

IN THE HIGH COURT OF BOMBAY AT GOA

**TAX APPEAL NO. 45 OF 2015
AND
TAX APPEAL NO. 46 OF 2015
AND
TAX APPEAL NO. 51 OF 2015**

India Furniture Products Limited,
a public limited Company,
having registered office at
Jaikissan Bhawan, Zuarinagar,
Goa 403726, at present having
the following address at
G-106, SIDCO, Industrial Estate,
Kakkalur, Tiruvallur-602003,
represented herein by its
Whole Time Director
Shri Pervesh Kumar Gandhi,
PAN Card No.AAAC21715A

... Appellant

Versus

The Commissioner of Income Tax,
Aaykar Bhavan, Patto,
Panaji, Goa.

... Respondent

Mr. Chetan Kumar Gouda, Advocate for the Appellant.

Ms. Amira Razaq, Standing Counsel for the Respondent.

Coram:- M. S. SONAK &

DAMA SESHADRI NAIDU, JJ.

Reserved on:- 27th October, 2020

Pronounced on:- 2nd November, 2020

JUDGMENT (Per M. S. Sonak, J.):

Heard Mr. Chetan Kumar Gouda along with Mr. Menino Pereira for the Appellants and Ms. Amira Razaq, learned Standing Counsel for the Respondent.

2. The learned counsel state that these appeals may be disposed of by a common judgment and order since, the issues involved in all these appeals are virtually identical and also the substantial questions of law as framed, are identical.

3. For convenience, Tax Appeal No.45 of 2015 is taken as the lead matter.

4. These Tax Appeals were admitted on 05.10.2015 on the following substantial question of law:-

(A) Whether the ITAT failed to realise that since the appellant paid LC Charges/commission charges which are in the nature of bank charges to their own Nationalized Banks based in India towards opening of the Letter of Credit it could not be construed under the 195(1) that such Usance charges were paid or were payable to a non resident supplier and, consequently, was liable to pay TDS?

5. The assessee filed return of income for the Assessment Year 2009-10 returning nil income claiming *inter alia* expenditure of ₹17,14,806/- as LC Charges and commission paid to the assessee's bankers in India in Indian currency.

6. The assessment officer made order dated 13.12.2011 under Section 143(3) of the Income Tax Act, 1961 (IT Act) disallowing expenditure of ₹17,14,806/- pertaining to LC Charges and commission paid to the assessee's bankers and added the same to the income of the appellants *inter alia* on the ground that the appellants had failed to deduct tax at source on this expenditure.

7. The appellants-assessee appealed to the CIT (Appeals), which allowed this appeal by order dated 04.03.2014 and deleted this addition of ₹17,14,806/-.

8. The respondent appealed to the ITAT, which has, by the impugned order dated 07.01.2015, allowed the respondent's appeal and restored the assessment order dated 13.12.2011. Hence this appeal by the assessee on the aforesaid substantial question of law.

9. Mr. Chetan Kumar Gouda, learned counsel for the appellants submitted that the amount of ₹17,14,806/- expended by the assessee does not constitute "interest" and consequently, there was no question of making any deduction of tax at source on this amount. In the

alternate, he submits that such payment was made to the bankers in India and in Indian currency. Therefore, he submits that the provisions of Section 195 of the IT Act were not at all attracted and there was no legal obligation to deduct any tax at source on such amount.

10. Mr. Gouda submits that the CIT (Appeals) had quite correctly appreciated this matter and the ITAT was not justified in interfering with the well-reasoned order of CIT (Appeals).

