

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

INCOME TAX APPEAL NO.1222 OF 2014

The Commissioner of Income Tax-8,
Mumbai

.... Appellant

Vs.

M/s. Golden Tobacco Ltd.
(formerly known as GTC Industries Ltd.),
Mumbai

.... Respondent

Mr. Arvind Pinto for the Appellant.
Mr. Jitendra Jain with Mr. Sameer Dalal for the
Respondent.

CORAM: S.C. DHARMADHIKARI &
SMT. SADHANA S. JADHAV, JJ.

DATE : APRIL 21, 2017

P.C:

1. The Revenue's appeal is directed against the order of the Income Tax Appellate Tribunal at Mumbai for the Assessment Years 1996-97 and 1997-98. By this order of 30-9-2013, the Tribunal has dismissed the ground raised by the Revenue. In the sense, in Income Tax Appeal No.195/M/2011 for the Assessment Year 1996-97, the Revenue was aggrieved by

the order of the Commissioner of Income Tax (Appeals), Mumbai, dated 13-10-2010.

2. Though Mr. Pinto would submit that each of the questions proposed at pages 5 and 6 of the paper-book {(A), (B) & (C)} are substantial questions of law, we are unable to agree with him.

3. It may be that for prior assessment years there was a certain finding rendered by the Tribunal, the Revenue's appeal was dismissed, and that order was challenged before us in further appeal. However, merely because that further appeal was not pressed on account of a meagre revenue/tax impact, we do not think that the questions now proposed are substantial questions of law.

4. The Revenue submits that during the course of assessment, the Assessing Officer observed from Schedule-J of the Balance-sheet that the respondent/assessee had given interest free loans and advances of Rs.4,01,44,769/-. That was

advanced to three entities. The assessee was asked to give details of the interest charged from all these companies. The assessee was directed to show cause as to why the interest paid should not be disallowed as non-business purpose. Meaning thereby, the advances were not given for business purposes. At the same time, the Revenue does not dispute that the assessee's explanation for a sum of Rs.1,87,50,000/- was accepted. The loans amounting to Rs.2,64,32,769/- to Dalmia Fresenius Ltd., Luster Print Media Ltd. and DALF & others were considered as interest free loans given for purposes other than business. In other words, the explanation in regard to Rs.1,87,50,000/- was accepted and as far as the balance was concerned, that was not an acceptable explanation. The disallowance was worked out at 20% of the amount of Rs.2,64,32,769/-, amounting to Rs.52,86,553/-. This was challenged by the assessee before the Commissioner of Income Tax (Appeals) who allowed that appeal on 3-10-2010.

5. Aggrieved thereby, the Revenue carried the matter in appeal to the Tribunal.

6. We have, with the assistance of Mr. Pinto and Mr. Jain, perused this memo of appeal and all the annexures thereto. In para 24.2 of the order of the Assessing Officer, these facts have been noted and in great details. The assessee had offered an explanation that he paid the share application money in the earlier years in respect of these companies. It has also been stated that borrowed funds have not been used for making these share applications. The assessee also stated that the subsidiary companies could not allot the shares to the assessee because the Department had attached the amount and in that regard orders of the Department were relied upon. The explanation of the assessee was accepted in respect of the very three companies. However, the Assessing Officer proceeds on the footing that no explanation has been offered in respect of the advances and loans to the extent indicated above. The Commissioner of Income Tax (Appeals) in reversing this decision came to the conclusion that this approach of the Assessing Officer was incorrect. The Assessing Officer had accepted the explanation in part and rejected as far as the other advances.

The First Appellate Authority's order at page 125 considers all the records. It is held that the assessee/appellant submitted that the advances were given to its group concern to the extent of Rs.2,64,32,769/- in the earlier year from its reserves and not from interest bearing loan. Similar disallowances were made in the later year and were deleted by the First Appellate Authority following the decision of the Hon'ble Supreme Court of India in the case of **S.A. Builders Ltd. Vs. Commissioner of Income-Tax (Appeals) and another**, reported in (2007) 288 ITR 1 (SC). It was pointed out that none of the share application monies are disbursed during the year under consideration and were advanced in the earlier years. How surplus of general reserve was utilised in advancing the monies has then been set out. It is in these circumstances that the Judgment of the Hon'ble Supreme Court was applied. It was held that interest payment is a permissible deduction even if borrowed funds are advanced for commercial reasons to subsidiary companies. The Assessing Officer has not made any efforts to show nexus between the borrowers and the subsequent advancing of the

loan to the subsidiary company. That is how the addition made by the Assessing Officer was deleted. The Tribunal, in upholding such factual finding referred to the settled principles, including those emerging from the Supreme Court's decision and held that nothing contrary on facts having been brought to its notice, the order of the Commissioner of Income Tax (Appeals) does not call for any interference.

7. We do not think that such factual findings, consistent as they are with the materials placed on record, can be termed as perverse or vitiated by any error of law apparent on the face of the record. The Hon'ble Supreme Court in the case of **S.A. Builders** (supra) considered the case of a assessee which transferred a huge amount of Rs.82 lakhs to its subsidiary company out of the cash credit account of the assessee in which there was a huge debit balance. That is why the Assessing Officer held that the assessee before the Supreme Court diverted its borrowed funds to a sister concern without charging any interest, the proportionate interest relating to the said amount out of the total interest paid to the Bank deserved to be

disallowed.

8. The Hon'ble Supreme Court on consideration of the arguments of both sides arrived at the conclusion that Section 36(1)(iii) of the Income Tax Act, 1961 states that the amount of 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 under Section 28 of the Income Tax Act. The Hon'ble Supreme Court then referred to its earlier Judgment and concluded that the assessee borrowed the fund from the Bank and lent some of it to its sister concern (a subsidiary) as interest free loan. The Hon'ble Supreme Court observed that the test is, whether this was done as a measure of commercial expediency. It is in this context that the Hon'ble Supreme Court referred to both Sections 37 and 36(1)(iii) and the expression used "for the purpose of business". That would include expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits from it. It is in the above circumstances that the Hon'ble Supreme Court clarified that if the money has been advanced to the sister

concern, what the sister concern did with this money has to be examined in order to decide whether it was for commercial expediency. If the money is advanced to a sister concern, that is not relevant, but what is relevant is whether the assessee advanced such amount to its sister concern as a measure of commercial expediency.

9. Of course, that would be decided in the facts and circumstances of each case. Therefore, para 36 of the Judgment in the case of S.A. Builders does not hold that in every case where the facts are similar to S.A. Builders', that orders of the Assessing Officer and as passed in the instant case have to be upheld. In the present case, the Assessing Officer did not carry out the necessary exercise. The Assessing Officer, in fact, granted partial relief and for the balance without carrying out the necessary exercise, he has disallowed the same and made an addition. The Commissioner of Income Tax (Appeals) found that this addition cannot be sustained both on facts and in law. The loans were given in the earlier year and there was sufficient general reserve available for investment. If the Assessing Officer

did not make any efforts to show any nexus between the borrowing and the subsequent advancing of loans to the subsidiary company, then, the disallowance made by the Assessing Officer had to be deleted. We do not think that the Tribunal's exercise of maintaining the order of the Commissioner of Income Tax (Appeals) raises any substantial question of law. More so, when it was ascertained that no interest bearing funds were released for advancing the sums to the subsidiary company or its related company on account of share application money. The assessee had sufficient reserves .

10. As a result of the above discussion, we do not find any reason to entertain this appeal. It is dismissed. There will be no order as to costs.

(SMT. SADHANA S. JADHAV, J.)

(S.C. DHARMADHIKARI, J.)