**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 8181 OF 2022**
**(ARISING OUT OF SLP (C) No. 9876 of 2020)**

**STATE BANK OF INDIA ...APPELLANT**

**Versus**

**ASSISTANT COMMISSIONER OF INCOME TAX ....RESPONDENT**

**O R D E R**

**Sudhanshu Dhulia, J.**

1. Leave granted. The appellant (State Bank of India) has challenged the judgement dated 13.01.2020 passed by a Division Bench of the Delhi High Court in ITA No. 05/2020 which has dismissed the appeal filed by the appellant and upheld the order passed by the Income Tax Appellate Tribunal (ITAT) dated 09.07.2019, holding the appellant as an assessee in default for the Assessment Year (AY) 2013-14, for not deducting TDS of its employees.

2. The question which has fallen for our consideration is whether the appellant was in default for not deducting tax at source while releasing payments to its employees as Leave Travel Concession (LTC)

3. LTC is a payment made to an employee which is exempted as 'income' and hence under normal circumstances, there should be no question of TDS on this payment. All the same, LTC has to be availed by an employee within certain limitations, prescribed by the law. Firstly, the travel must be done from one designated place in India to another designated place within India. In other words, LTC is not for a foreign travel. Secondly, LTC is given for the shortest route between these two places. Admittedly, the employees of SBI in the present case, had done their travel not just within India but their journey involved a foreign leg as well. It was also not the shortest route, consequently, according to the Revenue this was not a travel from a designated place within India to another designated place in India and thus it was in violation of the statutory provisions and hence the

payment made to its employees by the Bank could not be exempted, and the Bank ought to have deducted Tax at source, while making this payment. To give an example of one of the employees of the appellant who availed LTC taking a circuitous route of Delhi- Madurai- Columbo- Kuala Lampur- Singapore- Columbo- Delhi and his claim was fully reimbursed by the appellant and no tax was deducted under Section 192(1) for the same.

4. The appellant on the other hand through its counsel senior advocate Shri K.V. Vishwanathan, would argue that though the travel made by its employees under LTC did involve a foreign leg and admittedly a circuitous route as opposed to the shortest route was taken, yet two things go in the favour of the employees. Firstly, the employees of the appellant did travel from one designated place in India to another place within India (though in their travel itinerary a foreign country was also involved), and secondly the payments which were actually made to these employees was for the shortest route of their travel between two designated places within India. In other words, no payment was made for foreign travel though a

foreign leg was a part of the itinerary undertaken by these employees.

5. The above reasons given by the appellant-bank however, has not found favour either with the Assistant Commissioner of Income Tax or with the Commissioner of Income Tax (Appeals) or even the High Court. After examining the matter our considered opinion is that the view taken by the Delhi High Court and the Tribunal and even by the revenue in its initiation of proceedings cannot be faulted. The appellant whom we shall refer to as the 'assessee-employer' ought to have deducted tax at source.

6. Let us first go through some of the relevant provisions of the Income Tax Act, 1961 (for short 'the Act') and the Income Tax Rules, 1962 framed therein. Let us first take Section 192(1) of the Act which casts a statutory duty on the employer to deduct Tax at source from the salary of its employee

> "192(1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on

> the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year."

The consequences of failure to deduct tax at source when it is due, is given in Section 201, which reads as follows:-

> **"Consequences of failure to deduct or pay.**
>
> **201.** (1) Where any person, including the principal officer of a company,—
>
> (a) who is required to deduct any sum in accordance with the provisions of this Act; or
>
> (b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:
>
> **Provided** that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a payee or on the sum credited

to the account of a payee shall not be deemed to be an assessee in default in respect of such tax if such payee-

(i) has furnished his return of income under section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed

**Provided further** that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.

Section 10(5) which exempts payments received as LTC with which we are presently concerned. It reads as under :-

"**10.** In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included —

XXX XXX XXX

(*5*) in the case of an individual, the value of any travel concession or assistance received by, or due to him,—

