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

INCOME TAX APPEAL NO. 341 OF 2017

Pr.Commissioner of Income Tax-13. … Appellant.
V/s.
M/s.Sterling Oil Resources Ltd. … Respondent.

Mr.N.C.Mohanty for the appellant.
Mr.B.M.Chatterji, Senior Advocate with Mr.Shreyas Shah, Mr.Sankalp Sharma, Mr.Pritish Chatterjee and Mr.Upendra Lokegaonkar i/b. Mint and Confreres for the respondent.

CORAM : AKIL KURESHI AND S.J.KATHAWALLA, JJ.

DATE : 1st July 2019.

P.C.:

This appeal is filed by the Revenue to challenge the judgment of the Income Tax Appellate Tribunal ("Tribunal" for short) to raise the following question for our consideration:

> "Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the adjustment and confirming the stand of the DRP without appreciating the fact that this transaction is clearly hit by the provisions of Section 92(2) of the Income Tax Act, 1961?"

2. The respondent- assessee had filed the return of income for the assessment year 2009-10. During the course of assessment of such return, it was noticed that the assessee had applied for allotment of shares of its Associated Enterprise ("AE" for short). Such shares were, eventually allotted but after a gap of more than two years. The Department holds a belief that for the period during which the share

application money remained parked with AE, the same should be brought to tax on notional interest basis. The Tribunal made an interim judgment deleting the addition on the ground that the Assessing Officer cannot re-characterize the transaction. It was held that in the present case there was no interest free loan by the assessee to its AE.

3. The learned counsel for the Revenue vehemently contended that the Tribunal has committed serious error. He pointed out that a similar question has been admitted by this Court in Income Tax Appeal No.1583/2016.

4. On the other hand, the learned counsel for the assessee opposed the appeal contending that this issue has already been examined by this Court in Income Tax Appeal No.1248/2016 filed by the Revenue. The said appeal came to be dismissed by order dated 28th January 2019.

5. The facts as noted, are not seriously in dispute. The assessee's share application money remained with its AE for a considerable period of time before the shares were allotted. The Assessing Officer, therefore, treated this transaction as one of loans. It was under similar circumstances that this Court dismissed Revenue's Income Tax Appeal No.1248/2016 vide order dated 28th January 2019 making following observations:

> "2. The respondent- assessee is a Company registered under the Companies Act. For the Assessment Year 2009-10, the assessee was subjected to transfer pricing regime. Question no.1 arises out of the action of the Revenue to tax notional interest in the hands of the assessee through transfer pricing. The facts are that, during the period relevant to the assessment year in question, the assessee had subscribed to

redeemable preferential shares of its Associated Enterprises ("AE" for short) and redeemed some of its shares at par. The Transfer Pricing Officer ("TPO" for short) held that the preference shares were equivalent to interest free loans advanced by the assessee and accordingly charged the interest on notional basis. The Tribunal by the impugned judgment, deleted the addition observing that the TPO had re-characterised the transaction of subscription of shares into advancing of unsecured loans. The Tribunal did not accept such conclusion, inter-alia on the grounds that the TPO cannot disregard the apparent transaction and substitute the same without any material of exceptional circumstances pointing out that the assessee had tried to conceal the real transaction or that the transaction in question was sham. The Tribunal observed that the TPO cannot question the commercial expediency of the assessee entered into such transaction.

3. We are broadly in agreement with the view of the Tribunal. The facts on record would suggest that the assessee had entered into a transaction of purchase and sale of shares of an AE. Nothing is brought on record by the Revenue to suggest that the transaction was sham. In absence of any material on record, the TPO could not have treated such transaction as a loan and charged interest thereon on notional basis. No question of law arises."

6. Income Tax Appeal No.1583/2016 has been filed by the assessee. It is a case in which the Tribunal has taken a converse decision and, therefore, the assessee is in appeal. Admission of the said appeal, therefore, would not persuade us to admit the Revenue's appeal also. In the result, income tax appeal is dismissed.

(S.J.KATHAWALLA, J.) (AKIL KURESHI, J.)