11. Ms. Amira Razak, learned counsel for the respondent defends the impugned order made by the ITAT based on the reasoning reflected therein. She points out to the definition of “interest” in Section 2(28A) of the IT Act and submits that the charges paid by the bankers for obtaining letters of credit in order to import raw material from abroad also amount to interest. She submits that before the payment of such amount therefore, the assesses were duty bound to deduct tax at source. Since this was admittedly not done, the ITAT quite correctly disallowed this expenditure. Ms. Razak relies on the following decisions in support of her contentions:

(i) British Bank of Middle East v. Commissioner of Income Tax – (1998) 233 ITR 251 (Bombay);

(ii) M/s. Uniflex Cables Ltd. v. Dy. Commissioner of Income Tax – (2012) 19 Taxmann.com 315 (Mumbai); and

(iii) Commissioner of Income Tax v. Vijay Shipbreaking Corporation & Others – (2003) 129 Taxman 120 (Guj.)

12. The rival contentions now fall for our determination.

13. In this case, there is no dispute that the assesses were importing raw material from the sellers in Japan, Belgium, Germany, U.S.A., etc. Towards such purchase/import transactions, the assesses were required to provide Letters of Credit. Accordingly, the assesses, would provide Letters of Credit from the Indian bankers in order to secure the payments to the purchasers abroad. In order to provide such Letters of Credit the assesses, had to pay service fees and other charges to the Indian bankers. For this purpose, the assesses, during the relevant assessment year, incurred expenditure of ₹17,14,806/-. This includes LC Charges and commissions paid to the Indian banks. These expenses are referred to as Usance charges in trade parlance.

14. Mr. Gouda contends that the aforesaid expenses do not constitute “interest” and consequently, the provisions of Section 195 of the IT Act were not at all attracted to the present case. In the alternate he submits that even if the aforesaid Usance charges are to be held as “interest”, Section 195 of the IT Act is not attracted if such Usance charges were paid to the Indian bankers and not to the purchasers abroad.

15. Now Section 2(28A) of the IT Act defines “interest” in the following terms:

“2(28A) - “interest” means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised.”

16. Perusal of the aforesaid definition makes it clear that the expression “interest” for the purpose of the IT Act includes any service fee or other charge in respect of any credit facility which is not been utilized. Therefore, on a plain reading of the said clause, the charges paid by the assesses in respect of the credit facility amount to, interest. Therefore, it is not possible to accept Mr. Gouda's first contention in these appeals.

17. In order to appreciate Mr. Gouda's second contention reference is necessary to the provisions of Section 195(1) of the IT Act which reads as follows:

“195. (1) - Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) (or section 194LD) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

[Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.]

[Explanation 1.- For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest Payable Account" or "Suspense Account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

[Explanation 2.— For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

- (i) a residence or place of business or business connection in India; or*
- (ii) any other presence in any manner whatsoever in India.]”*

18. Now in this case, though Usance charges may have been paid to the Indian bankers by way of LC Charges and commission, nevertheless, such payment, is a part of the transaction involving purchase/import of raw material from non-residents.

19. According to us, issuing bank of the assesses, merely acts as an agent of the assesses. The Usance charges is the income of the non-

resident as envisaged in the provisions of Section 9(1)(v)(b) read with Section 5(2) of the IT Act. Therefore, the provisions of Section 195(1) were attracted and the assesses were obliged to deduct tax at source before making such payment.

20. In similar circumstances, the Gujarat High Court, in the case of *Vijay Shipbreaking Corporation & Others (supra)*, has held that the assesses was duty bound to deduct tax at source even in respect of bank charges incurred for providing Letters of Credit to foreign sellers.

21. No doubt, the decision of the Gujarat High Court was reversed by the Hon'ble Supreme Court in *Vijay Ship Breaking Corporation v. CIT - 314 ITR 309 (SC)*. However, the Hon'ble Supreme Court, made it clear that such reversal was only because of the amendment which entered force on September 18, 2003, but w.e.f. 01.04.1983. By reason of the said amendment, an explanation was added to Section 10(15)(iv)(c) of the IT Act which provided that Usance interest payable outside India by an undertaking engaged in business of ship-breaking in respect of purchase of a ship from outside India shall be deemed to be the interest payable on a debt incurred in a foreign country in respect of the purchase outside India.

