IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

*****

Writ Petition Nos. 31680, 31681, 31740, 31741, 31748, 31763, 42408, 42489, 42657, 42666, 42667, 42678, 43038, 43069 & 43078 of 2015

M/s IVRCL-KBL (JV),
Having regd.office at No.10-3-552/B,
M-22/2RT, Vijayanagar Colony,
Hyderabad

.... Petitioner

Vs.

Assistant Commissioner of Income Tax, Circle-7(1),

IT Towers, Hyderabad & 3 others.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 29.02.2016.

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

1. Whether Reporters of Local newspapers may be allowed to see the Judgments?

2. Whether the copies of judgment may be marked to Law Reports/Journals

3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?

JUSTICE RAMESH RANGANAT

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
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THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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.... Respondents

! Counsel for the petitioner: Sri Ch.Pushyam Kiran

^ Counsel for respondents: Sri T.Vinod Kumar, Standing Counsel for Income Tax Department.

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> HEAD NOTE:

? Citations:

1) (2006) 12 SCC 583
2) (1976) 1 SCC 245
3) (2006) 3 SCC 434
4) (1999) 6 SCC 418
5) (1985) 4 SCC 404
6) AIR 1961 SC 751
7) (1960) 1 SCR 200
8) (2004) 1 SCC 574
9) (1962) 2 SCR 159
10) AIR 1965 SC 1728
11) AIR 1991 SC 1406
12) AIR 1991 SC 1538
13) (1994)5 SCC 672
14) 1959 Supp (2) SCR 256
15) (1955) 2 SCR 483
16) 1959 Supp (2) SCR 875
17) (1976) 1 SCC 128
18) AIR 1965 SC 59
19) (1985) 1 SCC 591
20) AIR 1957 SC 281
21) (1989) 1 SCC 321
22) (2013) 357 ITR 396 (AP)
23) AIR 1972 SC 1781
24) AIR 1968 SC 1286

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Writ Petition Nos. 31680, 31681, 31740, 31741, 31748, 31763, 42408, 42489, 42657, 42666, 42667, 42678, 43038, 43069 & 43078 of 2015

COMMON ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

Five joint-venture entities have invoked the jurisdiction of this Court questioning the orders passed by the Assessing Authority, for the assessment years 2010-11 to 2012-2013, denying them credit for the tax deducted at source by the Government of Andhra Pradesh from their bills. Sri S.Ravi, learned Senior Counsel appearing on behalf of the petitioner, and Sri B.Narasimha Sarma and Sri T.Vinod Kumar, learned Senior Standing Counsel for Income Tax, would agree that it would suffice, for the disposal of all these writ petitions, if the contents of the assessment order, in W.P.No.31748 of 2015, are alone noted.

The assessment order dated 26.02.2015, passed in respect of M/s.IVRCL-KBL (JV) for the assessment year 2012-13, records that the assessee was a joint-venture executing civil contract works; they had filed their return of income, for the assessment year 2012-13, electronically declaring their total income as Rs.'Nil'; they had claimed refund of Rs.23,39,240/-; their case was selected for scrutiny, and subsequently a notice under Section 143(2) of the Income Tax Act, 1961 (for short "the Act") was issued and served on the assessee; later a notice under Section 142(1) of the Act was issued along with a questionnaire; in response thereto, the authorized representative of the assessee appeared and furnished the information; the assessee-JV was awarded contracts by the Irrigation Department of the Government of Andhra Pradesh; later these contracts were given by the assessee on sub-contract, to one of its constituents, on a back to back basis without any margin; during the assessment year under consideration, the assessee had declared gross receipts of Rs.1,07,55,16,904/-, and the same was passed on to the sub-contractor; and, in view of the above, the income of Rs."Nil", as returned by the assessee, was accepted. While disallowing the petitioner's claim for refund, of the tax deducted at source from their bills by the Government, the assessing authority held that, from the agreement signed between the JV and the constituent, it was clear that the JV was just a procedural device used for submitting the bid; all the contract works were to be executed only by the constituent member; the very purpose of forming a joint venture was to act as a connecting link between the Irrigation Department and the Joint-Venture constituent, and to handover the contract work received from the former to the latter; the JV never intended to execute any work whatsoever; admission of gross receipts, in their P&L Account by the JV, was only to transfer the same to

their constituent; as no real work was carried on by the assessee, no income had accrued to it; and, therefore, credit for TDS was not allowable in the hands of the assessee in terms of Rule 37BA(2)(i) of the Income Tax Rules, 1962 (for short "the Rules").

