satisfied with the stand of the CIT(A), the assessee carried the matter in further appeal before this Tribunal. As noted by the Tribunal itself, it was a case in which "the assessee deducted tax at source at the normal rate which is agreeable to the AO and raised a dispute in the letter addressed to the AO seeking no objection certificate." On these facts, a co-ordinate Bench of this Tribunal was of the considered view that "a plain reading of Sections 248, 249(2)(a) and 251(1)(c) of the Act shows that the right of filing an appeal before the CIT(A) is not saddled with a pre-condition of obtaining an order from the AO rejecting the claim of the assessee." "In other words", observed the co-ordinate Bench, "a formal order of an AO is not required to present an appeal under Sections 248/249 of the IT Act." We quite agree with the co-ordinate Bench but then we are also alive to the fact that it was a case in which by AO's conduct he had taken a stand that the assessee was liable to deduct tax at source, and his inaction in dealing with the representations of the assessee further made his intentions clear. What was probably missing in this case was only a formal order to the effect that the assessee had a withholding tax liability but there was no doubt about the stand of the AO to that effect. The AO did not pass the speaking order on assessee's contentions depriving the assessee an opportunity to go in appeal against the formal order. It resulted in a situation that AO ended up capitalizing out of its inertia and thus denying the lawful right of appeal to the assessee. Very rightly, our co-ordinate Bench did not allow this gross miscarriage of justice. We admire and respect the stand of the coordinate Bench and its effective dispensation of true justice. The material facts of the case as before that co-ordinate Bench, however, do not exist before us In contrast to that situation, we are dealing with a case in which the AO was completely out of picture at all stages or proceedings and the cause of action of appeal before the GIT(A) had nothing to do with the action or inaction of the AO. The cause of action for appeal before the CIT(A), in this case, was issuance of certificate by an independent chartered

accountant of assessee's choice stating that tax at a certain rate was required to be deducted by the assessee from remittance in question.

The cause of action for the filing of appeal, in the case before the co-ordinate Bench, was inaction of the AO. These two situations are, in our humble understanding, materially different. As Hon'ble Supreme Court has said in the case of *Madav Rao Jiyajo Rao Scindia Bahadur v. Union of India* permissible to pick up a word or a sentence from the judgment of a Court, divorced from its context, as containing a full exposition of law on a question when the question did not even fall to be answered in that judgment. Mr. Mahajani's reliance on this judicial precedent is thus of no use and avail. We reject the same.

9. We are, therefore, of the considered view that the CIT(A) acted contrary to the scheme of the IT Act in admitting an appeal against certificate issued by a firm of chartered accountants. In our considered view, he should have rejected the appeals as non-maintainable and should have given the liberty to the assessee to approach the AO (TDS) for seeking determination of withholding tax liability of the assessee and to follow the grievance redressal mechanism in case he is aggrieved of the stand of the AO. That is the proper course of action. It is, in our considered view, also necessary because appeal to the CIT(A) is only one of the courses of grievances redressal mechanism under the Act. An assessee may also approach the Administrative CIT, if so advised, under Section 264, but then such a course of action can only be followed when there is an 'order' by any authority subordinate to the CIT. Keeping all these things in mind, as also entirety of the case, we consider it fit and proper to hold that no appeal to CIT(A) is maintainable against the certificate issued by a chartered accountant under CBDT Circular No. 759. The CIT(A) should have dismissed the appeals on this ground alone. Accordingly, we see no need to address ourselves to the merits of the case and decline to consider the assessee's grievance on merits of the case.

10. In the impugned orders, the CIT(A) has dismissed the appeals--though on merits. We are also of the view that the CIT ought to have dismissed the appeals, though, as set out above, our reasoning is different. We, therefore, approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter. The

assessee tax deductor, however, is at liberty to take up the matter with the AO (TDS) for ascertainment of his withholding tax liability from the remittances in question. To avoid the possibility of a cul-de-sac due to inertia of the AO at this stage, we also consider it appropriate to direct the AO that, in case assessee chooses to take up the matter with the AO (TDS) for ascertainment of his withholding tax liability, he shall dispose of the matter, by way of a speaking order, within a reasonable time--say 90 days from the date on which he comes to be in seisin of the matter.

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