IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.62 OF 2016

THE PRINCIPAL COMMISSIONER OF INCOME TAX, PANAJI. ... Appellant.

VS

V. S. DEMPO HOLDING PVT. LTD. ... Respondent.

Ms. Susan Linhares, Advocate *for the Appellant*.

Mr. Mihir Nanivadekar with Ms. Vinita Palyekar, Advocates *for the Respondent*.

Coram: M.S. SONAK &
SMT. M.S. JAWALKAR, JJ.

Date: 19th July 2021

ORAL ORDER *(Per M. S. Sonak, J.)*

1. Heard Ms. Linhares for the Appellant, Mr. Mihir Nanivadekar who appears along with Ms. Vinita Palyekar for the Respondent.

2. In this appeal, the Appellant – Revenue had proposed the following two substantial questions of law:-

> "A. *Whether the Hon'ble ITAT was right in confirming the Ld.CIT(A)'s decision in deleting the addition of Rs.70,93,991/- on account of finance charges/interest on borrowed funds relying upon the fresh evidence produced before the CIT(A) and ITAT, without affording an opportunity to the Assessing Officer to examine the same though, the assessee had not been able to prove, with evidence, at the time of the assessment proceeding that the borrowed funds were wholly and exclusively used for business purpose and not diverted to give interest free advances to sister concerns?*

> *B. Whether the Hon'ble ITAT was right in not appreciating that the addition of Rs.15,37,40,627/- made on account of interest free loans advanced by the assessee to its subsidiaries, amounts to transfer of income without transferring assets u/s. 60 or 61. Also, the transactions has been done to avoid and/ or reduce the tax liability by means of settlement as per the decision of the Hon'ble Supreme Court in the Jaiswal (SP) vs. CIT (1197) 224 ITR 619?*"

3. This Court, by its order dated 14.06.2017, declined to frame the first substantial question of law by giving reasons therefor which are to be found in paragraph 4:-

> "*We called upon the learned Counsel appearing for the Appellant to produce the Appeal Memo before the ITIT Appeals to ascertain whether such grounds were raised before the ITAT. On perusal of the Memo, we find that no such challenge was raised by the Appellants whilst filing an Appeal against the Order of the CIT (Appeals) before the learned Tribunal. Apart from that, the authenticity of the documents was not disputed by the Appellant before the CIT (Appeals) nor before the learned Tribunal. When no such contentions were raised before the authorities below, we find that the question of re-appreciating the evidence in the present Appeal based on the said proposed substantial question of law on that count would not at all arise. Hence, the first substantial question of law does not survive.*"

4. By the same order dated 14.06.2017, the second substantial question of law was framed.

5. This appeal is concerned with the assessment year 2011-12. The assessee advanced interest-free loans to its subsidiaries in the amount of around Rs.1,32,31,09,867/-. The assessee was then called upon to explain why interest income should not be taxed in the hands of the assessee given the provisions of sections 60 and 61 of the Income Tax Act, 1961 (I.T. Act). The detailed explanation furnished by the assessee was not accepted by the assessing officer, who, by his order dated 28.11.2013, ordered the addition of an amount of Rs.15,37,40,627/- to the total income of the assessee under the head "Income from other sources".

6. The assessee appealed and the Commissioner of Income Tax (Appeals) and by his order dated 28.11.2014, accepted the case of the assessee and ordered the deletion of the amount of Rs.15,37,40,627/-.

7. The Revenue then appealed to the Income Tax Appellate Tribunal (ITAT) and the ITAT, by order dated 27.07.2015 dismissed the Revenue's appeal and upheld the deletion order by CIT(Appeals). Hence, the present appeal on the aforesaid substantial question of law.

8. Ms. Linhares submits that in this case, there is no material to establish any commercial expediency, which prompted the assessee to advance interest-free loans to its subsidiaries. Relying on ***S.A. Builders Ltd. vs. CIT***[1], she submits that in the absence of any material about commercial expediency, the interest which might have accrued to the assessee were the assessee to charge interest on the loan advanced, is liable to be taxed in the hands of the assessee. Ms. Linhares submitted that even the decision in ***S.P. Jaiswal vs. CIT***[2] supports such a contention. Based on these two decisions and her contention that no commercial expediency has been established by the

1 AIR 2007 SC 535

2 1997(3) Supreme 48

assessee in this matter, Ms. Linhares submitted that the substantial question of law as framed may be answered in favor of the Revenue.

9. Mr. Mihir Nanivadekar, learned Counsel for the Respondent defended the impugned orders made by the CIT (Appeals) and the ITAT based on the reasoning reflected therein. He submitted that in the facts of this case, commercial expediency has been established by the assessee. He submitted that in any case, the issue of commercial expediency might have been involved if the assessee had itself raised any loans to provide interest-free loans to its subsidiaries and thereafter claimed the interest payable by the assessee as deductions. He submits that the material on record points out to the reserve of Rs.1,000 crores, held by the assessee as well as the fact that the subsidiaries have not earned any interest as such from the interest-free loan advanced by the assessee. He relied on several decisions, including the decision in ***CIT-7 vs. Reliance Communications Infrastructure Limited***[3], to submit that this appeal may be dismissed.

