Sequeira

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

INCOME TAX APPEAL NO.1430 OF 2013

Director of Income Tax (IT) -I, Mumbai. .. Appellant
Vs
M/s Credit Agricole Indosuez. .. Respondent

Mr.Tejveer Singh, for the Appellant.
Mr.P.J.Pardiwalla, Senior counsel a/w Mr.Madhur Agarwal i/b Atul Jasani, for the Respondent.

CORAM: M.S.Sanklecha, J.
& N.M.Jamdar, J.
Wednesday 17 June, 2015.

Oral Order: ***(Per -M.S.Sanklecha, J.)***

This appeal by the Revenue under Section 260A of Income-tax Act 1961 (Act) challenges the order dated 12 September 2012 passed by the Income-tax Appellate Tribunal (Tribunal) for the Assessment Year 1997-1998.

2 At the hearing Mr.Tejveer Singh, learned counsel for the Revenue urges the following questions of law for consideration.

> *"(1) Whether, on the facts and in the circumstances of the case and in law, the Tribunal has erred in holding that interest earned on NOSTRO A/c. is taxable? Without prejudice, if the High Court decides that the interest earned on NOSTRO A/c. is not taxable, then, consequential disallowance u/s. 14A may be directed.*

(2) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in holding that the income chargeable at special rate u/s. 10(15) would be on gross basis and not on net basis?

(3) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was right in holding that the expenses incurred at Head Office on behalf of Indian Branch of the assessee are deductible u/s.37(1) of the Act without any restrictions contained in section 44C?

(4) Whether, on the facts and in the circumstances of the case and in law, the ITAT has erred in directing the A.O. to tax the interest received u/s 244A at the rate prescribed in Article 12 of DTAA between India and France?

(5) Whether, on the facts and in the circumstances of the case and in law, the ITAT has justified in holding that interest received by the Indian Permanent Establishment of the foreign bank from its HO and other overseas Branches, is not chargeable to tax in computing the total income?"

3 Regarding Question 1 :-

The Tribunal by the impugned order allowed the Revenue's Appeal holding that the interest received by the Respondent / Assessee on NOSTRO account amounting to Rs.13.66 crore is chargeable to tax. In the above circumstances, we are unable to understand how the Revenue is aggrieved by the impugned order accepting the Revenue's contention before it that the interest on NOSTRO account is chargeable to tax. Accordingly, Question 1 does not give rise to any substantial question of law. Hence not entertained.

4 Regarding Question 2 –

The Tribunal records in the impugned order that the Revenue has before it accepted the position that the exemption under Section 10(15)(iv)(h) of the Act is to be allowed on gross basis and not on net basis. Inspite of having accepted that exemption under Section 10(15)(iv)(h) of the Act is to be allowed on gross interest before the Tribunal, the Revenue has proposed to above question for consideration without pointing out in any manner the basis for withdrawing the concession made before the Tribunal. In any case in terms of Section 10(15)(iv)(h) of the Act, it is a self evident position that interest payable by any public sector company is not to form part of the total income. Further the Tribunal in the impugned order has relied upon it's own decision in other cases to hold in favour of the Respondent-assessee and decisions in those cases have not been shown to be inapplicable to the present facts and/or disturbed in appeal. Accordingly, Question 2 does not raise any substantial question of law to be entertained.

5 Regarding Question 3 –

The Tribunal by the impugned order allowed deduction of Rs. 48,60,08/- under Section 37 of the Act without in any manner being restricted by Section 44C of the Act. This was on the basis of an agreed position before it that this issue stands covered by the decision of the Tribunal in **JCIT v. American Express Bank Ltd.** - *[(2012) 24 Taxmann.com 50 (Mumbai-Trib.)]*. It is further pointed out by the Respondent that the Revenue being aggrieved by the decision of the Tribunal in **American Express** *(supra)* carried the issue in appeal to this Court being Income Tax Appeal No.1294 of

2013. This Court by an order dated 1 April 2015, dismissed the Revenue's Appeal on the above issue by following its decision in **Commissioner of Income Tax vs. Emirates Commercial Bank Ltd.**, *-262 ITR 55*. Accordingly, question 3 is not entertained as it does not raise any substantial question of law.

6 Regarding Question 4 –

(a) The Tribunal by the impugned order restored the issue of the rate at which interest is to be charged to tax on income-tax refund received under Section 244A of the Act to the Assessing Officer to be decided in the light of Indo-France DTAA and the decision of the Special Bench of the Tribunal in the matter of **Assistant Commissioner of Income Tax vs. Clough Engineering Ltd.** *-[130 ITD 137]*.

(b) The grievance of the Revenue is with the impugned order following the decision of the Special bench in **Clough Engineering Ltd.** *(supra)*.

