

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.4.2016

CORAM

THE HONOURABLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Tax Case Appeal Nos.19 to 21 of 2016

Ansaldo Energia SPA,
C/O N.Madhan, Tidel Park,
7th Floor, A Block,
(Module 601, 701-702),
4, Rajiv Gandhi Road,
Taramani, Chennai-113. ...Appellant/Appellant

Vs.

The Commissioner of Income Tax,
(International Taxation), Chennai. ...Respondent/Respondent

APPEALS under Section 260A of the Income Tax Act, 1961 against the order dated 17.7.2015 in I.T.A.Nos.1496 to 1498/Mds/2014 on the file of the Income Tax Appellate Tribunal, Madras 'D' Bench for the assessment years 2000-2001 to 2002-2003 against the order the Commissioner of Income Tax(Appeals)-VII, Chennai, dated 25.03.2014 made in I.T.A.Nos.840 to 842/13-14 against the Assessment order of the Assistant Director of Income Tax(International Taxation)-I, Chennai, dated 25.07.2012 for the Assessment years 2000-2001, 2001-2002 and 2002-2003 in PAN.No.AACCA4151H.

सत्यमेव जयते

For Appellant : Mr.N.V.Balaji
For Respondent : Mr.T.Ravikumar

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COMMON JUDGMENT
(Delivered by V.Ramasubramanian,J)

These appeals filed by the assessee under Section 260-A of the Income Tax Act, were admitted on 02.02.2016 on the following substantial questions of law:

"(i) Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that interest under Section 244A of the Act on refund of income tax is not covered within the term 'interest' under Article 12(4) and accordingly, the same is not outside the purview of taxation by India as provided in Article 12(3)(a) of the Double Taxation Avoidance Agreement between India and Italy? and

(ii) Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in not adjudicating the alternate ground of the appellant that the interest under Section 244A is liable to taxation at a restricted rate of 15% as provided in Article 12(2) of the Double Taxation Avoidance Agreement between India and Italy ?"

2. Heard Mr.N.V.Balaji, learned counsel for the appellant and Mr.T.Ravikumar, learned Standing Counsel for the Department.

3. The assessee/appellant is a company incorporated under the laws of Italy. The appellant is a non-resident for the purpose of the Income Tax Act, 1961 and it is a resident of Italy with whom the Government of India has entered into a Double Taxation Avoidance Agreement on 23.11.1995, but with effective date from 01.01.1996.

4. By orders dated 25.7.2012, the Assessing Officer gave effect to the orders of the Income Tax Appellate Tribunal and Commissioner of Income Tax (Appeals) in relation to the assessment years 2000-01, 2001-02, 2002-03 and determined the income and tax liability. This giving effect order gave rise to refunds to be granted to the appellant. This refund also carried interest under Section 244-A of the Act. While making payment of the interest along with refund, the Assessing Officer deducted tax at source at 42.024%.

5. Challenging the deduction at source made on the interest payable on the refund, the appellant filed three appeals before the Commissioner of Income Tax (Appeals). By a common order dated 25.3.2014, the Appellate Commissioner dismissed the appeals. The further appeals filed by the appellant before the Tribunal having also been dismissed, the assessee has come up with the above appeals.

6. For the purpose of convenience, let us take the first question of law, which we have already extracted above. If that question of law is answered in favour of the assessee, the

second question of law will not even arise for consideration.

7. The first question of law is as to whether the interest payable on the refund of income tax under Section 244-A falls within the definition of the term interest under Article 12.4 of the Double Taxation Avoidance Agreement or not.

8. Paragraphs 1 to 4 of Article 12 read as follows:

"1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in both the Contracting States.

2. Notwithstanding the provisions of paragraph 1, the tax chargeable in a Contracting State on interest arising in that State and paid to a resident of the other Contracting State in respect of loans or debts shall not exceed 15 per cent of the gross amount of such interest.

3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State shall be exempt from tax in that State, if:

(a) the payer of the interest is the Government of that Contracting State or a local authority thereof, or

(b) the interest is paid to any agency or instrumentality (including a financial institution) which may be agreed upon in this behalf by the two Contracting States.

4. The term "interest" as used in this Article means income from Government securities, bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and debt-claims of every kind as well as all other income assimilated to income from money lent by the taxation law of the State in which the income arises."

9. From a reading of the above paragraphs, it will be clear that the first rule under Article 12 is that interest arising in a contracting State and paid to a resident of the other contracting State may be taxed in both contracting States.

10. Paragraph 2 of Article 12 circumscribes the prescription contained in paragraph 1, by stipulating that the tax chargeable in a contracting State on interest arising in that State and paid to a resident of the other contracting State in respect of loans or debts shall not exceed 15% of the gross amount of such interest.

11. Paragraph 3 of Article 12 carves out an exception to the stipulation contained in paragraphs 1 and 2. As per paragraph 3,

the interest arising in a contracting State will be exempt from tax in that State, if any of the conditions stipulated in Clauses (a) or (b) of paragraph 3 are satisfied. Under Clause (a), if the payer of the interest is the Government of that contracting State or a local authority, then the interest arising in a contracting State shall be exempt from tax.

