

आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

श्री डी. मन्मोहन, उपाध्यक्ष एवं श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI D. MANMOHAN, VP AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. Nos. 3655, 3656 & 3657/Mum/2006

(निर्धारण वर्ष / Assessment Year: 1997-98, 1998-99 & 1999-2000)

Dy. CIT, Range-8(1), Room No. 210, Aayakar Bhavan, M. K. Road, Mumbai-400 020	बनाम/ Vs.	Cybertech Systems & Software P. Ltd. Cybertech House, Plot No. B-63/64/65, Road No. 21/34, J. B. Sawant Marg, MIDC, Wagle Estate, Mumbai-400 604
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACC 1905 B		
(राजस्व /Revenue)	:	(निर्धारिती/ Assessee)

&

आयकर अपील सं./I.T.A. Nos. 2358, 2359 & 2360/Mum/2006

(निर्धारण वर्ष / Assessment Year: 1997-98, 1998-99 & 1999-2000)

Cybertech Systems & Software P. Ltd. Cybertech House, Plot No. B-63/64/65, Road No. 21/34, J. B. Sawant Marg, MIDC, Wagle Estate, Mumbai-400 604	बनाम/ Vs.	Dy. CIT, Range-8(1), Room No. 210, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACC 1905 B		
(निर्धारिती/ Assessee)	:	(राजस्व /Revenue)

राजस्व की ओर से / Revenue by	:	Ms. S. Padmaja
निर्धारिती/ की ओर से/Assessee by	:	Shri Yogesh Thar

सुनवाई की तारीख / Date of Hearing	:	08.05.2015
घोषणा की तारीख / Date of Pronouncement	:	07.08.2015

आदेश / ORDER

Per Sanjay Arora, A. M.:

These are a set of three cross appeals, i.e., by the Assessee and the Revenue for three consecutive years, arising out of separate Orders by the Commissioner of Income Tax (Appeals)-VIII, Mumbai ('CIT(A)' for short) dated 29.03.2006 (for assessment years (A.Ys.) 1997-98 and 1998-99) and 30.03.2006 (for A.Y. 1999-2000), partly allowing the assessee's appeals contesting the levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 ('the Act' hereinafter) by the Assessing Officer (A.O.) for the said years.

2. The only issue arising in these appeals is the maintainability or otherwise in law of the penalty levied u/s.271(1)(c) of the Act as confirmed or deleted by the Id. CIT(A) in the facts and circumstances of the case.

3. The principal receipt (income) on which the penalty stands deleted by the first appellate authority is on account of interest receipt consequent to the denial of deduction u/s. 10B claimed by the assessee in its respect in assessment following the decision by the hon'ble apex court in *Liberty India vs. CIT* [2009] 317 ITR 218 (SC). This is a subsisting issue with the Revenue in the assessee's case, continuing, as far as we can see, since A.Y. 1996-97.

The Assessee's case

4.1 The assessee contends to have claimed benefit u/s.10B on the interest income following the decisions in the case of *CIT vs. Paramount Premises (P.) Ltd.* [1991] 190 ITR 259 (Bom) and *CIT vs. Nagpur Engineering Co. Ltd.* [2000] 245 ITR 806 (Bom). In fact, as would be evident per the said decisions, the Hon'ble High Court has only upheld the view as taken by the Tribunal. The fact that the hon'ble apex court per its subsequent decision in the case of *Liberty India* (supra) has ruled otherwise would not detract from the fact that the claim for deduction as made by the assessee was not

without a valid basis or, in any case, a basis in law. Rather, the same itself reflects a conflict in the judicial view at the relevant times, precluding penalty. Can the assessee under such circumstances be said to have concealed, or furnished inaccurate, particulars of income, so as to attract the provision of penalty u/s. 271(1)(c)?

The Revenue's case

4.2 The Revenue's case, on the other hand, is that there is no basis for the assessee being allowed the benefit of sec.10-B on its interest income. The said income, as clearly brought out by the Assessing Officer (A.O.) in the assessment order for A.Y. 1997-98, the first of the three years under reference, has nothing to do with the assessee's business activity, assessing the same as income from other sources. Likewise for A.Y. 1998-99, where the A.O. has again given a categorical finding that the interest income has no nexus with the assessee's business activity. In the case of *Paramount Premises (P.) Ltd.* (supra), which was subsequently followed by the Hon'ble jurisdictional High Court in the *Nagpur Engineering Co. Ltd.* (supra), the issue was of whether the interest income is assessable as income from business or from other sources. The Hon'ble Court found that the tribunal had given a definite finding that the interest income sprang from business activity of the assessee and did not arise out of any independent activity and, therefore, confirmed its assessment as business income. The said decision, based on a finding of fact, would thus be of no assistance to the assessee.