After extracting Rule 37BA(2)(i) of the Rules, the assessing authority held that TDS credit must be given to the constituent which actually performed and completed the work; this was the intention behind the amendment to Rule 37BA introduced by the Income Tax (8th amendment) Rules, 2011; in a similar case, the ITAT had held that, unless the assessee joint-venture offered income for taxation, TDS credit cannot be given; after its amendment, the scope of Rule 37BA was widened enabling credit of taxes to be extended to the actual payee in whose hands the income is assessed; and, therefore, the TDS credit, claimed by the assessee, should be disallowed.

The petitioners preferred appeals thereagainst to the Commissioner of Income Tax (Appeals). During the pendency of these appeals, they invoked the jurisdiction of this Court seeking refund. On being asked how two parallel remedies could be invoked simultaneously, they withdrew the appeals pending before the Commissioner of Income Tax (Appeals), and sought amendment of the prayer in the writ petitions to include a challenge to the assessment orders to the extent they were denied credit for the tax deducted at source. All the applications, for amendment of the prayer, have been allowed and, consequently, the prayer in these writ petitions now include a challenge to the assessment orders whereby the petitioners were denied the benefit of TDS credit in terms of Rule 37BA(2)(i) of the Rules.

Sri S.Ravi, learned Senior Counsel appearing on behalf of the petitioners, would submit that the petitioners had entered into agreements with the Government of Andhra Pradesh for execution of works relating to irrigation projects; they had, in turn, entered into agreements with one of their constituents for execution of the work; both the agreements were independent of each other; the Government was not a party to the agreement between the petitioner-JV and its constituent; likewise the constituent was not a party to the agreement between the Government and the petitioner; distinct and independent obligations arose under both the contracts; the Government of Andhra Pradesh was entitled to hold the petitioner alone responsible either for non-completion or for delay or for improper execution of the work; the

Government had deducted tax at source, from the bills payable to the petitioner, at 1%/2% as stipulated in Section 194C of the Act; the petitioner had also deducted TDS, at the very same rates, while making payment to the sub-contractor; both the petitioner and the sub-contractor had filed their respective returns of income; while the petitioner had filed a return with “Nil” income, and had claimed refund of the tax deducted at source from their bills by the Government, the sub-contractor had filed their return of income, and had claimed credit for the tax deducted at source, from their bills, by the petitioner; the sub-contractor had not sought refund of the tax deducted at source, from the bills of the petitioner, by the Government; there were two independent contracts in existence conferring distinct rights and liabilities on the parties thereto; income, arising out of the amounts received by the petitioner from the Government, was liable to be taxed only in their hands; the mere fact that the entire receipts had been transferred to the sub-contractor did not absolve the petitioner of their statutory obligation of filing their return of income, and for being assessed under the Act; as their income was “Nil”, the tax deducted at source, from their bills, was liable to be refunded to them alone, and not to the sub-contractor; it is not even the case of the department that the sub-contractor had made any request for such refund; and the intention of the Revenue was only to deny refund, of the tax deducted at source from the bills of the petitioner, on some or the other ground.

Both Sri B.Narasimha Sarma and Sri T.Vinod Kumar, learned Senior Standing Counsel for Income Tax, would contend that the joint-venture is merely a device to route the contract works from the Government to the JV constituent; no work was executed by the joint venture, and it was the sub-contractor who alone executed the entire work; the entire amount, received by the petitioner from the Government, was transferred, as it is, to the sub-contractor; and as the entire income, on the works executed for the Government, is assessable only in the hands of the sub-contractor, and not the petitioner, it is the sub-contractor who is entitled to be given credit for the tax deducted at source by the Government from the bills of the petitioners.

As noted hereinabove, the assessing authority relied on Rule 37BA(2)(i) of the Rules to deny the petitioners credit for the tax deducted at source by the Government from the amounts paid to them. Rule 37BA(2)(i) of the Rules was made in exercise of the powers conferred under Section 199(3) of the Act

which enables the CBDT, for the purposes of giving credit in respect of the tax deducted in terms of the provisions of Chapter XVII of the Act, to make such rules as may be necessary, including Rules for the purposes of giving credit to a person other than those referred to in Sections 199(1) &(2) of the Act, as also the assessment order for which such credit may be given. The power conferred on the CBDT, under Section 199(3) of the Act, is to make rules for the purpose of giving credit to a person, other than the person from whose amounts tax is deducted at source. It is, therefore, necessary to examine whether or not the Rules made by the CBDT in this regard justify refusal by the assessing authority to give credit, of the tax deducted by the Government from their bills, to the petitioners herein.