(*a*) from his employer for himself and his family, in connection with his proceeding on leave to any place in India ;

(*b*) from his employer or former employer for himself and his family, in connection with his proceeding to any place in India after retirement from service or after the termination of his service,

subject to such conditions as may be prescribed including conditions as to number of journeys and the amount which shall be exempt per head having regard to the travel concession or assistance granted to the employees of the Central Government :

**Provided** that the amount exempt under this clause shall in no case exceed the amount of expenses actually incurred for the purpose of such travel:

[*Explanation 1*].—For the purposes of this clause, "family", in relation to an individual, means—

(i) the spouse and children of the individual ; and

(ii) the parents, brothers and sisters of the individual or any of them, wholly or mainly dependent on the individual.”

The above provision has to be read along with Rule 2B of Income Tax Rules. Rule 2B reads as under :-

> "[**Conditions for the purpose of section 10(5) .**
>
> **2B.** (1) The amount exempted under clause (*5*) of section 10 in respect of the value of travel concession or assistance received by or due to the individual from his employer or former employer for himself and his family, in connection with his proceeding,—
>
> (a) on leave to any place in India;
>
> (b) to any place in India after retirement from service or after the termination of his service, shall be the amount actually incurred on the performance of such travel subject to the following conditions, namely :—
>
> [(i) where the journey is performed on or after the 1st day of October, 1997, by air, an amount not exceeding the air economy fare of the national carrier by the shortest route to the place of destination;
>
> (ii) where places of origin of journey and destination are connected by rail and the journey is performed on or after the 1st day of October, 1997, by any mode of transport other than by air, an amount not exceeding the air-conditioned first class rail

> fare by the shortest route to the place of destination; and
>
> (iii) where the places of origin of journey and destination or part thereof are not connected by rail and the journey is performed on or after the 1st day of October, 1997, between such places, the amount eligible for exemption shall be :—
>
> (A) where a recognised public transport system exists, an amount not exceeding the 1st class or deluxe class fare, as the case may be, on such transport by the shortest route to the place of destination; and
>
> (B) where no recognised public transport system exists, an amount equivalent to the air-conditioned first class rail fare, for the distance of the journey by the shortest route, as if the journey had been performed by rail.]"

7. The appellant before us is a Public Sector Bank, namely, State Bank of India (SBI). The Revenue has held the appellant to be an "assessee in default", for not deducting the tax at source of its employees.

8. These proceedings started with a Spot Verification under Section 133A when it was discerned by the Revenue that some of the employees of the assessee-

employer had claimed LTC even for their travel to places outside India. These employees, even though, raised a claim of their travel expenses between two points within India but between the two points they had also travelled to a foreign country as well, thus taking a circuitous route for their destination which involved a foreign place. The matter was hence examined by the Assessing Officer who was of the opinion that the amount of money received by an employee as LTC is exempted under Section 10(5) of the Act, however, this exemption cannot be claimed by an employee for travel outside India which has been done in this case and therefore the assessee-employer defaulted in not deducting tax at source from this amount claimed by its employees as LTC. There were two violations of the LTC Rules, pointed out by the Assessing Officer:

A. The employee did not travel only to a domestic destination but to a foreign country as well and

B. The employees had admittedly not taken the shortest possible route between the two destinations thus the Applicant was held to be an assessee in default by the Assessing Officer.

The travel undertaken by the employees as LTC was hence in violation of Section 10(5) of the Act read with Rule 2B of the Income Tax Rules, 1962, both of which have been reproduced above. The order of the Assessing Officer was challenged before CIT (A), which was dismissed and so was their appeal before the Income Tax Appellate Tribunal.

9. The Delhi High Court *vide* its order dated 13.01.2020 dismissed the appeal holding that there was no substantial question of law in the Appeal. It was held that the amount received by the employees of the assessee employer towards their LTC claims is not liable for the exemption as these employees had visited foreign countries which is not permissible under the law.