5. We have heard the parties, and perused the material on record.

5.1 Section 10B(1), which provides for the exemption of income from tax, as it stood at the relevant time, i.e., prior to its substitution by Finance Act, 2000 w.e.f. 01.04.2001, reads as under:

'Special provisions in respect of newly established hundred per cent export-oriented undertakings.

10B. (1) Subject to the provisions of this section, any profits and gains derived by an assessee from a hundred per cent export-oriented undertaking (hereafter in this section referred to as the undertaking) to

which this section applies shall not be included in the total income of the assessee.

(2) This section applies to any undertaking which fulfils all the following conditions, namely:—

(i)

5.2 The hon'ble apex court in *CIT vs. Govinda Choudhary and Sons* [1993] 203 ITR 881 (SC) clarified that the interest income partakes the same character as the receipt for the payment of which it was otherwise entitled. In the facts of that case, the contract amounts due to the assessee, a contractor, were not paid in time on account of disputes between the parties, and the interest was awarded for the delay. The apex court adverted to the settled law that the interest income is assessable as income from other sources only where it cannot be brought within one or the other specific heads of charge (income). In the circumstances of the case, it could not be said, as had been by the tribunal, that the interest was *de hors* the assessee-respondent's business, *being in fact incidental and attributable to the assessee's contract business*.

5.3 In the facts of the present case, the interest income stands earned on deposits placed with the bank/s for fixed term/s (FDRs) and inter-corporate deposits (ICDs). The A.O. has further given a categorical finding of the interest income, which is even otherwise apparent, i.e., from the manner in which it is being derived, as having no direct relationship with the assessee's business activity, supporting his case through reliance on a series of decisions, listed in his orders for A.Ys. 1997-98 and 1998-99, some of which we enlist as under:

- 1) *Orissa State Warehousing Corp. vs. CIT* [1999] 237 ITR 589 (SC);
- 2) *Cambay Electric Supply Indl. Co. Ltd. vs. CIT* [1978] 113 ITR 84 (SC).
- 3) *CIT vs. Raja Bahadur Kamakhya Narayan Singh* [1948] 16 ITR 325 (PC);
- 4) *CIT vs. K K Doshi & Co.* [2000] 245 ITR 849 (Bom);
- 5) *CIT vs. S. G. Jhaveri Consultancy Ltd.* [2000] 245 ITR 854 (Bom)
- 6) *South India Shipping Corporation vs. CIT* [1999] 240 ITR 24 (Mad);

- 7) *Fenner (India) Ltd. vs. CIT* [1999] 239 ITR 480 (Mad);
- 8) *North East Gases (Pvt.) Ltd. vs. CIT* [1996] 220 ITR 372 (Gau);
- 9) *CIT vs. Cement Distributors Ltd.* [1994] 208 ITR 355 (Del); and
- 10) *Hindustan Lever Ltd. vs. CIT* [1980] 121 ITR 951 (Bom).

This finding by the A.O. has not been disturbed; rather, not even contested by the assessee at any stage. The ld. Authorized Representative (AR), on this being pointed out during hearing, i.e., that the interest income stands specifically assessed u/s.56, i.e., as income from other sources, for A.Y. 1997-98, would submit that it stands assessed as business income for the subsequent two years. Further, the tribunal vide its order for A.Y. 2000-01 (PB pgs. 101A to 101T) held that in light of the fact that the assessee is entitled to relief u/s.10B of the Act on its receipt, it becomes *naturally* entitled to deduction there-under on the interest income. We find little merit in the assessee's said contention in view of the undisputed facts of the case, i.e., of the interest income in the undisputed facts of the case arising out of bank FDRs and ICDs. In fact, the A.O.'s finding that the same has no nexus with the assessee's business, remains unchallenged. Rather, the assessee's plea in the appellate proceedings was for the netting of the interest income in-as-much as the assessee had also paid interest. While the interest income stands specifically assessed as income from other sources for A.Y. 1997-98, there is no head-wise classification of the income for A.Y. 1998-99, which though cannot be read to imply or mean that the said income stands assessed as business income, particularly considering the clear finding/s in the matter and the undisputed facts of the case. For A.Y. 1999-2000, again, there is a clear reference by the A.O. to the reasons mentioned by him in the assessment order for A.Y. 1998-99, the immediately preceding year (refer page 16 of the assessment order). In fact, the A.O., and only rightly, has gone further to state that the interest income could not be regarded as *derived from* the assessee's business, adverting to a host of decisions

explaining the restricted scope of the word 'derived', some of which we quote as under:

- i) *Cambay Electric Supply Industrial Co. Ltd.* (supra);
- ii) *Sterling Foods vs. CIT* [1985] 150 ITR 292 (Kar) [affirmed in 237 ITR 579 (SC)];
- iii) *Cement Distributors Ltd.* (supra);
- iv) *North East Gases (Pvt.) Ltd.* (supra);
- v) *Fenner (India) Ltd. vs. CIT* [1999] 239 ITR 480 (Mad); and
- vi) *A. M. Moosa, Bharat Sea Foods vs. CIT* [1997] 224 ITR 735