While examining the applicability of the Rules, it must be borne in mind that the Rules made by the CBDT, in the exercise of the powers conferred under Section 199(3) of the Act, must be read harmoniously with all the clauses of Section199 and the other provisions of the Act. It is settled law that Rules, made under the Act, should be interpreted in conformity with the provisions of the Act (**Ispat Industries Ltd. v. Commr. of Customs**[1]), and not the other way round. A rule should be read as supplemental to the provisions of the parent Act. It cannot be interpreted in a manner as to come into conflict with the parent Act, in which case the Act will prevail. (**STO v. H. Farid Ahmed & Sons**[2]). A piece of subordinate legislation should be read in the light of the statutory scheme of the Act. (**Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group**[3]). Rules made for carrying out the purposes of the Act cannot be so framed as not to carry out the purposes of the Act, and cannot be in conflict therewith, (**Laghu Udyog Bharati v. Union of India**[4]). An expression used in a rule must, unless there is anything repugnant in the subject or context, have the same meaning as is assigned to it under the Statute. (**Onkarlal Nandlal v. State of Rajasthan**[5]). Rules should be consistent with the provisions of the Act. (**State of U.P. vs. Babu Ram Upadhya**[6]). A statutory rule cannot enlarge or restrict the meaning of a Section. If a rule goes beyond, or is contrary to, what the Section contemplates, the rule must yield to the Statute. (**Central Bank of India v.**

Workmen[7]). It is necessary, therefore, to read Rule 37BA(2)(i) of the Rules in conformity with Section 194C and 199(1) of the Act.

Section 194C of the Act relates to payment to contractors. Under Clause (1) thereof, any person, responsible for paying any sum to any resident for carrying out any work in pursuance of a contract between the contractor and the specified person, shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof whichever is earlier, deduct an amount equal to the percentage prescribed in the Section as income tax on the income comprised therein. In terms of Section 194C(1) of the Act, the person responsible for paying the sum (in the present case, the Government of Andhra Pradesh) to any resident (i.e the petitioners herein) for carrying out a work in pursuance of a contract between them, deducted tax at source at the time of payment of the bills by them to the petitioners herein. Likewise, in compliance with the requirements of Section 194C of the Act, the petitioners deducted tax at source from the amounts paid by them to the sub-contractors.

Section 199 of the Act relates to Credit for tax deducted and, under sub-section (1) thereof, any deduction made in accordance with the foregoing provisions of Chapter XVII, and paid to the Central Government, shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of the property or of the unit-holder, or of the shareholder, as the case may be. In the present case, deduction of TDS by the Government of Andhra Pradesh was on behalf of the petitioner, for it is from their income that tax was deducted at source. Section 199(1) of the Act, in the present case, refers to the petitioners alone, and not their constituent i.e the sub-contractors.

While Sri T.Vinod Kumar, learned Senior Standing Counsel for Income Tax, would place emphasis on the words "***the person from whose income***", in Section 199(1) of the Act, to contend that the said person is the sub-contractor and not the petitioner, that would require this Court to ignore the subsequent words "***from whose income the deduction was made***". In the present case, the deductions were made by the Government from the amounts paid to the petitioner, and no amount was paid by the Government directly to the sub-contractor. As such the question of deducting tax at source, from the amount payable to the sub-contractor, does not arise. On a reading of Section

199(1) of the Act as a whole, it is evident that the said provision, when applied to the facts of the present case, refers only to the petitioner, and not to the sub-contractor.