22. The explanation made it clear that Usance interest is exempted from payment of income tax in respect of ship-breaking activity. It is

only on account of this amendment which came into force after the decision of the Gujarat High Court, that, the issue was answered in favour of the assesses and against the Revenue. The Hon'ble Supreme Court ruled that on account of this exemption which was given the retrospective effect, since tax was not assessable in India, there was no question of TDS being deducted by the assesses.

23. This means that the decision of the Gujarat High Court was not really interfered on its intrinsic merit. The interference was only on account of the subsequent amendment which entered force with the retrospective effect. The Gujarat High Court, had taken the view that Usance interest is payable in terms of Section 2(28A) of the IT Act and therefore, the provisions of Section 195 were clearly applicable to such assesses. If the assesses, failed to deduct tax at source, then, the expenditure so incurred was not entitled to be exempted from the total income of such assesses.

24. In this case, the assessment officer, has quite correctly held that Usance means the allowable period of time permitted by the customs between the date of bill and its payment. The Usance of a bill varies between countries. The charges paid for Usance period are called Usance charges. Usance charges in import purchases are paid on a letter of credit. Usance letter of credit is a letter of credit that requires beneficiary to present as a necessary document. Therefore, the

ultimate beneficiary of the Usance charges is the supplier of goods/services.

25. Since in the present case, the assesses imported the raw material for its consumption based on a letter of credit and paid the Usance charges, the beneficiary of such charges is the foreign seller. The issuing bank of the assesses has merely acted as an agent of the assesses. The Usance charges therefore constitute income of a non-resident as envisaged in the provisions of Section 9(1)(v)(b) read with Section 5(2) of the IT Act. Therefore, the provisions of Section 195(1) of the IT Act were attracted and the assesses were obliged to deduct tax at source failing which, such expenditure, could not be exempted under Section 40(a)(i) of the IT Act.

26. The assessment officer notes and there is no serious challenge that the foreign sellers were located in countries with whom the assesses have transacted are covered by DTAA but the provisions of DTAA state that interest is chargeable to tax in both the contracting states. Since, Usance charges are covered in the definition of interest under Section 2(28A) of the IT Act, the assesses were obliged to deduct tax at source in terms of Section 195(1) of the IT Act.

27. The ruling in *Gnanasigamani Nadar v. Canara Bank – (1990) 1 MLJ 401* is of no assistance to the case of the assesses because this decision refers to the principles governing a letter of credit. There is

absolutely no dispute in regard to these principles. However, in the facts of the present case, it is apparent that the assesses have paid Usance charges basically to facilitate imports from the foreign sellers. Therefore, there was obligation to deduct tax at source in terms of Section 195(1) of the IT Act.

28. The ruling in *Dhakeshwari Cotton Mills Ltd. v. CIT – (1954) 26 ITR 775 (SC)* is again not at all relevant to the issue which arises in the present appeals. This is not a case where the Income Tax Officer has ignored any material evidence on record or his assessment is based on pure guesswork or suspicion. In this case, the assessment officer, has evaluated the entire evidence on record and applied the provisions of Section 2(28A) and Section 195(1) of the IT Act to such facts.

29. Similarly, the ruling in *Esthuri Aswathiah v. CIT – (1967) 66 ITR 478 (SC)* is also not attracted in the facts of the present case. The case before the Hon'ble Supreme Court, the Tribunal, without recording any reasons disbelieved the explanation of the assesses and itself made an estimate of the unaccounted income. The Tribunal, in the present case, has not indulged into any such exercise.

30. Accordingly, for all the aforesaid reasons we are satisfied that there is no error in the impugned judgment and order of the ITAT. Accordingly, the substantial question of law is required to be decided

against the assesses and in favour of the Revenue. All these appeals are therefore liable to be dismissed and are hereby dismissed by answering the substantial question of law against the assesses and in favour of the Revenue.

31. There shall be no order as to costs.

DAMA SESHADRI NAIDU, J.

M. S. SONAK, J.