IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NOS. 26 OF 2009 & 1 OF 2010

The Commissioner of Income Tax,
having office at Aayakar Bhavan
Patto Plaza, Panaji Goa. …. Appellant

V e r s u s

M/s. Goa Minerals Pvt. Ltd.,
Salgaocar House,
Opp. F.L. Gomes road,
Vasco-da-Gama, Goa. …. Respondent

Ms. A. Razaq, Advocate for the appellant.

Mr. P. J. Pardiwalla, Senior Advocate with Mr. A. F. Diniz, Advocate for the respondent.

Coram:- F. M. REIS &
NUTAN D. SARDESSAI, JJ.

Date:- 11th April, 2017

ORAL JUDGMENT (Per F. M. Reis, J)

Heard Ms. A. Razaq, learned counsel appearing for the appellant and Mr. P. J. Pardiwalla, learned Senior Counsel appearing for the respondent.

2. The above appeals under Section 260-A of the Income Tax Act came to be admitted by an order dated 12.12.2011 on the following substantial question of law.

> "Whether the Income Tax Appellate Tribunal was right in deleting the addition made by the A.O., disallowing the charter hire charges of Barges as being excessive under Section 40A(ii)(a) of the Income Tax Act ?

3. Ms. A. Razaq, learned counsel appearing for the appellant points out that though the hire charges have been assessed in the hands of HUF, the amounts were duly received by the individual members of the HUF. The learned counsel as such points out that the impugned order passed by the Income Tax Appellate Tribunal on this count alone deserves to be quashed and set aside. The learned counsel further pointed out that as such amounts were allegedly paid in terms of the provisions of Section 40A(2)(a) of the said Act which payments are excessive and consequently the appellate authority was not justified in deleting the addition made by the Assessing Officer disallowing the hire

charges of the barges as being excessive. The learned counsel further submits that the authorities below have erroneously found that the amounts were not excessive and as such the substantial question of law framed by this Court is to be answered in favour of the appellant.

4. On the other hand, Mr. Pardiwalla, learned Senior Counsel appearing for the respondent has submitted that the question of examining whether the amounts are received by the HUF or the members would be irrelevant as according to him the fact finding authorities below have concurrently found that the amounts charged were not in excessive as they were based on the rates quoted by the Barge Owners Association. The learned Senior Counsel further pointed out that in such circumstances, as the findings of the fact finding authorities are based on the material on record, this Court in the present appeals under Section 260A of the Income Tax Act cannot reappreciate the evidence to come to any contrary findings. The learned Senior Counsel thereafter has taken us through the order passed by the

Income Tax Appellate Tribunal to point out that the Tribunal has rightly deleted the addition made by the Assessing Officer and as such the above appeals deserve to be rejected. In support of his submissions, the learned Senior Counsel has relied upon the judgments of this Court reported in ***244 CTR 102*** in the case of ***CIT vs. V. S. Dempo and Co. (P) Ltd.,*** and ***213 Taxation 235*** in the case of ***CIT vs. Indo Saudi Service Travel (P) Ltd.*** The learned Senior Counsel as such points out that there is no substance in the above appeals.

5. We have duly considered the rival contentions and we have also gone through the records. Section 40A(2)(a) of the Income Tax Act reads thus :

> "(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub- section, and the [Assessing] Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the

> payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction”

6. On going through the said provisions, it clearly provides that in case the first part of the Section is satisfied, the question of refusing such charges when such amounts are not excessive would not at all arise. In the present case, the authorities below have concurrently found that the charges claimed by the respondent were not excessive as they were based on the charges fixed by the Barge Owners Association. As the findings of fact have been arrived at based on the documentary evidence on record whose authenticity has not been disputed by the appellant, we find that such findings cannot be said to be perverse. The learned counsel appearing for the appellant was unable to point out that the finding rendered by the authorities below is on the basis of misreading of the evidence or that any

relevant document has been over-looked while arriving at such findings of fact. As already pointed out herein above, the findings of fact are based on the documentary evidence and consequently, this Court in the present appeals under Section 260 of the Income Tax Act cannot reappreciate the evidence to come to any contrary findings. As the appellant have failed to produce any evidence or material to show that the amount of charges were excessive, we are of the opinion that there is no infirmity committed by the Tribunal while coming to the conclusion that the amount charged are not excessive and as such do not come within the four corners of Section 40A(2)(a) of the Income Tax Act.

7. In fact, this Court in the judgment in the case of ***V. S. Dempo & Co. (P) Ltd.,*** (supra) has observed at paras 6, 9 and 10 thus :

> **"6.** In our view, in a business of export consistency of supply as well as quality of supply is important. In order to assure a consistent supply of material of the same quality the

purchaser of a commodity may pay to a seller bound under a contract a little higher than the current rate. Furthermore, in case of yearly contracts by agreeing to bye goods at a specified rate the exporter is insulated from vagaries of any seasonal rise in the market rate. Therefore, unless the rate agreed is so very much excessive or unreasonable as to doubt the objective behind the agreement, it cannot be said that the rate, a little higher than the seasonal market rate is unjustified or amounts to diversion of profit. In this connection, the fact that the assessee as well as its subsidiary which is the seller are in the same tax bracket and pay same rate of tax is a fact which assumes importance. Admittedly, it is not a case of tax evasion inasmuch as if the rate would have been less, the assessee's profit would have been more, but the profits of the seller would have been less and both being taxable at the same rate, there would be no difference in the aggregate tax payable by the assessee and its subsidiary.