12. But, paragraph 4 of Article 12 defines the term "interest". The term "interest" in paragraph 3 contains four items. They are (i) income from Government securities, bonds or debentures, (ii) debt claims of every kind, and (iii) all other income assimilated to income from money lent by the taxation law of that State in which the income arises.

13. The contention of Mr.N.V.Balaji, learned counsel for the appellant is that the interest paid on the refund in terms of Section 244-A of the Income Tax Act, is a debt claim, within the meaning of the term "interest" under paragraph 4 of Article 12 and that therefore, it is exempt under Clause (a) of paragraph 3 of Article 12. To substantiate his contention that the interest payable by the Government of India on the refund of income tax is a debt claim, the learned counsel relied upon the decision of the Supreme Court in Union of India v. Tata Chemicals Ltd. [(2014) 363 ITR 612]. Paragraph 38 of the said decision reads as follows:

"Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing Statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which ex aequo et bono ought to be refunded, the right to interest follows, as a matter of course."

14. As a matter of fact, the issue that arose for consideration before the Supreme Court in Tata Chemicals, as seen from paragraph 2 was as to whether the Revenue was legally responsible under Section 244-A for payment of interest on the refund of tax made to the resident/deductor under Section 240 or not. Therefore, the contention of the learned counsel for the appellant is that all the three authorities erred in holding that the interest payable on the refund of tax was not a debt due from the Government.

15. In response to the above contentions, Mr.T.Ravi Kumar, learned Standing Counsel for the Department submitted that paragraph 4 and paragraph 3(a) of Article 12 of Double Taxation Avoidance Agreement will not apply to a case where the assessee has a permanent establishment in India. According to the learned Standing Counsel, if an assessee has a permanent establishment, within the meaning of Article 5 of Double Taxation Avoidance Agreement, the interest that was payable even under Section 244-A would be treated as part of the business profits under Article 7 and made taxable even as per the provisions of the Double Taxation Avoidance Agreement.

16. In support of the above contention, the learned Standing Counsel for the Department drew our attention to the order of the Income Tax Appellate Tribunal dated 11.5.2007 in relation to the assessment year 2000-01, in respect of the very same assessee, wherein the Tribunal recorded a finding that the assessee has a permanent establishment in India. This finding recorded from paragraphs 52 to 58 of the decision of the Income Tax Appellate Tribunal in ITA No.411/Mds/2006 dated 11.5.2007 was also confirmed by this Court in TCA No.1303 of 2007. However, the assessee has taken this matter on appeal to the Supreme Court and the matter is now pending.

17. Therefore, it is contended by Mr.T.Ravikumar, learned Standing Counsel (i) that the fact that the assessee has a permanent establishment in India already stands adjudicated by an order of the Tribunal and also confirmed by an order of this Court, and (ii) that therefore, by virtue of Article 12.6 read with Articles 5 and 7, the interest paid on the refund of income tax under Section 244-A constitute business profits taxable under Article 7 of Double Taxation Avoidance Agreement.

18. But, we are unable to accept the above contention for the simple reason that Article 12.6 does not deal with a situation where the State is the person paying the interest. Article 12.6 reads as follows:

"6. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a political or administrative sub-division, a local authority or a resident of that

State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated."

19. The first portion of Article 12.6 states that the interest will be deemed to arise in a contracting State, when the payer is that State itself. To this rule found in the first line of Article 12.6, an exception is carved out in the remaining part of Article 12.6. What follows the first portion of Article 12.6 is that when the person paying the interest whether the resident of the contracting State or not, has a permanent establishment in a contracting State, such interest borne by the permanent establishment will be deemed to arise in that State.

20. In other words, if the assessee is the payer of the interest, it is only then that the second part of Article 12.6 will arise. In this case, the payer of interest is the Government of the contracting State, namely the Government of India. Therefore, Article 12.6 has no application at all to the case.

21. As a matter of fact, the Tribunal seems to have realised this position. That is why the Tribunal, after having extracted the argument of the departmental representative made on the basis of the decision of the Tribunal in *BJ Services Company Middle East Ltd. v. Assistant Commissioner of Income Tax [(2009) 29 SOT 312]*, chose not to deal with either Article 12.6 or with BJ Services Company.

22. To put it differently, the departmental representative appears to have invited the attention of the Tribunal to Article 12.6 and the decision of the Tribunal at Delhi Bench in BJ Services Company, as seen from paragraph 5 of the order of the Tribunal, which is under appeal. But, since paragraph 12.6 has no application at all to the case, the Tribunal rightly chose not to deal with it, but to focus only upon paragraphs 4 and 3 (a) of Article 12.

23. In fact, the contention of the learned Standing Counsel for the Department revolving around paragraph 6 of Article 12, overlooks the fact that the Tribunal did not rest its conclusion on Article 12.6. This is why a contention is raised by the learned counsel for the appellant that what was not

recorded as a finding by the Tribunal, cannot now be raised by the Revenue on an appeal filed by the assessee. Though he is correct in his legal submission, we thought we would still have a look at Article 12.6 and expose the fact that the second part of Article 12.6 does not deal with the issue as to whether the interest payable by the Government under Section 244-A would fall within Article 12.3 or not.

