आयकर अपीलीय अधिकरण, मुंबई "सी" खंडपीठ

Income-tax Appellate Tribunal "C" Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं रविश सूद, न्यायिक सदस्य

Before S/Sh. Rajendra, Accountant Member & Ramlal Negi, Judicial Member

आयकर अपील सं./I.T.A. No. 3532/Mum/2014, निर्धारण वर्ष /Assessment Year:1997-98

Procter & Gamble Distribution Company Limited ***(Merged with Procter & Gamble Home Products Limited)*** P & G Plaza Cardinal Gracias Road, Chakkala, Andheri (E), Mumbai-400 009 **PAN:AAACP4072C**	Vs.	Dy. CIT, Circle 8(2), Mumbai
(अपीलार्थी **/Appellant**)		(प्रत्यर्थी **/ Respondent**)

Revenue by: Shri Haresh G. Buch

Assessee by: Shri Rayat Mittal - DR

सुनवाई की तारीख **/ Date of Hearing: 30.01.2018**

घोषणा की तारीख **/ Date of Pronouncement: 01.03.2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार /PER RAJENDRA, AM-

Challenging the order dated 20.02.2014 of the CIT(A)-17, Mumbai the assessee has filed the present appeal.Assessee-company,engaged in the business of marketing and selling of toilet soaps,filed its return of income on 20/11/1997, declaring total income at Rs.1.28 crores.The Assessing Officer(AO)completed the assessment on 30/3/2000,u/s 143(3) of the Act,determining its total income at Rs.29.38 crores.The assessee agitated before the first appellate authority (FAA) who partly allowed its appeal.Aggrieved by the order of the FAA the assessee as well as the AO filed appeals before the Tribunal.Vide its order,dated 29/07/2011,the Tribunal (ITA no.3596/Mum./2003 and ITA no.3661/Mum./2003).The Tribunal restored the matter to the file of the AO observing as under:-

> *"6.Having carefully heard the submissions of the rival parties and perusing the material available on record we find merit in the plea of the learned counsel for the assessee that on the similar issue, the Tribunal in the earlier years has restored back the matter to the file of the AO vide finding recorded in paragraph 13, page 7 and 8 of its order dated 9.5.2008 (supra) as under:-*
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> "13. Ld. A.R. for assessee mentioned that the similar payments were made to M/s. Asia Today Ltd. And issue came up before the Hon'ble Tribunal in the case of M/s. PGHHPL vide ITA no.5153/M/ 98 for A.Y.1995-96 and 5887 & 5688/M/99 for A.Y. 1994-95 & 1996-97. In these appeals, on this issue, the Hon'ble ITAT has referred the issue to the

> files of the AO for the reasons that the AO failed a pass a speaking order as to how the provisions of section 40(a) are applicable. The Tribunal held that the place of happenings are outside India and the payments have been made outside India. Following the above, AR for ass fairly requested that the matter may be sent to the AO for fresh adjudication at the end of the A.O. Ld. CIT – DR relied on the order o the CIT(A) in this regard and argued that the decision of Tribunal, Mumbai G-Bench, in the case of M/s. Satellite Television Asia Region Ltd., vide ITA no.5066/M/2004 for the A.Y. 2000-01 is applicable and he argued that the payment of advertisement expenses to Asia Today Ltd., without deduction of tax under section 40(a) is rightly to the file of the A.O. for examining afresh after affording reasonable opportunity to the assessee of being heard. He shall also examine the revenue's argument relying on the decision in the case of Satellite Television Asia Region Ltd. (supra). Accordingly, this ground is set aside."
>
> *In the absence of any distinguishing feature brought on record by the Revenue, we respectfully following the order of the Tribunal (supra) set aside the orders passed by the Revenue authorities on this account and restore the issue to the file of the AO for examination afresh in the light of the directions given by the Tribunal in the said order (supra) and according to law after providing reasonable opportunity of being heard to the assessee."*

2.The AO in pursuance of the order of the Tribunal passed order u/s 143(3) rws 254 of the Act,on 17/12/2012,determining the income of the assessee at Rs.4.93 crores.

3.During the appellate proceedings, before the FAA,the assessee made submissions with regard to disallowance of advertisement expenditure incurred in foreign currency,amounting to Rs.20.39 lakhs.Before him,it was argued that the foreign entity namely Asian Today Ltd.,Hong Kong,had not rendered services in India,that provisions of section 195 were applicable,that the assessee was not obliged to deduct at source for the payments made to the Hong Kong Company,that the AO was not justified in invoking the provisions of section 40(a)(i) of the Act. After considering the assessment order and the submissions of the assessee,the FAA held that the claim made by the assessee about rendering of services by the foreign entity outside India was no longer valid,that the Act was amended vide Finance Act,2010,that an Explanation was inserted with retrospective effect,that rendering of services was no more a decisive factor for application of section 9 r.w.s.195 of the Act,that old transaction arose in India,that the advertising took place in India,that the income from advertisement had arisen in India,that the same was chargeable to tax in India.He deliberated upon the principles governing the Explanation and held that the same would clarify and explain doubts /ambiguity.With regard to the legal maxim *'lexnoncogitad impossiblea'*,the FAA observed that legislative intent of the amendment was quite clear,that he was bound by the law as it existed.Finally,he upheld the order of the AO.

