

Meena

IN THE HIGH COURT OF BOMBAY AT GOA
TAX APPEAL NO 57 OF 2016

**THE PRINCIPAL COMMISSIONER OF
INCOME TAX,**

having office at Aayakar Bhavan, Patto-
Plaza, Panaji- Goa.

... APPELLANT

~ VERSUS ~

SESA RESOURCES LTD

(Earlier known as VS Dempo & Co Pvt Ltd)

Dempo House, Campal, Panaji, Goa.

PAN No.AAACV7160R

... RESPONDENT

APPEARANCES

FOR THE APPELLANT

Ms Susan Linhares, *Advocate*

FOR THE RESPONDENT

Mr SR Rivankar, *Advocate*

**CORAM : G.S.Patel &
Nutan D. Sardesai, JJ.**

DATED : 16th August 2017.

ORAL JUDGMENT (per G.S. Patel J)

A. INTRODUCTORY

1. The appellant, the Principal Commissioner of the Income Tax, Goa (“**PCIT**”), is in appeal against the order of 20th August 2015 of the Income Tax Appellate Tribunal, Panaji Bench (“**ITAT**”). Ms Linhares for the appellant submits that that substantial questions of law arise out of this order. In paragraph 6 these have been set out:

- “A. Whether on the facts & in the circumstances of the case, the Hon'ble ITAT is right in deleting the addition of Rs.1,53,313 on account of disallowance of excess claim of depreciation @60% as against 15% on UPS at par with the depreciation rate on computers when UPS are electrical equipments as held in the decision of Hon'ble Delhi Bench of ITAT in *Nestle India Ltd. v DCIT* (2007) 111 TTJ (Del) 0498?
- B. Whether on the facts & in the circumstances of the case, the Hon'ble ITAT is right in deleting the addition of Rs.4,27,39,010 towards disallowance of expenditure of interest paid on loans taken at interest & advanced the same money to sister concerns without charging any interest, even it the assessee could not produced the evidence to show that the advances were used for business purpose as held in the case of *Mir Mohd. Ali v CIT* in 38 ITR 413?
- C. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in deleting the addition of Rs.21,19,97,295 considering that the expenses incurred on repairs and maintenance of the old vessel can only be categorized as current

repairs as the same has been incurred to keep the vessels in good condition without increasing the capacity by ignoring the decision of the Hon'ble Supreme Court in the case of *Ballimal Naval Kishore v CIT* (1997) 224 ITR 414 and *CIT v. Saravana Spinning Mills (P) Ltd.* (2007) 163 Taxman 196, wherein it was held that the object of current repairs should not be obtaining a new or fresh advantage & every expenditure does not come automatically under current repairs?

- D. Whether on the facts & in the circumstances of the case, the Hon'ble ITAT is right in deleting the addition made by the AO on account of disallowance of additional depreciation amounting to Rs.88,24,295 by ignoring the decision of Hon'ble Supreme Court in the case of *CIT v Gem India Manufacturing Co.* (2001) 249 ITR 307 (SC) and *Lucky Minmat (P) Ltd. v. CIT* (2001) 116 Taxman 1 (SC)."

B. FACTUAL BACKGROUND

2. The assessee company, Sesa Resources Ltd ("**SRL**"), previously known as VS Dempo & Co Pvt Ltd, is engaged in mining, mineral processing for exports, shipping and stevedoring. SRL filed an e-return of Income on 29th September 2009. It declared a total income of Rs 3,55,13,43,220. The return was processed and the case was taken up for scrutiny. A notice under Section 143(2) of the Income Tax Act 1961 ("**the Act**") was issued to SRL on 28th August 2010.

3. By an order dated 29th December 2011, the Assessing Officer (“AO”) *inter alia* disallowed the expenditure incurred on repairs amounting to Rs 21,19,97,295 on two marine vessels called MV Priyamvada and MV Goan Pride. The AO also reworked depreciation on an Uninterrupted Power Supply installation (“UPS”) at Rs 1,53,313/- and disallowed an amount of Rs 4,27,39,010/- as interest on loans given by SRL to its sister concerns. Lastly, the AO rejected additional depreciation of Rs 88,24,295/- on equipment, plant and machinery, holding that the extraction and processing of iron ore was neither manufacture nor production within the meaning of Section 32(iia) of the Act.

