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IN THE HIGH COURT OF DELHI AT NEW DELHI

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INCOME TAX APPEAL NO. 17/2014

Date of decision: 3rd September, 2014

M/S LEA INTERNATIONAL LIMITED

..... Appellant

Through: Mr. Ved Jain & Mr. Pranjal Srivastava,
Advocates.

versus

ASSISTANT DIRECTOR OF INCOME TAX

..... Respondent

Through: Mr. Sanjeev Sabharwal, Sr. Advocate
with Mr. Ruchir Bhatia & Ms. Swati Thapa,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL):

M/s Lea International Limited, a non-resident, has filed this appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) against the order of the Income Tax Appellate Tribunal (Tribunal, for short) dated 11th July, 2013 upholding levy of penalty for concealment of income under Section 271(1)(c) of the Act.

2. The appeal in question pertains to Assessment Year 2005-06.
3. The respondent-assessee a foreign company based in Canada was, during the relevant period, engaged in providing engineering consultancy service for design, supervision, transportation, planning and project



management in the field of roads and highways, urban development, transportation, planning, water resources and railways.

4. The appellant-assessee had received Rs.2,29,583/- under a contract with Asian Development Bank (ADB), for providing consultancy service. In the return of income, the aforesaid amount was claimed as exempt from tax. We shall be referring to the return of income and the reason as to why the said receipt was claimed to be exempt from tax subsequently. By assessment order dated 15th May, 2007, the Assessing Officer held that Rs.2,29,583/- was not exempt and was added to the return income. Subsequently, notice under Section 271(1)(c) of the Act was issued and penalty was imposed in respect of two additions, including addition of Rs.2,29,583/-, which was claimed to be exempt. The aforesaid order of penalty has been upheld by the Commissioner of Income Tax (Appeals) and by the Tribunal in the impugned order.

5. It is an undisputed position that the agreement between the appellant-assessee and ADB dated 23rd November, 2004 provided as under:-

“Section 12.02. ADB has obtained the confirmation of the Government that:

(a) The Consultant and the personnel shall have the status of experts performing missions for ADB and that they shall be entitled to the privileges, exemptions and immunities conferred upon such experts by the provisions of the Agreement Establishing the Asian Development Bank; and



that without limiting the generality of those provisions, the Government confirms that:

- (i) except where ADB shall otherwise agree, the Consultant, and the personnel shall be immune from legal process with respect to all acts performed by them in their capacity as Consultants in connection with the Technical Assistance;
- (ii) the personnel and their families (if they are not citizens or nationals of the recipient country) shall be exempt from immigration restrictions, alien registration requirements and national service obligations of the recipient country;
- (iii) the Consultant and the personnel (if they are not citizens or nationals of the recipient country) may bring into the recipient country reasonable amounts of foreign currency for the purpose of the Technical Assistance and may withdraw from the recipient country similar amounts of foreign currency together with any amounts earned therein by the Consultant and the personnel in connection with the Technical Assistance; and
- (iv) the personnel and their families (if they are not citizens or nationals of the recipient country) may bring into the recipient country reasonable amounts of foreign currency for their personal use and may withdrew similar amounts of foreign currency from the recipient country;

(b) The Government shall:

- (i) promptly provide the personnel and their families with any entry and exit visas, residence permits, foreign exchange permits and travel documents required for their stay in the recipient country;
- (ii) promptly provide the Consultant and the personnel with work permits and other documents necessary to enable them to perform their work on the Technical Assistance; and
- (iii) promptly clear through customs any equipment, materials or supplies required for the Technical Assistance, any personal effects and household goods of the personnel and their families.

(c) The Government shall exempt the Consultant



and the personnel from, or bear the cost of, any taxes, duties, fees or other impositions levied under the laws and regulations in effect in the territories of the recipient country or of any political subdivision or agency thereof in respect of:

- (i) any payments made in connection with the carrying out of the Technical Assistance to the Consultant or the personnel (except where the recipient country has reserved the right to tax its nationals pursuant to Article 58.2 of the Agreement Establishing the Asian Development Bank);
- (ii) any equipment, materials and supplies which have been brought into the territories of the recipient country which are to become the property of the Government;
- (iii) any equipment, materials and supplies which have been brought into the territories of the recipient country (except by Consultants or personnel who are citizens or nationals of the recipient country) for the purpose of carrying out the Technical Assistance and which will be consumed therein or subsequently withdrawn therefrom; and
- (iv) any personal effects of the personnel and their families (if they are not citizens or nationals of the recipient country) which, having been brought into the territories of the recipient country will be consumed therein or subsequently withdrawn therefrom.”

6. The agreement records that the Government of India had agreed and affirmed to provide and make available to the consultant, i.e., the appellant-assessee free of charges several facilities, services, equipment, material documents, information etc. Sub-clause (iii) of clause (b), stipulated that the Government shall exempt or bear cost of any taxes, etc. in India.

7. The explanation and the stand of the appellant-assessee was that



relying upon the aforesaid clauses, income or receipt of Rs.2,29,583/- w
treated as exempt from tax. The aforesaid explanation has been rejected by
the Tribunal on the ground that the application for exemption under
Section 10(8A) of the Act was filed by the appellant-assessee with the
Additional Secretary, Department of Economic Affairs, Ministry of
Finance, Government of India, on 20th November, 2006, but the return of
income was filed on 29th October, 2005 and notice for scrutiny assessment
under Section 143(2) was issued on 25th October, 2006. In other words, the
said application under Section 10(8A) dated 20th November, 2006 was filed
subsequent and post filing of the return and issue of notice. This showed
lack of bona fides on the part of the appellant-assessee.