24. As an alternative submission, it was contended by Mr.T.Ravikumar, learned Standing Counsel that the question whether the interest payable by the Government was a debt claim within the meaning of Article 12.4, did not arise for consideration in Tata Chemicals at all and that what was found in paragraph 38 of Tata Chemicals was only a passing reference. Therefore, relying upon the decision of the Supreme Court in Commissioner of Central Excise v. Srikumar Agencies [AIR 2008 SCW 942], it was contended by the learned Standing Counsel that stray observations found in judgments cannot be taken to be an expression of a proposition of law and that judgments are not to be read as Euclid's theorem.

25. For a moment, we will keep aside the decision of the Supreme Court in Tata Chemicals and have a plain look at Section 244-A of the Income Tax Act. Under Sub-section (1) of Section 244-A, an assessee is made entitled to receive in addition to any amount of refund that has become due to him, simple interest calculated in the manner provided therein. Sub-section (1) of Section 244-A uses two important expressions, namely (i) becomes due, and (ii) be entitled to. The expression "becomes due" is a clear indication that an assessee will be entitled to the benefit of Section 244-A only if the refund of any amount has become due. If a refund has become due, interest on the refund is also automatic subject to the satisfaction of other conditions. Anything that is due and which a person is entitled to collect, is naturally in the nature of a debt claim. Therefore, we do not think that the Supreme Court made a very stray observation in paragraph 38 of its decision in Tata Chemicals, without realising what they were actually indicating. The statement found in paragraph 38 of the decision in Tata Chemicals to the effect "refund due and payable to the assessee is debt-owed payable by the revenue" is actually a perfect statement of law. It is certainly a theorem, but not Euclid's theorem. Therefore, the law as we see is well settled to the effect that what was due as a refund and what was payable as interest on such refund are debt claims within the meaning of Article 12.4. As a consequence, they satisfy the parameters of Article 12.3(a). Hence, the first question of law is answered in favour of the appellant. Consequently, the second question of

law does not arise for consideration. The appeal stands allowed.
There will be no order as to costs.

s/d-
Assistant Registrar(CCC)

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Sub-Assistant Registrar

RS/kpl

To

1.The Income Tax Appellate Tribunal,
Madras 'D' Bench
Chennai

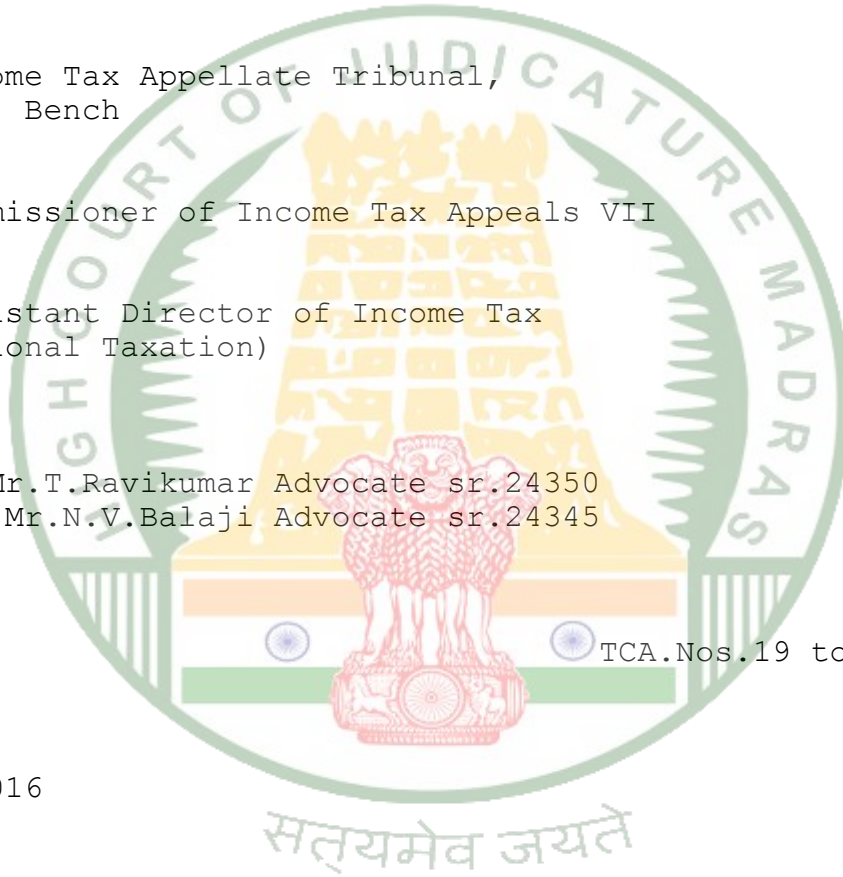
2.The Commissioner of Income Tax Appeals VII
Chennai

3.The Assistant Director of Income Tax
(International Taxation)
Chennai

+2 cc to Mr.T.Ravikumar Advocate sr.24350
+3 ccs to Mr.N.V.Balaji Advocate sr.24345

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