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

INCOME TAX APPEAL NO. 986 OF 2015
(Original Tax Appeal No. 62 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 260A 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. 2001-02.

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

(1) 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 ?

(2) 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 ?

(3) 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"?

(4) 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 ?

(5) 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 ?

(6) 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?

(7) 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 ?

(8) 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. So far as Question No.6 is concerned, Ms. Desai very fairly states that the same does not arises for consideration from the impugned order of the Tribunal for the Assessment Year 2001-02. Accordingly, Question No.6 is dismissed as not pressed.

4. Ms. Desai, the learned Counsel appearing for revenue very fairly states that so far as Question Nos.1, 2, 5, 7 and 8 are concerned, the issue therein is 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.1 is answered in the negative and Question Nos.2, 5, 7 and 8 are answered in the affirmative. Thus the aforesaid Question Nos.1, 2, 5, 7 and 8 stand concluded in favour of the respondent-assessee and against the appellant-revenue.

5. So far as Question No.3 is concerned, the impugned order of the ITAT has restored the issue to the Assessing Officer at the behest of the revenue. Before the ITAT as recorded in paragraph 27of the impugned order, the revenue did not dispute that interest

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income is liable to be assessed to tax under the head 'income from business or profession'. However the same was not eligible for inclusion in profits of business as interest income had no nexus with export activities. The revenue's contention was that only 90% of the net interest to be excluded is where the respondent-assessee is able to establish nexus between the interest received and interest paid. This was by following the decision of Special Bench of the Tribunal in the ***Lalsons Enterprises*** 9 ITD 25. The substantial question of law raised before us with regard to interest income being classified as income from other sources was not an issue canvased by the revenue before the ITAT.

6. In view of the fact that the revenue itself has not disputed before the ITAT that the interest income is assessable under the head 'income from business or profession', the substantial questions as raised would not arise from the order of the Tribunal. This is so as there is no dispute between the parties that the interest income does form part of the profits and gains of business or profession. Accordingly, Question No.3 is dismissed.

7. So far as Question No.4 is concerned, it is an agreed position between the parties that for the reasons mentioned in the order passed today in Income Tax Appeal No. 987/2015 in respect of Assessment Year 1998-99, the substantial question of law is to answer in the negative i.e. in favour of the revenue and against the respondent-assessee. However the Assessing Officer while giving effect to the order of this Court would consider the respondent-assessee's submission that on application of the principle of netting is laid down by the Apex Court in ACG Associated Capsules Pvt. Ltd. (supra), in case there is a positive income, then alone the application of explanation (baa) to Section 80HHC of the Act would arise and be applied.

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

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