10. Mr. Nanivadekar also relied on ***The Principal Commissioner of Income Tax vs. Sesa Resources Ltd. (Earlier known as VS Dempo & Co Pvt Ltd)***[4], decided on 16.08.2017, in which, the Division Bench of this Court, has rejected the Revenue's contention that even notional interest can be assessed to tax or that the grant of interest-free loans was not based on any commercial expediency. Mr. Nanivadekar pointed out that it is precisely the loan transactions that are involved in the present appeal that was considered by the Division

3 (2012) 21 Taxmann 118 (Bom)

4 Tax Appeal No.57 of 2016

Bench in Tax Appeal No. 57/2016. He submits that this is an additional reason as to why this appeal should be dismissed.

11. The rival contentions now fall for our determination.

12. In this case, both the CIT (Appeals) and ITAT have recorded concurrent findings of fact that the loans advanced by the assessee to its subsidiaries were not sham transactions or paper transactions, but further, such loans were advanced for reasons of commercial expediency. These findings have been confirmed by the Division Bench deciding Tax Appeal No. 57/2016 since the loan transactions in the said appeal were the very loan transactions that were the subject matter of the present appeal. That apart, the CIT (Appeals) in the present case, has recorded certain findings of fact, which are borne out from the evidence on record. For instance, CIT (Appeals) has recorded a finding that the subsidiary companies to whom the assessee had advanced the loans have not earned any interest income therefrom. There is a finding that the assessee is the holding company and has major stakes in the subsidiary to whom these interest-free loans came to be advanced. There is a finding that the source of subsidiaries' income is not 'interest'. There is a finding that the assessee had reserves of over Rs.1,000 crores. Based on all these findings of fact, the CIT (Appeals) has concluded that the loans were advanced for commercial expediency.

13. The ITAT, upon considering the contentions of the Revenue has affirmed the findings of fact recorded by the CIT (Appeals). Thus, in this case, there are concurrent findings of fact that are themselves based on the material on record. Therefore, even if we proceed on the basis that the commercial expediency test is indeed required to be applied to the case at hand, such test stands fulfilled based on the concurrent findings of fact recorded by the two authorities.

14. The ITAT has also relied on the decision of the Gauhati High Court in ***Highways Construction Co. (P.) Ltd. vs. Commissioner of Income-tax***[5], in which it is held that where there are no findings of fact to the effect that any interest had actually been collected by the assessee but was not reflected in the accounts, there was no provision empowering the Income Tax authorities to include in the income, interest, which was neither due nor collected. The addition of amounts as notional interest was therefore not justified. In the present case as well there is no such finding. Only notional income is sought to be included in the income and taxed.

15. The decision in *S.P. Jaiswal* (supra) is distinguishable because in that case, the father had advanced a loan to his own children, and interest was earned by the children on the loan so advanced. There was also evidence that the father had himself taken loans to be able to advance such loans to his children. Even the Revenue, in the said case, had contended that these transactions were merely paper adjustments intended to reduce the tax liability and there was factually no loan as such which could be said to have been advanced. The Hon'ble Apex Court, also accepted that these were only paper transactions. There can be no comparison between the factual situation in *Jaiswal* (supra) and the factual situation in the present case. The CIT (Appeals) and

5 (1993) 199 ITR 702 (Gau)

ITAT have quite correctly distinguished *Jaiswal* (supra) as being inapplicable to the facts of the present case.

16. *S.A. Builders* (supra) takes the view that it is not in every case that interest on a borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the directors of the sister concern utilize the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that the money so advanced is a measure of commercial expediency. However, money can be said to have been advanced to a sister concern for commercial expediency in many other circumstances. Where a holding company, has a deep interest in its subsidiary, and the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purpose, the holding company would ordinarily be entitled to a deduction on the interest of the borrowed loans.

17. In the present case, there are findings of fact that the assessee is the holding company and has a deep interest in its subsidiary. Besides, there is material on record that the loans that were advanced to the subsidiaries were not from the borrowed monies. It is also not the case where the assessee had claimed any deductions on the interest paid for borrowing the monies to advance interest-free loans to its subsidiaries. Rather, the material on record suggests that the assessee had reserves of over Rs.1,000 crores and further, even the subsidiaries, did not derive any interest income as such from out of these interest-free advances received from the assessee. All these circumstances do establish a case of commercial expediency even applying the principles laid down in *S.A. Builders* (supra). Therefore, based on *S.A. Builders* (supra), there is no case made out to interfere with the view taken by the CIT (Appeals) and the ITAT.

18. The assessee, has quite rightly relied on *Reliance Communication* (supra) which has after considering *S.A. Builders* (supra) held that the expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for business. An expenditure, which is commercially expedient, may not be incurred under a legal obligation, but so long as it meets the requirement of commercial expediency, it has to be allowed. In the present case, there is not even any allegation that the interest-free loans advanced by the assessee were utilized for the personal benefit of the directors of the sister concern.

19. As noted earlier, the Revenue, had urged that substantial question of law (A) be framed, but this request was declined by this Court by a speaking order dated 14.06.2017.

20. As a result, the substantial question of law as framed is required to be answered against the Revenue and in favor of the assessee.

21. This appeal fails and is hereby dismissed. There shall be no order as to costs.

SMT. M.S. JAWALKAR, J. M.S. SONAK, J.

jfd/-