(c) However we find that the decision in **Clough Engineering** *(supra)* of the Special Bench had been followed by the Tribunal in *ITA No.183/Mum/2010* -[**M/s DHL Operations B.V., The Netherlands Vs. Dy. Director of Income Tax]**. The issue before the Tribunal was the rate of tax on which Income tax refund is to be taxed i.e. on the basis of the Articles of DTAA or under the Act. The Tribunal on examination of the DTAA in the above case concluded that interest on income tax refund is not effectively connected with the PE (Permanent Establishment) either on asset

test or activity test. Therefore, taxable under the Article 11(2) of Indo-Netherlands tax treaty. The Revenue carried the aforesaid decision of **M/s DHL Operations B.V.***(supra)* in appeal to this Court, being Income Tax Appeal No.431 of 2012. This Court by order dated 17 July 2014 refused to entertain the appeal. In the circumstances no fault can be found with the impugned order of the Tribunal in restoring the issue to the Assessing officer to determine / adopt the rate of tax on refund in the light of the relevant clauses of Indo-France DTAA and the decision of Special Bench in **Clough Engineering** *(supra)* Accordingly, question 4 does not raise any substantial question of law so as to be entertained.

7 Regarding question 5 –

(a) Mr.Tejveer Singh, the learned counsel for the Revenue submitted that this question ought to be admitted as a similar issue has been admitted by this Court. In support Mr.Singh tenders the order dated 14 February 2013 of this Court in Income Tax Appeal (L) No.2078 of 2012, in **Director of Income Tax (IT)-1 Vs. M/s Antwerp Diamond Bank N.V**. The question on which the above appeal was admitted reads as under -

> *a) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in holding that interest payable by the Indian Permanent Establishment of the foreign bank to its HO and other overseas branches, is deductible in computing the total income?*

(b) Mr.Pardiwala the learned Senior counsel for the Respondent contests the submission on behalf of the Revenue and submits that in the present case the question as raised by the Revenue is not in respect of deducting the payment of interest to compute total

income but with regard to the chargeability to tax of the interest received by the Indian Permanent Establishment (PE) from its Head Office in computing the total income. It is pointed out that the Indian PE and the head office are one and the same person. It is settled position that one cannot make a profit out of oneself as held by the Apex Court in **Sir Kikabhai Premchand v. Commissioner of Income-tax (Central) Bonbay** - *24 ITR page 506.* The impugned order of the Tribunal also places reliance upon the Special Bench decision in the case of **Sumitomo Mitsui Banking Corpn. Vs Deputy Director of Income-tax (IT), Range-2(1), Mumbai** - *[(2012) 19 Taxmann.com 364 (Mum.) (SB)]* to hold that man cannot make profit out of himself and therefore the interest received by the Assessee from it's own Head Office is not chargeable to tax.

(c) So far as the reliance by the Revenue on order dated 14 April 2013 of this Court admitting the appeal in **M/s Antwerp Diamond Bank N.V.***(supra)*, is concerned, deduction on account of interest paid by the Indian PE to its Head office was in the specific context of Articles 7(2) and 7(3) of the Indo-Belgium DTAA. The case of **M/s Antwerp Diamond Bank N.V.***(supra)* before the Tribunal was a part of the Special Bench decision in **Sumitomo Mitsui Banking Corpn.***(supra)* wherein at para 50, it is held as under :

> *"50. As regards the deduction of interest payable to the head office in the hands of Indian PE for the purpose of computing profits attributable to the said PE, there is no dispute that such deduction is not permissible under the Indian Income-tax Act (domestic law) being the payment*

made to self. Both the Indian PE and the foreign GE of which it is a part are not separate entities for the purpose of taxation under the domestic law and the same being one and the same entity recognized as one assessee under the domestic law, interest payable by Indian PE to foreign GE of which it is a part, cannot be treated as expenditure allowable as deduction being payment to self. This position which is well settled under the domestic law has not been disputed even by the learned representatives of the assessees during the course of hearing before us. They, however, have relied on the relevant tax treaties in support of the assessee's claim for deduction on account of interest payable to GE while computing the profits attributable to PE in India as per article 7(2) and 7(3) read with paragraph No.8 of the protocol.

51. .....

52. A combined reading of article 7(2) and 7(3) of the treaty and paragraph No.8 of the protocol thus makes it clear that for the purpose of computing the profits attributable to the PE in India, the said PE is to be treated as a distinct and separate entity which is dealing wholly independently with the general enterprise of which it is a part and deduction has to be allowed for all the expenses which are incurred for the purpose of PE whether in India or elsewhere barring the amount paid by a permanent establishment to the head office of GE or any other offices thereof, inter alia, by way of interest on moneys lent to the permanent establishment except where the enterprise is a banking institution."

(Emphasis supplied)

It would thus be noticed from the order of this Court dated 14 February 2013 admitting the Revenue's Appeal, in the case of **M/s Antwerp Diamond** (*supra)* arose from a different factual matrix viz. specific provision of DTAA allowing deduction and not under

the regular provisions of Income-tax Act. Thus the fact that the Appeal in the case of **M/s Antwerp Diamond** (*supra)* is admitted would have no relevance for admitting the present appeal on the proposed Question No.5. It is also necessary to point out that the Tribunal in the impugned order has recorded the fact that the Respondent-Assessee has admitted before it that to bring about parity, it is not claiming any deduction of interest paid by it to its Head Office while computing the taxable income.