Let us now examine the scope of Rule 37BA(2)(i) of the Rules, and whether the assessing authority was justified in denying credit of TDS to the petitioners placing reliance thereupon. While 37BA of the Rules was inserted by the Income Tax (Sixth Amendment) Rules, 2009 with effect from 01.04.2009, Sub-rule 2(i) was substituted by the Income Tax (Eighth Amendment) Rules, 2011 with effect from 01.11.2011. Rule 37BA(1) stipulates that credit for tax deducted at source, and paid to the Central Government in accordance with the provisions of Chapter XVII, shall be given to the person to whom payment has been made or credit has been given (deductee) on the basis of information, relating to the deduction of tax, furnished by the deductor to the income tax authority or the person authorised by such authority. It is not in dispute that the information, relating to deduction of tax at source, has been furnished by the deductor (State Government) to the Income Tax Authority. It is also not in dispute that the information so furnished refers to the petitioner as the deductee, and that tax has been deducted at source by the Government from their bills alone. As the construction to be placed on Sub-rule 2(i) is in issue, in the present writ petition, it is necessary to extract sub-rule 2(i) of Rule 37BA, and its proviso as it stood before, and after, its amendment.

Before its amendment w.e.f. 01.11.2011, Rule 37BA(2)(i) reads thus:-

> ***2(i) If the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for tax deducted at source shall be given to the other person in cases where –***
>
> (a) the income of the deductee is included in the total income of another person under the provisions of Section 60, section 61, section 64, section 93 or section 94;
>
> (b) the income of a deductee being an association of persons or a trust is assessable in the hands of members of the association of persons, or in the hands of trustees, as the case may be;
>
> (c) the income from an asset held in the name of a deductee, being a partner of a firm of a karta of a Hindu undivided family, is assessable as the income of the firm, or Hindu undivided family, as the case may be;
>
> (d) the income from a property, deposit, security, unit or

share held in the name of a deductee is owned jointly by the deductee and other persons and the income is assessable in their hands in the same proportion as their ownership of the asset;

Provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other person in the information relating to deduction of tax referred to in sub-rule (1)

After its amendment w.e.f. 01.11.2011, Rule 37BA (2) (i) reads thus:-

(2) (i) Where under any provisions of the Act, the whole or any part of the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for the whole or any part of the tax deducted at source, as the case may be, shall be given to the other person and not to the deductee :

Provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other person in the information relating to deduction of tax referred to in sub-rule (1).

The pre-amended Rule 37BA(2)(i) was applicable only to the four categories of persons referred to therein. As both the learned Senior Standing Counsel for Income Tax place emphasis only on Clause (b), it is unnecessary for us to examine the scope of any of the other clauses. The petitioner, a Joint Venture, would fall within the ambit of "association of persons" as referred to in Clause (b) of Rule 37BA(2). Clause (b), as it then stood, was applicable only in cases where the income of the association of persons was assessable in the hands of its members (i.e if the income of the petitioner-JV was assessable in the hands of its constituent i.e the sub-contractor). In such an event, sub-rule (2)(i)(b) of Rule 37BA required credit, for such tax deducted at source, to be given to the constituent member of the joint venture. If Clause (b) were to be paraphrased, in the context of the present case, it would require the income of the petitioner-joint venture to be assessable in the hands of the sub-contractor.

Emphasis is placed by both the learned Senior Standing Counsel for Income Tax on the word "***shall***", in Clause 2(i) of Rule 37BA of the Rules, to contend that, by its use, the Rule mandates the assessing authority, notwithstanding the claim of the petitioner for credit to be given to them, to give credit only to the "other person" (sub-contractor), and not to the petitioners. Use of the word "***shall***", in Clause 2(i) of Rule 37BA of the Rules, casts an

obligation on the assessing authority to give credit, of the tax deducted at source, to the person in whose hands the income is assessable to tax. In case it is a person, other than the deductee, then the assessing authority is required, nay bound, to give them credit. The assessing authority cannot refuse to give credit to the other person, in whose hands the income is assessable to tax, merely because tax was deducted at source from the amounts paid to the deductee.