4. The assessee appealed to the Commissioner of Income Tax (A) (“CIT”), who heard the parties, and, by an order dated 25th March 2015, partly allowed SRL’s appeal. The CIT held that the expenditure claimed on repairs was “current repairs”. He directed the AO to delete the disallowance. He also ordered the deletion of disallowance of interest on loans to SRL’s sister concerns. In regard to the disallowance of additional depreciation, the CIT allowed the depreciation of Rs 88,24,295/-. On the question of the depreciation on the UPS, the CIT directed the AO to allow depreciation at 60%.

5. The Revenue and SRL both filed an appeal to the ITAT. By its order dated 20th August 2015, the ITAT allowed the appeal of the assessee and dismissed that of the Revenue.

C. SUMMARY

6. Having heard Ms Linhares for the appellant, the PCIT, and Mr Rivankar for the respondent SRL at some length, we are not persuaded that any substantial questions of law arise in the matter sufficient to justify admission of this appeal. We will deal with each of the four questions proposed immediately, as it seems to us that all these questions are either fully answered by settled decisions or are questions of fact and not questions of law, leave alone substantial questions of law.

D. FINDINGS ON THE PROPOSED SUBSTANTIAL QUESTIONS OF LAW

I. DEPRECIATION ON UPS

7. The submission of the Revenue here is that a UPS, though used admittedly only in conjunction with a computer network, is not itself a 'computer'. Reliance is sought to be placed on the ITAT decision in *Nestle India Limited v Deputy Commissioner of Income Tax*.¹ However, the issue is squarely covered by a decision of a coordinate bench of the ITAT in the case of SRL itself in ITA No 190/PNJ/2011. The CIT followed that decision. It was on this limited ground that in paragraphs 9 and 10 the ITAT held against the Revenue on this aspect of the appeal. We see no defect in the

1 (2007) 111 TTJ Delhi 498.

reasoning of the Tribunal. Indeed we are unable to appreciate why, when there is a decision of a coordinate Bench on an identical point, the Tribunal should, or even could, take a diametrically opposite view. To do so would only add to uncertainty in tax proceedings, and the doctrine of precedent would apply just as much to the ITAT. This is by no stretch of the imagination a substantial question of law.

II. INTEREST PAID ON LOANS TO SISTER CONCERNS

8. Before the ITAT, the Revenue challenged the CIT's deletion of the AO's disallowance on interest expenditure on loans taken at interest and advanced to sister concerns interest-free. The charge is not that SRL could not prove evidence of loans, but that it could not establish that the loans were given for business purposes.

9. Ms Linhares relies on the decision of the High Court of Madras in *Mir Mohd Ali v Commissioner of Income-Tax*.² There, the assessee's accounts were rejected as unreliable, and the Tribunal was left to estimate how much of the payment represented interest on loans borrowed and utilized for the assessee's transport business. The Court held it was for the assessee to prove that each of the loans on which he paid interest in the years in question was utilised for his business, a burden the assessee did not discharge. The Court found there was no material on record to sustain the argument that the estimates taken by the Tribunal were unreasonable.

2 (1960) 38 ITR 413 (Madras).

10. *Ex facie*, we are unable to see how this question arises in the present case. The loans were admittedly given to sister concerns; it is difficult to see what purpose other than business, and we mean this in the widest sense, those loans might have served.

11. The argument is in any case fully countered by Mr Rivankar for SRL on the strength of the decision of the Supreme Court in *SA Builders Ltd v Commissioner of Income Tax (Appeals) and Anr.*³ The Supreme Court said:

In this connection we may refer to Section 36(1)(iii) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') which states that "the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession" has to be allowed as a deduction in computing the income tax under Section 28 of the Act.

In *Madhav Prasad Jantia vs. Commissioner of Income Tax U.P.* AIR 1979 SC 1291, this Court held that the expression "for the purpose of business" occurring under the provision is wider in scope than the expression "for the purpose of earning income, profits or gains", and this has been the consistent view of this Court.