9. Clause (a) of sub-section (2) of Section 40A of the Act provides that where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of the sub-section and the Assessing Officer is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as it so considered by him to be excessive or unreasonable, shall not be allowed as a deduction. The object of Section 40A(2) is to prevent diversion of income. An assessee who has large income and is liable to pay tax at the highest rate prescribed under the Act often seeks to transfer a part of his income to a related person who is not liable to pay tax at all or liable to pay tax at a rate lower than the rate at which the assessee pays the tax. In order to curb such tendency of diversion of income and thereby reducing the tax liability by illegitimate means, Section 40-A was added to the Act by an amendment made by the Finance Act, 1968. Clause (b) of Section 40A(2) gives the list of related persons. It is only where the payment is made by the assessee to the related persons mentioned in clause (b) of Section 40A(2) of the Act that the Assessing Officer gets jurisdiction to disallow the expenditure or a part of the expenditure which he considers excessive or unreasonable. Clause (b) of Section 40A(2) reads as under :

"**40A**(2)(*b*) The persons referred to in clause (*a*) are the following, namely:—

(*i*) where the assessee is an individual any relative of the assessee;

(*ii*) where the assessee is a company, firm, association of persons or Hindu undivided family, any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member;

(*iii*) any individual who has a substantial interest in the business or profession of the assessee, or any relative of such individual;

(*iv*) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member;

(*v*) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the assessee; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member;

(*vi*) any person who carries on a business or profession,—

(*A*) where the assessee being an individual, or any relative of such assessee, has a substantial interest in the business or profession of that person; or

(*B*) where the assessee being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner, or member, has a substantial interest in the business or profession of that person.

Explanation.—For the purposes of this sub-section, a person shall be deemed to have a substantial interest in a business or profession, if,—

(*a*) in a case where the business or profession is carried on by a company, such person is, at any time during the previous year, the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profit) carrying not less than twenty per cent of the voting power; and

(*b*) in any other case, such person is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the profits of such business or profession."

10. Learned Counsel for the appellant submitted that the present case falls under sub-clause (ii) or sub-clause (iv) of clause (b) of Section 40A(2). Sub-clause (ii) provides that where the assessee is a company, firm, association of persons or Hindu undivided family, any director of the company, partner of the firm, or member of the association or family, or

any relative of such director, partner or member would be a related person. In the present case, the assessee is a company and the seller is its subsidiary company. The seller i.e. the subsidiary company does not fall in any of the capacities mentioned under sub-clause (ii) of clause (b). Only a director of the company, partner of the firm, or member of the association or family or any relative of such director, partner or member is a related person, under sub-clause (ii) of clause (b) of sub-section (2). Another company, even if it is a subsidiary of the assessee , is not a related person within the meaning of sub-clause (ii) of clause (b) of Section 40A(2). Sub-clause (iv) of clause (b) of Section 40A(2) provides that in case of a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or

> family, or any relative of such director, partner or member is a related person. Again a subsidiary company does not fall in any of the class of persons mentioned in sub-clause (iv) of clause (b) of Section 40A(2). In law, a holding company is a member of subsidiary company and holds more than 50% equity share capital of the subsidiary company (except in cases where it controls the composition of the board of directors without holding majority of the shares). While the holding company is a member of its subsidiary company, the subsidiary company is not a member of the holding company. As, the subsidiary company was not a member of the assessee sub-clause (iv) of clause (b) of Section 40A(2) of the Act is also not attracted in the present case."

8. Taking note of the said observations, we find that in the present case, the learned Tribunal has found in the impugned order dated 18.02.2009 for the Assessment Years 2003-2004 that

there is no evidence brought on record to show that the payment itself was excessive and it had enriched the individual Directors. It is also noted that the records reveal that there is no undue advantage by the Directors by the arrangement and there is no loss to the Revenue as the subject amount has already been taxed in the hands of the HUF. It is further noted that the case of the HUFs has not been reopened and there is no reopening of the assessment of the individual Directors. It is also pointed out that the records reveal that the barges were taken on payment of time charter charges of income earned from the transportation of iron ore on the basis of per tonne rate as prescribed by the Goa Barge Owners Association. Considering the said factual position, the learned Tribunal observed that in the absence of any comparative case that the payments were excessive and unreasonable, the orders of the Revenue Authorities are liable to be set aside. The learned Tribunal also took note of the Circular dated 06.07.1968, particularly para 74 thereof and noted that there is nothing on record to show that either of the parties enriched by getting a fixed sum of money as charter hire charges and the tax due by the

Assessee has been reduced by this arrangement. The learned Tribunal also found that as far as the other appeal being I.T.A. No. 48/PANJ/2006, the issues involved are identical and consequently, the appeal filed by the respondents came to be allowed.

9. In the present case, we find that the factual findings are that there is no excessive payment or that the arrangement has in any way enriched the respondents which cannot be faulted as they are based on the appreciation of evidence by the learned Tribunal and no perversity has been shown to such findings by the appellant.

10. In such circumstances and for the aforesaid reasons, we find that the substantial question of law framed is answered against the Revenue/appellant. Both the appeals stand accordingly rejected.

NUTAN D. SARDESSAI, J. **F. M. REIS, J.**

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