As noted hereinabove, in the present case, there are two distinct and independent contracts. While it does appear that the joint venture was constituted only for it to enter into a contract with the Government, and for one of its constituents to execute the work, the fact remains that there is no privity of contract between the Government and the constituent of the JV i.e the sub-contractor. The rights and obligations under the first contract are only that of the Government and the petitioner; and those, in the second contract, are only that of the petitioner and the sub-contractor. The contractual obligation, to execute the work for the Government, is that of the joint venture alone, and not that of the constituent member of the JV i.e the sub-contractor. Any action which the Government of Andhra Pradesh could have taken, for breach of the terms and conditions of the first contract, was only against the petitioner JV and not its constituent. While the sub-contractor, no doubt, executed the work, they did so in terms of the second contract entered into between them and the petitioner-JV. It is evident, therefore, that the contractual receipts under the first contract is only that of the petitioner; and the income, arising out of the said contract, is assessable only in their hands, and not in the hands of the sub-contractor. The sub-contractor is assessable to tax on their income earned out the amounts received by them from the petitioner in terms of the second contract, and not in terms of the first contract between the Government of Andhra Pradesh and the petitioner-JV. As noted hereinabove, not only did the Government of Andhra Pradesh deduct tax at source from the petitioner's bills, the petitioner, in turn, while making payment to the sub-contractor, also deducted tax at source from the bills of the latter. Credit for the tax deducted at source, by the petitioner from the bills of the sub-contractor, was given to the sub-contractor as such income was assessable in their hands. Likewise credit for the tax deducted at source, from the bills of the petitioner, was required to be given to the petitioner alone as the income, from the contract entered into

between them and the Government of Andhra Pradesh, was assessable only in their hands, and not in the hands of the sub-contractor.

The ambit of Clause 2(i) of Rule 37BA of the Rules is restricted by its proviso. Ordinarily, a proviso is read either as an exception to the substantive provision to which it is added, or as restricting the width and amplitude of the said provision. The proper function of a proviso is to except, and to deal with a case which would otherwise fall within the general language of the provision, and its effect is confined to that case. It is a qualification of the preceding provision. Ordinarily, a proviso is not interpreted as stating a general rule. (**Haryana State Coop. Land Development Bank Ltd. v. Banks Employees Union**[8]**; Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha**[9]**; Calcutta Tramways Co. Ltd. v. Corpn. of Calcutt**[10]; **A.N. Sehgal v. Raje Ram Sheora**[11]**; Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal**[12] and **Kerala State Housing Board v. Ramapriya Hotels (P) Ltd**[13]). A proviso to a particular provision of a Statute/Rule embraces the field which is covered by the said provision. It carves out an exception to the provision to which it has been enacted as a proviso, and to no other. (**CIT v. Indo-Mercantile Bank Ltd.,**[14]; **Ram Narain Sons Ltd. v. Assistant Commissioner of Sales Tax**[15]). The proper course is to apply the broad general rule of construction which is that a Section/Rule must be construed as a whole, each portion throwing light, if need be, on the rest. (**Tahsildar Singh v. State of U.P.,**[16]; **Dwarka Prasad v. Dwarka Das Saraf**[17]; **Commissioner of Income-tax, Kerala and Coimbatore v. P. Krishna Warriar**[18] **Maxwell on Interpretation of Statutes, 10th Edn., p. 162**). A proviso cannot be torn apart from the main Section/Rule nor can it be used to nullify or set at naught the real object of the main Section. (**S. Sundaram Pillai v. V.R. Pattabiraman**[19]; **Craies in his book Statute Law (7th Edn.**) It is a fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It is to be construed harmoniously with the main enactment. (**Abdul Jabar Butt v. State of Jammu & Kashmir**[20]; **Indo-Mercantile Bank Ltd.,**[14]; **Ram Narain**

Sons Ltd.[15] and **State of Punjab v. Kailash Nath**[21]).

The proviso to Rule 37BA (2)(i) requires the deductee to file a declaration with the deductor, and for the deductor to report the tax deduction, in the name of the other person, in the information relating to deduction of tax referred to in sub-rule (1). In cases where the income is assessable in the hands of a person, other than the deductee, the proviso to Clause (2)(i) enables the deductee to file a declaration with the deductor. On such a declaration being made, the deductor is required to report the tax deducted at source, not in the name of the deductee but in the name of the other person, in the information which they are required to furnish to the Income Tax Department. It is not even contended before us, by either of the learned Senior Standing Counsel for Income-Tax, that the petitioner (deductee) had made any such declaration to the State Government (deductor), or that the State Government (deductor) had reported, the tax deducted at source, in the name of the other person (the sub-contractor) to the Income Tax Department.

As the proviso restricts the ambit of Rule 37BA(2)(i), it is only in cases where the procedure prescribed in the proviso is followed is credit, of the tax deducted at source, required to given to the person other than the deductee. In the present case, as the deductee (the petitioner) claims that credit, for the tax deducted at source, should be given to them, and not to the sub-contractor, they have justifiably not filed any such declaration with the Government, and the Government has also not reported, the tax deducted at source, in the name of the other person, but has reported such deduction only in the name of the deductee (the petitioner).

