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ITXA-1248-2016 (sr.20)
Monday, 28.1.2019

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1248 OF 2016

Pr. Commissioner of Income Tax-6Appellant
V/s.
M/s. Aegis LimitedRespondent

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Mr. Ashok Kotangale I/by. Ms. Padma Divakar, Advocate for the appellant.

Mr. Nishant Thakkar a/w. Ms. Jasmine Amalsadwala I/by. PDS Legal, Advocate for the respondent.

CORAM : AKIL KURESHI, &

SANDEEP K. SHINDE, JJ.

Monday, 28th January, 2019.

P.C. :

1. The Revenue has filed this Appeal challenging the judgment of the Income Tax Appellate Tribunal. The following questions were pressed before us :

“1. Whether on the facts and circumstances of the case and in law, the Income Tax Appellate

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Tribunal erred in not considering the fact that the assessee had actually advanced/lent money to its AE in the garb of preference shares leading to attraction of provisions relating to Transfer Pricing in the ease of the assessee in view of Section 92B of the Act, without appreciating the fact that these preferential shares do not carry any dividend and are beyond scope of any capital appreciation ?

2. Whether on the facts and circumstances of the case and in law, the Income Tax Appellate Tribunal erred in deleting an adjustment made u/s. 36(1)(iii) towards interest on interest free loans advanced to the companies under the same management, relying on the decision of Hon'ble Bombay High Court decision in the case of M/s. Reliance Utilities and Power Ltd. ignoring the fact that the facts of the case are clearly distinguishable as the Assessing Officer in the assessment order has clearly brought out that the interest free funds of the assessee were invested in share investment and fixed assets and the assessee failed to prove the utilization of borrowed funds for its own business ?

2. Whether on the facts and circumstances of the case and in law, the Income Tax Appellate Tribunal erred in not considering the fact that the rate of corporate guarantee fee was calculated by the TPO by adopting a scientific approach to differential in the corresponding credit rating of assessee and the AE ?”

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.

4. Question no.2 relates to the act of the assessee of making interest free advances to an AE. The Tribunal came to the conclusion that the assessee had sufficient interest free loans out of which subject advances are made. The Tribunal referred to and relied upon the decision of this Court in the case of **Commissioner of Income-tax V/s. Reliance Utilities and Power Ltd. reported in [2009] 313 ITR 340 (Bom)** and deleted the disallowances. In subject judgments, this Court had held and observed as under :

“9. The Revenue being aggrieved by the order preferred an appeal to the Tribunal. Before the Tribunal, it was sought to be contended that the shareholders funds of Rs.172,10,88,000 were utilised for the purchase of fixed assets shown in schedule D in terms of the balance-sheet as on March 31, 1999. It was submitted that the assessee had not reserve or own funds for making the investments in the sister concern and, therefore, borrowed funds had been utilised and interest on these investments are for non-business purposes and hence rightly

disallowed by the Assessing Officer.

10. On the other hand on behalf of the assessee the learned counsel relied on the order of the Commissioner of Income-tax (Appeals) and submitted that the assessee had total interest-free fund of Rs.398 crores.”

5. No question of law in this respect arises.

6. Question no.3 arises out of the additions made by the TPO in connection with the corporate guarantee given by the assessee in favour of its AE. The Tribunal restricted subject addition to 1% guarantee commission relying upon other decisions of the Tribunal along similar lines. The TPO had, however, added 5% by way of commission.

7. The learned Counsel for the assessee drew our attention to a judgment of this Court in the case of **Commissioner of Income-tax, Mumbai v. Everest Kento Cylinders Ltd.** Reported in [2015] 58 taxmann.com 254

and submitted that there is a substantial difference between a bank guarantee and a corporate guarantee. He pointed out, that this Court in the said judgment in the case of *Everest Kento Cylinders Ltd.* (supra) has recognised that in view of inherent differences between the two lines of guarantee, rate of commission to be charged in each cases would be different. We may reproduce the relevant portion of the judgment of this Court :

“10. Having considered submissions of Mr. Malhotra for the revenue and Mr. Pardiwalla for the assessee, we are of the view that the order of the Tribunal as regards disallowance under [section 14A](#) and restricting the same to Rs.1 lac was justified in view of the material before the Tribunal. Furthermore, having considered the fact that a sum of Rs.4,47,649/- was not conceded in the return but was adhoc acceptance during the course of assessment, the assessee could not be bound by it. The Tribunal as the second fact finding authority had gone into factual aspects in great detail and therefore having

interpreted the law as it stood on the relevant date the order passed cannot be faulted. In the matter of guarantee commission, the adjustment made by the TPO were based on instances restricted to the commercial banks providing guarantees and did not contemplate the issue of a Corporate Guarantee. No doubt these are contracts of guarantee, however, when they are Commercial banks that issue bank guarantees which are treated as the blood of commerce being easily encashable in the event of default, and if the bank guarantee had to be obtained from Commercial Banks, the higher commission could have been justified. In the present case, it is assessee company that is issuing Corporate Guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which applied for issuance of a Corporate guarantee are distinct and separate from that of bank guarantee and accordingly we are of the view that commission charged cannot be called in question, in the manner TPO has done. In our

view the comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a Corporate Guarantee issued by holding company for the benefit of its AE, a subsidiary company. In view of the above discussion we are of the view that the appeal does not raise any substantial question of law and it is dismissed. There will be no order as to costs.”

8. It can thus be seen that, the Tribunal applied a lower percentage of commission in the present case considering that, what the assessee had provided was a corporate guarantee and not a bank guarantee. No question of law arises.

9. The Income Tax Appeal is therefore dismissed.

(SANDEEP K. SHINDE, J)

(AKIL KURESHI, J)