In our opinion, the High Court in the impugned judgment, as well as the Tribunal and the Income Tax authorities have approached the matter from an erroneous angle. **In the present case, the assessee borrowed the fund from the bank and lent some of it to its sister concern (a subsidiary) on interest-free loan. The test, in our opinion, in such a case is really whether this was done as a measure of commercial expediency.**

3 (2007) 288 ITR 1.

In our opinion, the decisions relating to Section 37 of the Act will also be applicable to Section 36(1)(iii) because in Section 37 also the expression used is “for the purpose of business”. It has been consistently held in decisions relating to Section 37 that the expression “for the purpose of business” includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby.

Thus in *Atherton vs. British Insulated & Helsby Cables Ltd* (1925) 10 TC 155 (HL), it was held by the House of Lords that in order to claim a deduction, **it is enough to show that the money is expended, not of necessity and with a view to direct and immediate benefit, but voluntarily and on grounds of commercial expediency and in order to indirectly to facilitate the carrying on the business.** The above test in *Atherton’s case* (supra) has been approved by this Court in several decisions e.g. *Eastern Investments Ltd. Vs. CIT* (1951) 20 ITR 1, *CIT vs. Chandulal Keshavlal & Co.* (1960) 38 ITR 601 etc. **In our opinion, the High Court as well as the Tribunal and other Income Tax authorities should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the High Court and other authorities should have enquired as to whether the interest free loan was given to the sister company (which is a subsidiary of the assessee) as a measure of commercial expediency, and if it was, it should have been allowed.**

The expression “commercial expediency” is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.

No doubt, as held in *Madhav Prasad Jantia vs. CIT* (supra), if the borrowed amount was donated for some sentimental or personal reasons and not on the ground of commercial expediency, the interest thereon could not have been allowed under Section 36(1)(iii) of the Act. In *Madhav Prasad's* case (supra), the borrowed amount was donated to a college with a view to commemorate the memory of the assessee's deceased husband after whom the college was to be named. It was held by this Court that the interest on the borrowed fund in such a case could not be allowed, as it could not be said that it was for commercial expediency.

Thus, the ratio of *Madhav Prasad Jantia's* case (supra) is that the borrowed fund advanced to a third party should be for commercial expediency if it is sought to be allowed under Section 36(1)(iii) of the Act.

(Emphasis added)

12. Thus, the test is in such cases is whether the loans in question and interest thereon were matters of commercial expediency. We may note that this is admittedly not a case where the amount was either a donation (as in *Madhav Prasad Jantia's* case, supra) or even loan was given to an individual or to a director of the company in his personal capacity. Had that been so, the question might legitimately been asked as to prove the purposes of the loan. In other words, the question posed by the Revenue suggests its own answer. It postulates that when two commercial entities have between them a loan transaction, it is conceivable that the purpose is something other than a business purpose. *Prima facie*, it seems that the only possible other purpose, as oppose to a business purpose or commercial expediency, is a 'personal' one (such as a loan to a

director for personal use or a commemorative loan), and a commercial entity can have no such personal purpose. The finding of the Tribunal in paragraph 11 of its order, in our view, cannot be faulted. It relied on a decision of a co-ordinate bench of the Tribunal in another matter where a decision of the Gauhati High Court in *Highways Construction Co Pvt Ltd v Commissioner Of Income-Tax*⁴ was considered. The finding there was that only the real income earned by the assessee could be brought to tax, not some notional income. The question suggested as a substantial of law seems to proceed on a basis that some notional interest might have been asked to be assessed. We are unable to agree.

III. CURRENT REPAIRS TO OLD VESSELS

13. The question as posed is, in our view and as pointed out before us by Mr Rivankar, fully covered by the decision of a Division Bench of this Court in *Commissioner of Income-Tax v Chougule and Co Pvt Ltd*.⁵ The High Court held, again significantly in the contest of a company exporting ore and involved in some aspects of shipping, that expenditure on repairs and replacements has to be considered from an appropriate perspective. The original cost of the asset is of no relevance. The Division Bench judgment gives us a colourful example by pointing out that the original cost of an Ambassador-model vehicle in the mid-1970s was around Rs 28,000/-. After a few years, its written-down value would be insignificant. Yet repairs on such a car might often involve an

4 (1993) 199 ITR 702 Gau.