8. The appellant-assessee has placed on record copy of the letter dated
20th November, 2006, which was filed with the Additional Secretary,
Department of Economic Affairs, Ministry of Finance, Government of
India. The said letter for the sake of convenience is reproduced below:-

**“LEA International Ltd.
Transportation and Management consultant
Consulting Engineers**

Dated: 20th November, 2006

To,
The Addl. Secretary,
Department of Economic Affairs,
Ministry of Finance, Government of India, North Block,



New Delhi

Re: Approval u/s 10(8A) of the Income Tax Act, 1961

Sir,

The applicant, M/s Lea International Limited, Canada had entered into an agreement with M/s Asian Development Bank on 23rd November, 2004 for rendering technical consultancy services in relation to "North Eastern Region Urban Development Project". Appendices 4 of the said agreement enlists the Specific assurances of the Government. section 12.02 of the appendix 4 provides that- *"The government shall exempt the Consultant and the personnel from, or bear the cost of, any taxes, duties, fees or other impositions levied under the laws and regulations in effect in the territories of the recipient country or of any political subdivision or agency thereof in respect of "(i) any payments made in connection with the carrying out of the Technical Assistance to the Consultant or the personnel (except where the recipient country has reserved the right to tax its nationals pursuant to Article 56.2 of the Agreement 'Establishing the Asian Development Bank); (ii).....;(iii)..... and (iv).....;"*

The applicant was under bona-fide belief its income is exempt from Indian Income Tax on the basis of section 12.02 of the appendix 4 of the agreement entered into with ADB. Of late, the applicant has been advised by its tax consultant that section 10(8A) of the Income Tax Act, 1961 deals with such income and to be eligible for exemption under this section, the agreement for engagement of the consultant should be approved by your office, being the designated prescribed authority under this section for being eligible for the exemption from the Income Tax Act, 1961. The copy of the agreement with ADB is enclosed herewith for, your kind perusal and record.

In view of the above, we request you to kindly approve the agreement with retrospective effect.

Preyed accordingly,

Your truly,
For Lea International Limited



(Authorised Signatory)
Encl : As above”

9. We have already quoted above the relevant clauses of the agreement between the appellant-assessee, a non-resident and ADB and the factum that the Government of India had agreed to certain terms and conditions, including the condition relating to payment of taxes. The letter dated 20th November, 2006 no doubt was written after filing of the return and post issue of notice under Section 143(2), but it records that the appellant-assessee was under the bona fide belief that the receipt was exempt on the basis of Section 12.02 of the appendix 4 of the agreement between them and ADB, referring to the obligation of the Government of India. Subsequently, on the advice given by the tax consultants, the application under Section 10(8A) was being moved. The letter clearly stated the reason and cause why the application was moved on 20th November, 2006 and not earlier. The appellant-assessee had given an intelligible and cogent explanation in this regard, which was not considered and examined or even noticed by the Tribunal. The surrounding and attending circumstances indicate and establish that the said explanation was genuine and correct. In this connection, we may notice that in the return of income itself, the appellant-assessee had taken care and caution to reveal and state full and material facts. In the computation of assessable income, the appellant-assessee had specifically disclosed that consultancy fee of Rs.2,29,583/-



had been treated as exempt under the Act and a specific note 3.2

schedule 8 of the balance sheet was recorded. The said note reads as under:-

“3.2 Consultancy/Technical fees includes Rs.112,55,025 in respect of contract TA 4348-IND North Eastern Region Urban Development Project, wherein it is provided in the agreement that income resulting from this project is exempt with reference to the provisions of the agreement establishing the Asian Development Bank (The Charter), the firm and each of its consultants is an expert performing a mission for the ADB and as such is entitled to the immunities, privileges, and exemptions set forth in article 55 & 56 of the charter. The related expenses of Rs.110,25,445 have been included under respective heads of expenditure. Resultant net profit of Rs.229,583 has been claimed as exempt under the Income Tax Act, 1961.”

10. The said note does not refer to Section 10(8A), but refers to the agreement and the stance and stand of the appellant-assessee. This clearly shows that the subsequent application dated 20th November, 2006 was pursuant to the legal advice, but earlier the receipt in question was claimed as exempt in view of the terms and conditions set out in the agreement between the appellant-assessee and the ADB. The said stand was thus specifically mentioned in note 3.2. Looked from this light, it is apparent that the issue involved interpretation of the agreement between the appellant-assessee and ADB. The assessee had taken due care and caution to mention all relevant facts in the return of income without any attempt to



conceal or withhold information or details. No reference was made Section 10(8A) of the Act in the said notes. May be the appellant-assessee was wrong in his understanding of law and wrong legal advice was given to him, but this does not mean or shows that the appellant-assessee had not acted *bond fide* in view of the aforesaid factual matrix. The Tribunal has also recorded that the application filed on 20th November, 2006 has not been disposed of, which also means that the application had not been rejected. Whatever be the situation, we do not think it is a fit case for imposition of penalty under Section 271(1)(c) of the Act and as the appellant-assessee had been able to explain the reason and cause why the said income was claimed as exempt and the said reason and cause was bona fide and it cannot be a case of the Revenue that all material facts and particulars were not placed before the Assessing Officer.

11. The question of law is accordingly answered in favour of the appellant-assessee and against the respondent-Revenue. The appeal is disposed of. No costs.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

SEPTEMBER 03, 2014
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