(d) Accordingly, in view of the above settled position that no person can make profit out of itself, the proposed question of law not being substantial, is not entertained.

8. However before we close, we cannot but observe the manner in which this appeal has been filed and prosecuted with regard to the proposed questions 1, 2 and 3. It was casual and callous, as the following facts would demonstrate:

i. In respect of Question No.1 the Revenue sought to agitate an issue contrary to its stand before the Tribunal. The Revenue's prayer before the Tribunal, was to declare that interest income earned on NOSTRO account is taxable. The impugned order of the Tribunal granted the Revenue's prayer and held that interest earned on NOSTRO account is taxable. Before us, the question framed/ agitated was that the Tribunal erred in granting interest on NOSTRO account. It is beyond comprehension as to how a party can be aggrieved by an order that grants its prayer.

ii Question Nos.2 and 3 as framed, were conceded by the Revenue at the hearing before the Tribunal. Nevertheless, the Revenue sought to challenge what has not been contested before the Tribunal. This without even a whisper as to why the concession made before the Tribunal was not correct or that subsequent decisions of Court makes the concession before the Tribunal not sustainable in law.

iii The Appeal memo has been signed by a senior officer of the Revenue viz. Director of Income-tax (IT)-I and he has also directed the Asst. Director of Income-tax (IT)I(2), Mumbai to file this appeal. Either there is no application of mind to the order of the Tribunal before filing of this appeal or the Revenue is deliberately seeking to keep the pot boiling, so that uncertainty is kept alive. It shows the casual attitude of the Revenue in filing appeals. This is not the first of its kind. We had earlier also passed orders disapproving this conduct of the revenue, but there is no improvement. If filing of such appeals on questions (1), (2) and (3) by the Revenue without justification is unacceptable, the counsel for the Revenue persisting in arguing those questions of law taking valuable time of Court is further objectionable. Such frivolous appeals add to the burden of the Court and thoughtless prosecution of these takes time of the Court which could be utilised for more meritorious(debatable) cases.

iv The manner in which sometimes the unmeritorious appeals are persisted by the advocates for the Revenue reminds us of the

famous observations of Mr.Justice Crampton in **R v O'Connell** *(1844) 7 ILR 261 @ 312 -*

> *"Another doctrine broached by another eminent counsel I cannot pass by without a comment. That learned counsel described the advocate as the mere mouthpiece of his client, he told us that the speech of the counsel was to be taken as that of the client; and thence seemed to conclude that the client only was answerable for its language and sentiments.*
>
> *Such, I do conceive, is not the office of an advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons – he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law – he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."*
>
> *(Emphasis supplied)*

v Undoubtedly, an Advocate has to fearlessly put forth his client's point of view, however the same has to be tempered / guided by truth and justice of the dispute. In matters of tax, justice requires that there must be certainty of law which presupposes equal application of law. Thus where the issue in controversy stands settled by decisions of this Court or the Tribunal in any other case and the Revenue has accepted that decision, then in that event the Revenue ought not to agitate the issue further unless there is some cogent justification such as change in law or some later

decision of an higher forum etc. then in such cases appropriately the appeal memo itself must specify the reasons for preferring an appeal failing which at least before admission the officer concerned should file an affidavit pointing out the reasons for filing the appeal. It is only when the Court is satisfied with the reasons given, that the merits of the issue need be examined of purposes for admission. (Please see ITA No. 37/2013 CIT vs. M/s. Procter and Gamble Home Products Ltd dated 19/1/2015; ITA No.269/2011 CIT vs. SBI dated 4/2/2015; ITA No.330/2013 Director of I.T. vs. CitiBank NV dated 11/3/2015).

vi Filing of appeal under Section 260A of the Act is a serious issue. The parties who seek to file such appeals (which are normally after two tires of appeal before the Authorities under the Act) must do so after due application of mind and not raise frivolous / concluded issues. This is certainly expected of the State. The Registry has informed us that out of 4784 appeals from the order of the Tribunal filed in this Court during the period 01/01/2014 to 01/06/2014 the appeals filed by the Revenue are 3968 and only 816 by the class of Assessee as a whole.

vii We direct the Registry and also the Counsel appearing for the Revenue to forward a copy of this order to CBDT. What could possibly be done is to provide an inhouse committee of senior officers of the Revenue to review decisions taken in respect of appeals already filed and pending. If it is found that questions raised are covered by any decision of this Court or Apex Court or it relies upon an earlier decision of the Tribunal which has been

accepted by the Revenue as no appeal there from has been filed then they could be separately classified. On completion of the above exercise such appeals could be either withdrawn and/or dismissed as not pressed.

9. With these observations the Appeal is dismissed. No order as to costs.

(N.M.Jamdar, J.) *(M.S.Sanklecha, J.)*