Incomes chargeable to tax U/s. 172 cannot be subject to TDS under chapter XVII-B

**Brief of the case:**

The Hon’ble Bombay HC in the case of CIT vs. Dempo and Co. P. Ltd that when the non- resident payee is assessable under special provisions contained in Sec 172 , then the payer cannot be made responsible for deducting tax at source on the payments made to non-resident. Therefore, disallowance of expenditure cannot be justified. However,

the Divisional Bench of High court referred the case to Larger Bench due to disagreement with the view taken by Division Bench in earlier case on identical facts.

**Facts of the case:**

The assessee in its return of income had claimed expenditure of Rs.1.8 crores being the demurrage claim paid to a nonresident shipping company. The Assessing Officer disallowed such expenditure for failure to deduct tax at source under Section 195 of the Act.

The argument of the assessee for non-deducting tax at source was that since the payee is non-resident shipping company the provision of Chapter XVII-B relating to TDS are not applicable as the payee is governed by Sec 172 which is specially for non-resident carrying on shipping business.

CIT (A) rejected the claim of assessee and held that the income of payee would be computed by Sec 44B and therefore, the TDS provisions are applicable.

However, Tribunal allowed the claim of assessee by following its earlier decision in the case of DCIT Vs. Orient (Goa) (P) Ltd. rendered on 2 December 2004.Tribunal relied on CBDT Circular N0. 723 and held that Section 172 of the Act is a charging as well as a machinery provision in respect of nonresident shipping companies. It provides for determination and collection of tax. Thus Chapter XVII of the Act in respect of deducting tax at source would not apply in such cases.

**Contention of Revenue:**

It was submitted that the same issue has been considered by Division Bench of the same court in the case of Orient Goa P. Ltd. 325 ITR 554 and in that case the court reversed the findings of tribunal and upheld the disallowance u/s 40(a)(i).

Therefore, the same decision should be followed by the court in this case also.

**Contention of Assessee:**

The assessee had no obligation to deduct tax u/s 40(a)(i) on demurrage charges paid to foreign shipping company because non-resident shipping company engaged in operation of ships are governed by Section 172 of the Act which provide altogether a different machinery to tax such income of non-resident ship wise or journey wise.

Further , as per CBDT circular 723 dated 19th September,1995 also provides that Section 172 is a selfcontained code for levy and recovery of taxes ship wise and journey wise in case of ships owned or chartered by non-residents.

Therefore, since the normal provisions of sec are not applicable to payee , no obligation to deduct tax u/s 195 and thereby no disallowance can be made u/s 40(a)(i).

**Issue before High Court:**

Whether on the facts and in the circumstances of the case, the assessee was entitled to claim deduction of the demurrage charges of Rs.1,08,53,980/paid to foreign company, without deducting tax on it, under sec 40(a)(i) of the IT Act,1961.

**Held by Hon’ble Bombay High Court:**

The High court examined its own earlier decision in the case of M/s Orient (Goa)(P) Ltd, 325 ITR 554.In that case the court held Sec 172 is applicable only in respect of non-resident carrying on shipping business . Sec 172 has no application in relation to assessee company (payer) because we are not examining the tax liability of foreign company and assessee is not a foreign company Therefore, to fall in the purview of sec 172 assessee has to be non-resident which is not the case. But the High court (in present case) could not satisfy the view taken by its Division Bench’s decision in Orient P. Ltd case. This is for reason that Section 172 of the Act provides a complete code itself for levy and recovery of tax ship wise and journey wise and the same is provided in circular no. 723 issued by CBDT. Section 172 of the Act has to be examined through the prism of the non-resident shipping company in respect of its income.

As such, the logic behind considering the assessee in isolation and ignoring the fact that the payee’s income is taxable u/s 172 under a totally different mechanism , is not clear to this court in the present case.

But it is well settled position under the law that it is not open to a Division Bench to take a view contrary to the view taken by another Division Bench of this Court.

In such circumstances, it is best to refer the issue to Larger Bench of this Court. Certainty of law is an important ingredient of Rule of Law.

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