Sri T.Vinod Kumar, learned Senior Standing Counsel for Income-Tax, would contend that the amended Rule 37BA of the Rules would apply retrospectively; and it is that Rule which should be applied while examining whether credit, for the tax deducted at source, should be given to the petitioner-joint venture or to its constituent i.e. the sub-contractor. Reliance is placed by the learned Senior Standing Counsel on a Division Bench judgment of this Court, in **Commissioner of Income Tax vs. Bhooratnam and Co.**[22], in this regard.

It is no doubt true that the Division Bench of this Court in **Bhooratnam and Co.**[22], placing reliance on the judgments of the Supreme Court, in **State**

of Madras v. Lateef Hamid & Co.[23] and **Tikaram & Sons v. Commissioner of Sales Tax**[24], held that Rule 37BA is a procedural provision dealing with the manner of giving credit, for the tax deducted at source, for the purposes of Section 199; it applies to pending proceedings also; where a new procedure is prescribed by law, it governs all pending cases; alterations, in the name of procedure, are always retrospective unless there is some good reason why they should not be; and the amendment to Rule 37BA, as introduced by the Income Tax (8th Amendment) Rules, 2011, being procedural in nature, would have retrospective effect. As it would make no difference to the case on hand, whether the pre-amended or the amended Clause 2(i) of Rule 37BA of the Rules is applied, we shall proceed on the premise that the amended Clause 2(i) of Rule 37BA is alone applicable. The amended Clause 2(i) of Rule 37BA starts with the words *"**Where under any provisions of the Act**"*. It is only where a specific provision in the Act stipulates that the tax deducted at source is assessable in the hands of a person, other than the deductee, is credit for the whole, or any part, of the tax deducted at source required to be given to the other person, and not to the deductee. We have not been shown any such provision in the Act which requires the whole, or any part of the income, on which tax is deducted at source from the bills of the petitioner-JV, to be assessable in the hands of its constituent i.e the sub-contractor.

A feeble attempt is made by Sri T.Vinod Kumar, learned Senior Standing Counsel for Income Tax, placing reliance on the petitioner's own case before the Income Tax Appellate Tribunal (for short "ITAT") in I.T.A.No.1197/Hyd/2011 dated 12.07.2012 for the assessment year 2008-09, to contend that the provision referred to in Rule 37BA(2)(i), which found acceptance with the ITAT, is Section 60 of the Act. Section 60 of the Act relates to transfer of income where there is no transfer of assets and, thereunder, all income, arising to any person by virtue of a transfer, whether revocable or not and whether effected before or after the commencement of the Act, shall, where there is no transfer of the asset from which the income arises, be chargeable to income tax as the income of the transferor, and shall be included in his total income. Section 60 of the Act applies to cases where an asset belongs to one person, while the income arising from such an asset is claimed to be the income of another. In

such cases, Section 60 of the Act requires the income from such an asset to be treated as the income of the owner of the asset alone, and to be included in his total income. Section 60 of the Act has no application to the facts of the present case, for it is not even the case of the Revenue that, while retaining an asset, the petitioner had transferred the income arising therefrom to the sub-contractor. The assessing authority has clearly misconstrued Rule 37BA(2)(i) of the Rules in holding that the petitioner is not entitled to claim credit for the tax deducted at source, by the Government, from their bills.

Before parting with the case, we must also take note of the fact that the parties before us appear to have raised contentions to the contrary before the ITAT in I.T.A.No.1197/Hyd/2011 for the assessment year 2008-09. While the Revenue's contention before the ITAT was that the petitioner was liable to tax for the income received by them from the Government, for the works executed by the sub-contractor, the petitioner herein had contended that it was the sub-contractor who should be subjected to tax on the income received from the Government, as it is they who had executed the works. Sri S.Ravi, learned Senior Counsel appearing on behalf of the petitioners, would, as an explanation to the apparent contradiction, submit that the issue before the ITAT was regarding the person in whose hands the income was to be subjected to tax, and the question as to who was entitled to be given credit, for the tax deducted at source, did not arise for consideration therein. Learned Senior Counsel would point out that, in the appeal before the ITAT, the joint-venture was sought to be assessed to tax on an estimation of their profits, though the constituent sub-contractor had also been assessed to tax. On the other hand Sri T.Vinod Kumar, learned Senior Standing Counsel for Income Tax, would submit that their contention to the contrary before the ITAT notwithstanding, the assessing authority, in the present cases, had merely followed the order of the ITAT in the appeal relating to an earlier assessment year. This submission of the learned Senior Standing Counsel for Income Tax does not merit acceptance as the assessment orders, in the present batch of writ petitions, make no reference to the order of the ITAT.