5 (1995) 214 ITR 523.

expenditure higher than the original cost of the car. That would not make the expenditure one of capital nature. By 1995, the replacement cost of that very Ambassador car would be Rs.2 lakhs. An expenditure of Rs.50,000 or Rs.75,000 on its repairs could not be said to bring into existence 'a new car', or result in an addition to such a car, notwithstanding that the expenditure on repairs would be twice that of its original cost. We can multiply examples: vintage cars and motorcycles, for instance, or, in less indulgent terms, an old but otherwise usable shipping vessel.

14. The discussion before the Division Bench was whether the amount was shown to paid on account of 'current repairs'. This, as the Division Bench said, is not an expression defined by statute. It has to be understood in its popular and commercial sense, and given its plain meaning. The expression means repairs that one undertakes in the normal course to preserve, maintain or properly utilise an item or machinery or equipment, or to restore it to its original condition. It does mean only petty repairs or repairs required by wear and tear during that particular year. The repairs must not bring into existence a new item, nor obtain a new or different advantage. The amount of expenditure is not decisive; so is the process of repair or that there might have been extensive replacements of parts of the item. The original acquisition cost is most certainly irrelevant. The replacement cost may be used as an indicator of the true character of the expenditure. There may be a rebuttable presumption — a question of fact — if the current repairs added to the written down or disposal value exceed the present replacement cost of the asset. The word 'current' indicates that the legislative intent was to restrict the allowance to

expenditure incurred for preservation and maintenance of the asset in its current state (as opposed to an expenditure incurred on any improvements or additions, or bringing into being a new item or a new advantage). Reference was made in *Chougule and Co* to the decision of Chagla CJ in *New Shorrock Spg and Mfg Co Ltd v CIT*.⁶ The simple test set out there, one that must be borne in mind is whether as a result of the claimed expenditure on repairs an already existing asset is being preserved and maintained or an attempt is being made to bring a new asset into existence or to obtain to new and different advantage.

15. The decision of Chagla CJ in was also expressly approved by Supreme Court in *Ballimal Naval Kishore v Commissioner of Income-Tax*,⁷ on which Ms Linhares relies. There, the Supreme Court also said that if the expenditure is incurred with a view to bring into existence a new asset or an advantage of an enduring nature, it cannot qualify for deduction. Far from assisting the Revenue, this is a decision that is actually against it. Similarly, the Supreme Court decision in *Commissioner of Income-tax, Madurai v Savarana Spg Mills (P) Ltd*⁸ does not actually assist the Revenue. There, a question of modernisation/current/repairs expenditure was being tested as revenue expenditure. Here again the Court provided a example, this time of an air conditioner, by saying that the replacement of a compressor would fall within the expression of the word ‘current repairs’; the assessee did not bring into existence a new air conditioner by replacing its compressor. What is true of an air

6 (1956) 30 ITR 338 (Bom).

7 (1997) 90 Taxman 402 (SC).

8 (2007) 163 Taxman 201 (SC).

conditioner and its compressor is almost certainly true of a ship and its various parts. Not only did the *Saravana Court* approve the decision in *Ballimal Naval Kishore* and *New Shorrocks* but also set out in paragraph 11 the distinction between 'repairs' and 'current repairs':

11. An allowance is granted by clause (i) of Section 31 in respect of amount expended on current repairs to machinery, plant or furniture used for the purposes of business, irrespective of whether the assessee is the owner of the assets or has only used them. **The expression "current repairs" denotes repairs which are attended to when the need for them arises from the viewpoint of a businessman. The word "repair" involves renewal. However, the words used in Section 31(i) are "current repairs". The object behind Section 31(i) is to preserve and maintain the asset and not to bring in a new asset. In our view, Section 31(i) limits the scope of allowability of expenditure as deduction in respect of repairs made to machinery, plant or furniture by restricting it to the concept of "current repairs". All repairs are not current repairs. Section 37(1) allows claims for expenditure which are not of capital nature. However, even Section 37(1) excludes those items of expenditure which expressly falls in Sections 30 to 36. The effect is to delimit the scope of allowability of deductions for repairs to the extent provided for in Sections 30 to 36. To decide the applicability of Section 31(i) the test is not whether the expenditure is revenue or capital in nature, which test has been wrongly applied by the High Court, but whether the expenditure is "current repairs". The basic test to find out as to what would constitute current repairs is that the expenditure must have been incurred to "preserve and maintain" an**