10. The provisions of law discussed above prescribe that the air fare between the two points, within India will be given and the LTC which will be given will be of the shortest route between these two places, which have to be within India. A conjoint reading of the provisions discussed herein with the facts of this case cannot sustain the argument of the appellant that the travel of its employees was within India and no payments were made for any foreign leg involved.

11. We do not want to get into the role of the travel agencies and the present dynamics of air fare, but it is difficult for us to accept that a person will avail foreign tour without paying any price for it. We leave it at that.

12. It can be seen from the records that many of the employees of the appellants had undertaken travel to Port Blair via Malaysia, Singapore or Port Blair via Bangkok, Malaysia or Rameswaram via Mauritius or Madurai via Dubai, Thailand and Port Blair via Europe etc. It is very difficult to appreciate as to how the

appellant who is the assessee-employer could have failed to take into account this aspect. This was the elephant in the room.

13. The contention of the Appellant that there is no specific bar under Section 10(5) for a foreign travel and therefore a foreign journey can be availed as long as the starting and destination points remain within India is also without merits. LTC is for travel within India, from one place in India to another place in India. There should be no ambiguity on this.

14. The second argument urged by the appellant that payments made to these employees was of the shortest route of their actual travel cannot be accepted either. It has already been clarified above, that in view of the provisions of the Act, the moment employees undertake travel with a foreign leg, it is not a travel within India and hence not covered under the provisions of Section 10(5) of the Act.

15. A foreign travel also frustrates the basic purpose of LTC. The basic objective of the LTC scheme was to

familiarise a civil servant or a Government employee to gain some perspective of Indian culture by traveling in this vast country. It is for this reason that the 6th Pay Commission rejected the demand of paying cash compensation in lieu of LTC and also rejected the demand of foreign travel. In para 4.3.4 of the 6th Pay Commission Report dated March, 2008 this is what was said :-

> "4.3.4. The demand for allowing travel abroad at least once in the entire career under the scheme is not in consonance with the basic objective of the scheme. The Government employee cannot gain any perspective of the Indian culture by traveling abroad. Besides, the attendant cost in foreign travel would also make the expenditure under this scheme much higher. The Commission is, therefore, not inclined to concede the demand to allow foreign travel under LTC."

This is also an objection of the Revenue which has been raised in its counter affidavit filed by respondent no. 1-Assistant Commission of Income Tax wherein the Revenue has asserted that the provision for LTC was introduced to motivate employees and encourage its employees towards tourism in India and

it is for this reason that reimbursement of LTC was exempted. There was no intention of legislature to allow the employees to travel abroad in the garb of LTC available by virtue of Section 10(5) of the Act. Therefore, the Revenue has a valid objection (apart from other objections which are clearly violative of the Statute), that the intention and purpose of the scheme is also violated in the garb of tour within India, foreign travel is being availed.

16. The aforementioned order passed by the CIT(A) has rightly held that the obligation of deducting tax is distinct from payment of tax. The appellant cannot claim ignorance about the travel plans of its employees as during settlement of LTC Bills the complete facts are available before the assessee about the details of their employees' travels. Therefore, it cannot be a case of *bonafide* mistake, as all the relevant facts were before the Assessee employer and he was therefore fully in a position to calculate the 'estimated income' of its employees. The contention of Shri K.V. Vishwanathan, learned

senior advocate that there may be a *bonafide* mistake by the assessee-employer in calculating the 'estimated income' cannot be accepted since all the relevant documents and material were before the assessee- employer at the relevant time and the assessee employer therefore ought to have applied his mind and deducted tax at source as it was his statutory duty, under Section 192(1) of the Act.

17. In conclusion we do not find any reason to interfere with the order passed by the Delhi High Court. The appeal is dismissed.

**.....CJI.**
**(UDAY UMESH LALIT)**

**.....J.**
**(S. RAVINDRA BHAT)**

**.....J.**
**(SUDHANSHU DHULIA)**

**New Delhi**
**November 4, 2022**