As the order of the ITAT, for the assessment year 2008-09, has attained finality, it would be wholly inappropriate for us to re-appreciate the findings recorded therein or examine the validity of its conclusions. While it does appear that the parties before us had earlier taken an opposite stand before the

ITAT, it cannot also be lost sight of that the question, which fell for consideration in the appeal before the ITAT, was whether the petitioner could have been assessed to tax, estimating the profits they had made from the contract, when the entire amount received by them from the Government had been transferred to the sub-contractor. The scope of Rule 37BA of the Rules did not arise for consideration therein. In any event, any declaration of law by the ITAT would not bind this Court. It is wholly unnecessary for us, therefore, to dwell on this aspect any further.

On being asked how the Revenue could retain the amount representing the tax deducted at source from the petitioners' bills, and not pay it either to the petitioner or to the sub-contractor, Sri T.Vinod Kumar, learned Senior Standing Counsel for Income Tax, would submit that, as the income is assessable in the hands of the sub-contractor, it is they, and not the petitioner, who can claim credit and, whenever any such claim is made, the Department would give them credit for the TDS, and refund the amount in accordance with Rule 37BA of the Rules. It is, however, not in dispute that the sub-contractor has not made any claim for being given credit for the tax deducted at source by the Government from the bills of the petitioner herein. It is not as if there were conflicting claims by the petitioner-JV on the one hand, and its constituent sub-contractor on the other, both seeking credit for the tax deducted at source by the Government, necessitating retention of these amounts by the Revenue till resolution of the conflicting claims. As held by the Division Bench of this Court, in ***Bhooratnam and Co.***[24], the Revenue cannot be allowed to retain the amounts representing the tax deducted at source without credit being given to anybody. If credit of tax is not allowed to the petitioner-assessee, and the sub-contractor has not made any claim for refund, it would result in credit of the TDS not being taken by anybody and this, as has been rightly pointed out by the Division Bench in **Bhooratnam and Co.**[22], is not the spirit and the intention of the law.

To the limited extent the assessing authority denied credit to the petitioner, for the tax deducted at source from their bills by the Government, the impugned assessment orders/rectification orders are set aside. The assessing authority shall determine the quantum of credit for TDS which the petitioners are entitled to in terms of this order, and refund the amount so computed to the petitioners herein in accordance with law. The entire exercise, culminating in

final orders being passed, shall be completed within a period of three month from the date of receipt of a copy of this order. It is made clear that this order shall not preclude the assessing authority, if he so chooses, from reopening the assessments, and in passing orders thereafter in accordance with Sections 147 and 148 of the Act.

All the writ petitions are disposed of accordingly. The miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

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RAMESH RANGANATHAN, J

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M. SATYANARAYANA MURTHY, J

Date:29.02.2016

Note: L.R.Copy to be marked.
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THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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Writ Petition Nos. 31680, 31681, 31740, 31741, 31748, 31763, 42408, 42489, 42657, 42666, 42667, 42678, 43038, 43069 & 43078 of 2015

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Date:29.02.2016

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[1] (2006) 12 SCC 583
[2] (1976) 1 SCC 245
[3] (2006) 3 SCC 434
[4] (1999) 6 SCC 418
[5] (1985) 4 SCC 404
[6] AIR 1961 SC 751
[7] (1960) 1 SCR 200
[8] (2004) 1 SCC 574
[9] (1962) 2 SCR 159
[10] AIR 1965 SC 1728
[11] AIR 1991 SC 1406
[12] AIR 1991 SC 1538
[13] (1994)5 SCC 672
[14] 1959 Supp (2) SCR 256
[15] (1955) 2 SCR 483
[16] 1959 Supp (2) SCR 875
[17] (1976) 1 SCC 128
[18] AIR 1965 SC 59
[19] (1985) 1 SCC 591
[20] AIR 1957 SC 281
[21] (1989) 1 SCC 321
[22] (2013) 357 ITR 396 (AP)
[23] AIR 1972 SC 1781
[24] AIR 1968 SC 1286