IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 987 OF 2015
(Original Tax Appeal No. 59 of 2007 – Goa Bench)

The Commissioner of Income Tax ..Appellant
Vs.
V.S. Dempo and Co. Pvt. Ltd. ..Respondent

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Ms. Asha Desai, Advocate for Appellant.
Mr. Mihir Naniwadekar, Advocate for Respondent.

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CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
DATED : 8 SEPTEMBER 2015

P.C.:

The challenge in this appeal under Section 160A of the Income Tax Act, 1961 (the 'Act') is to the order dated 11 December 2006 passed by the Income Tax Appellate Tribunal (the 'ITAT'). The Assessment Year involved is A.Y. 1998-99.

2. By an order dated 12 October 2007, the appeal was admitted on the following substantial questions of law:

(I) Whether in the facts and in the circumstances of the case, the ITAT has erred while referring the issue to the file of A.O., to exclude 90 % of 'net' interest income excess of interest received or paid provided there is direct nexus between interest earned and paid after establishing the fact that all the interest income except the interest on income tax is forming part of the profits of the business and not income from other sources ?

(II) Whether the findings of the ITAT while restoring the issue of interest income to the file of the A.O. to exclude 90 % of 'net' interest income is valid in law ?

(III) Whether in the facts and in the circumstances of the case, the ITAT is right in law in taking into account the 'interest on bank deposits', 'interest on intercorporate deposits', 'interest on debentures', and interest from sister concerns' and 'other interest' is forming the part of the head “Profits and gains of business or profession”?

(IV) Whether the findings of the ITAT that the receipts on account of 'professional services' and 'proceeds from electronic data processing' are not income falling within the exclusionary provisions of clause (baa) of Explanation to section 80HHC, is right in law ?

(V) Whether the findings of the ITAT, that 90% of the 'net' income from receipts on account of 'stevedoring agency business' and 'travel agency business' are falling within the exclusive provision of clause (baa) of explanation to section 80HHC, is right in law ?

(VI) Whether in facts and circumstances of the case, the ITAT has erred in applying the provision of Section 172 in holding that section 40(a)(i), is not applicable, particularly when section 172 concerned with levy and recovery of tax in a case of any ship, as against section 195 r/w 40(a) (i) of the IT Act, refers to non-resident Assessee as in the present case?

(VII) Whether the findings of the ITAT, that only 90 % of 'net' income from the 'transfer of vessel' and 'barge freight', has to be excluded, for the purpose of computing profits of the business under clause (baa) of Explanation to section 80HHC, is right in law ?

(VIII) Whether the findings of the ITAT that, only 90 % of the 'net' income from the 'lease hire charges' received by the Assessee apart from depreciation has to be excluded for the purpose of computing profits of the business under clause (baa) of Explanation to Section 80HHC, is right in law ?

3. Ms. Desai, learned Counsel appearing for revenue very fairly states that so far as Question Nos. I, II, V, VII and VIII are concerned, the issue raised therein, are covered by the decision of the Apex Court in ***ACG Associated Capsules Pvt. Ltd. Vs. CIT***[1] against the revenue. In the above view, Question No. I is answered in the negative and Question Nos. II, V, VII and VIII in the affirmative. Thus the aforesaid Question Nos. I, II, V, VII and VIII stand concluded in favour of the respondent-assessee and against the revenue.

4. So far as Question Nos. III and VI are concerned, Ms.Desai very fairly states that the same do not arise from the impugned order of the Tribunal for the subject assessment year. Accordingly, Questions Nos. III and VI do not arise for our consideration and are dismissed, as not pressed.

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5. The only question which arises for our consideration according to Ms. Desai in support of the appeal is, Question No.IV. Both the CIT(A) as well as the ITAT by the impugned order, have taken a view that the receipt on account of electronic data processing and professional services is not income but in the nature of reimbursement of expenses. Therefore, no occasion to invoke clause (bba) of Explanation to 80HHC of the Act, would arise.

6. Mr. Naniwadekar, learned Counsel for respondent-assessee states that even if one accepts the revenue's contention that the receipts attributable to electronic data processing and professional services is income and not reimbursement of expenses, the issue would be academic. This is because if 'net' income is determined i.e. income after excluding expenses from the gross receipts is done following the decision of Apex Court in ACG Associated Capsules Pvt. Ltd. (supra), there would not be a positive figure as income.

7. In the above view, we accept the revenue's contention that the receipts attributable to electronic data process and

professional services would be in the nature of income. Therefore while answering Question No. IV in negative i.e. in favour of the appellant-revenue and against the respondent-assessee, the Assessing Officer while giving effect to this order, would examine whether or not, there is any income on net basis i.e. after reducing expenditure from gross receipts. It is only thereafter, if there is a positive income, the Assessing Officer would apply the provisions of clause (baa) of the Section 80HHC of the Act.

8. Accordingly, appeal disposed of in the above terms. No order as to costs.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**