already existing asset, and the object of the expenditure must not be to bring a new asset into existence or to obtain a new advantage. In fact, in the present case, in the balance sheet the assessee, viz, M/s Saravana Spinning Mills has indicated the above expense as an item incurred for purchase of a New Asset. In our view, the High Court had erred in placing reliance on the report of SITRA in coming to the conclusion that the textile mill is a plant under Section 31(i). As stated above, each machine in a segment has an independent role to play in the mill and the output of each division is different from the other. "Repair" implies the existence of a part of the machine which has malfunction. If the argument of the assessee herein before us is to be accepted it would result in absurdity and it would make the provisions of Section 31(i) completely redundant. According to Shri R. Venkataraman, learned senior counsel for the assessee, the textile plant consists of about 25 machines. One of such machines is the Ring Frame. If the argument of the assessee is to be accepted, it would mean that periodically one machine out of 25 would be replaced, and on that basis, from time to time, each of these 25 machines in the textile plant would be entitled to claim allowance under Section 31(i). In our view, the A.O. was right in holding that each machine including the Ring Frame was an independent and separate machine capable of independent and specific function and, therefore, the expenditure incurred for replacement of the new machine would not come within the meaning of the words "current repairs". In the present case, it is not the case of the assessee that a part of the machine (out of 25 machines) needed repairs. The entire machine had been replaced. Therefore, the expenditure incurred by the assessee did not fall within the meaning of "current repairs" in Section 31(i).

(Emphasis added)

16. The question before the ITAT was in regard to expenditure on repairs and maintenance of old shipping vessels. Again, the ITAT relied on a decision of a coordinate bench. SRL's submission was that the expenditure was necessary to keep the vessel in good working condition and to keep them seaworthy. The increased expenditure did not result in an increase of the capacity of the vessels or any new advantage or capital asset coming into existence.

17. Other than by interfering on a question of fact we see no possibility of entering into any such question. Once again, we are quite unable to see how this question arises as a substantial one of law.

IV. ADDITIONAL DEPRECIATION

18. Here, the ITAT held against Revenue on the question of the additional depreciation and the deletion by the CIT of the AO's disallowance. It was submitted before the ITAT that this was fully covered by a decision of a coordinate bench of the ITAT in a case of Sesa Goa Ltd. The CIT followed the decision. The ITAT held, in our view correctly, that the CIT's approach could not be faulted.

19. We do not find merit in Ms Linhares's reliance on the decisions in *CIT v Gem India Manufacturing Co*⁹ and *Lucky Minmat*

9 [2001] 117 Taxman 368 (SC).

(P) *Ltd v CIT*.¹⁰ Both decisions are in completely different contexts. *Gem India* was a case of cutting and polishing of diamonds, and in *Lucky Minmat* the assessee was involved in the business of mining limestone and marble blocks and then cutting and sizing these before sale.

20. Far more apposite is the decision that Mr Rivankar cites as fully covering the issue here, that of the Supreme Court in *The Commissioner of Income Tax v Sesa Goa Ltd*.¹¹ The Supreme Court affirmed the Division Bench decision of this court in *CIT v Sesa Goa Ltd*.¹² There, too, the question arose *inter alia* in regard to ore extraction and processing. That too was a case of a mining company. The Supreme Court held that mining for the purpose of production of mineral ore falls within the ambit of the word ‘production’.

21. The Division Bench of this Court had held that in such a process, ore has to be extracted or raised from earth. This activity is ‘production’, entitling the assessee to the benefit of Section 32(A) of the Act. Thus, there would be an allowable depreciation deduction in respect of the machinery used in mining. It cannot be said that mining is neither production nor manufacture. That is no longer *res integra*.

22. The consequence is that none of the questions framed before us arise as substantial questions of law.

10 (2001) 9 SCC 669 : (2000) 245 ITR 830. The party’s name is incorrectly spelt in the Taxman report.

11 (2004) 271 ITR 331.

12 (2004) 266 ITR 126 (Bom).

23. The appeal is dismissed. There will be no order of costs.

NUTAN D. SARDESSAI, J.

G.S. PATEL, J.