4.Before us,the Authorised Representative(AR)stated that the assessment order was passed in the name of an entity that was not existing,that the order was invalid,that the Tribunal had passed order in the name of PGDCL,that while giving effect to the said order the AO made the assessment in the case of PGPHL.He referred to the case of Intel Technology India(P.)Ltd.(380 ITR 272),and Spice Entertainment Ltd.(ITA 475 of 2011,dtd.03.08.2011,Hon'ble Delhi High Court)Maruti Suzuki India Ltd.(72 taxmann.com 164).He further stated that the matter pertained to the AY.1997-98,that amended provisions of section 9 and resultant violation of section 40(a)(ia)of the Act was not applicable to that AY.,that services were rendered outside India.He relied upon the case of Lehman Brothers & Advisors (P.)Ltd.(157 ITD 1003),KPMG(177TTJ 708) and Channel Guide India Ltd.(139 ITD 49).

5.We find that the original assessment had travelled up to the Tribunal,that after passing of assessment order and before the adjudication of the second appeal name of the assessee had changed as per the orders of the Hon'ble High Court,that the Tribunal had in its order dated specifically mentioned the name of the assessee as PGDCL,that it was also mentioned in that order that earlier the company was known as PGHPL, that matter was remanded back to the AO to decide the issue of applying the provisions of section 40(a)(i)in light of the order M/s. Satellite Television Asia Region Ltd.(supra),that while passing the fresh order the AO passed the order in the name of PGHPL,that FAA also did not pass the order in the name of the new entity i.e.PGDCL.Thus,the departmental authorities have passed orders about a non-existent entity.As per the established provisions of taxation laws orders passed,in case of an assessee who is not existing,is a null and void order.The Hon'ble Karnataka High Court in the case of Intel Technoloy(supra) has held as under:

> "*The framing of assessment against a non-existing entity or person is not a procedural irregularity but a jurisdictional defect which goes to the root of the matter…..the proceedings were initiated against a non-existing assessee-company even after the amalgamation of the company with the successor company. Therefore, the assessment was not valid. The Department was not entitled to the benefit of section 292B of the Income-tax Act, 1961……."*

In the other matters,relied upon by the AR,similar views have been confirmed.So, we hold that the order of the AO and the FAA are invalid orders.

0.Even on merits the assessee deserves to succeed.The issue of retrospective applicability of explanation to section 9(1)of the Act,has been examined at various judicial forums and it has

been held that provisions of section 40(a)(i)cannot be invoked retrospectively.It has to remembered that the alleged liability to deduct tax arose in the AY. and at that time explanation was not part of the section 9(1).Law never expects a person to perform impossibles.In the year under appeal how the assessee could have deducted tax at source when there was no provision in the statute.We are unable to understand the logic of the FAA that he knew that explanation was retrospective and that he had to act as per law.As he was aware that the amendment to section was not part of the Act at the time of making the payment to the foreign entities,he should not have endorsed the action of the AO.In the matter of the Lehman Brothers(supra)the Tribunal has held as under:

> *"We would also like to mention that the retrospective amendment to section 9 cannot change the tax withholding liability with retrospective effect. In the cases of Virolo International (supra) and Channel Guide India Ltd. v. Asstt. CIT [2012] 139 ITD 49/25 taxmann.com 25 (Mum.) it had been clearly held that liability to deduct tax cannot be implemented retrospectively. The assessee had acted as per the provisions of Act that were applicable at the time of making the payment and in the case under consideration there was no liability on part of the assessee to deduct tax for the payment made. Considering the above, we are of the opinion that the order of the FAA does not suffer from any legal or factual infirmity. So, confirming his order, we decide effective ground of appeal against the AO."*

Case laws relied upon by the AR before us,are unanimous that no liability can be fastened to an assessee because of retrospective amendment to the section 9(1) of the Act.Respectfully following the orders mentioned in the earlier part of our order and considering the above we are of the opinion that the order of the FAA cannot be endorsed.So,reversing the same,we decide the effective ground of appeal in favour of the assessee.

As a result,appeal filed by the assessee stands allowed.
फलतः निर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है.
Order pronounced in the open court on 1st March,2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 01 मार्च, 2018 को की गई।

Sd/-	**Sd/-**
(RAMLAL NEGI)	**(RAJENDRA)**
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 01.03.2018.
Roshani, Sr. PS/JV,Sr. PS
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :
1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR " G " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**,** जी खंडपीठ,आ.अधि.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**