That is to say, that the interest income does not form part of the assessee's business, the same could not in any case be said to be derived there-from, a condition precedent for the income of the assessee's export business from being eligible for deduction u/s. 10B, for which reference may be made to the provision of section 10B(1), reproduced hereinabove. Though, therefore, surely, the A.O. has not segregated the interest income, stating the same to have been found to be business income would be clearly incorrect in view of his clear finding of it being not connected with the assessee's business activity but only by way of interest on surplus funds, i.e., for the time being. There is nothing on record to suggest otherwise, i.e., of the interest bearing deposits as occasioned by the assessee's business requirements, of a clear nexus with business, much less an intimate relationship, denoting one of first degree, as contemplated by law, which thus is with the said deposits.

5.4 As regards the reference to the decision by the tribunal for A.Y. 2000-01, the ld. AR omitted to refer to the last part of the relevant para (para 16 of the tribunal's order/at PB pg. 101R), which clarifies the reason for the tribunal for so considering, i.e., in view of the interest income being admitted to be a part of the assessee's business income. There is clearly no such admission in the facts and circumstances of the case, with in fact the A.O. having found it to be a fit case for the levy of penalty,

initiating and subsequently levying penalty on the claim for deduction u/s. 10B on the interest income, so that the same can only be regarded as contested.

5.5 Continuing further, as regards the decisions by the Hon'ble jurisdictional High Court relied upon, in our clear view, the same would be of no assistance to the assessee. As unequivocally clarified in *Paramount Premises (P.) Ltd.* (supra), the decision upholding the assessment of interest as business income is based squarely on the factual finding by the tribunal to the effect that the interest income sprang from the business activity of the assessee-respondent, and did not arise out of the any independent activity. There is clearly little scope for the application of the said decision in the facts of the present case, given the clear finding of no connection between the assessee's business activity and the deposits yielding interest income. In fact, even assessment as business income, as observed during hearing, would not by itself suffice in-as-much as it would require a further satisfaction of the condition of section 10B, i.e., of it being derived from such business, toward which we find no contention, much less basis, being, as apparent, with the deposits *per se*. The decision in the case of *Nagpur Engineering Co. Ltd.* (supra) is only by following the decision in *Paramount Premises (P.) Ltd.* (supra). It is well settled that what is binding and has precedent value, is the *ratio decendi* of a decision. The said decision, rendered following the decision in *Paramount Premises (P.) Ltd.* (supra), thus, cannot be said to lay down any proposition independent and apart from that stated in *Paramount Premises (P.) Ltd.* (supra), and which we find as no different from that stated by the Hon'ble Apex Court in *Govinda Choudhary and Sons* (supra). *That is, that it all depends on the facts of the case.* The Hon'ble High Court, therefore, presumably and inferably, in the latter decision, i.e., *Nagpur Engineering Co. Ltd.* (supra), again found a direct nexus between the assessee's business and the interest income, leading it to being assessed as business income and, further, of the said nexus as being of first degree, as explained as far back as in *Raja Bahadur Kamakhya Narayan Singh* (supra), so that

the primary condition of 'derived from', as against incidental or attributable to, as is again well settled, stands satisfied in the facts and circumstances of the case, as found by the tribunal. That is, its decision again rests on the edifice of the factual findings by the tribunal, the final fact finding authority. *The said decisions, thus, on the contrary, support the Revenues' case.* The finding by the tribunal in the instant case, as apparent, is of it being a fit case for the impugned claim being disallowed in view of the decision in *Liberty India* (supra), so that there was no relation of first degree between the assessee's business, which it found as qualifying for deduction u/s.10B, and the interest bearing deposit/s. The decision in the case of *Liberty India* (supra), it needs to be appreciated, is only in line and tandem with the earlier decisions, cited supra, by the hon'ble apex court, which listing is again not exhaustive, so that the apex court does not thereby lay down any new law. Rather, the decisions by the hon'ble jurisdictional high court relied upon by the assessee are not inconsistent with the decision in *Liberty India* (supra) and, in fact, in consonance with the decision by the Hon'ble Apex Court in *Govinda Choudhary and Sons* (supra). Further, the assessee also has nowhere contested any of the several decisions relied upon by the Revenue, including by the hon'ble apex court and the jurisdictional high court cited supra, many of which are prior to the dates of the filing of the returns in the instant case, so that they represented the well-settled/established law of the land; there being in fact a complete unanimity between the different high courts on the subject, i.e., both with the regard to the nature of the receipt by way of interest, as explained in *Govinda Choudhary and Sons* (supra), as well as *qua* the scope of the words 'derived from'.

5.6 We, in view of the foregoing, find no merit in the assessee's case. It, to our mind, has not adduced any explanation, much less substantiated it, except for a bald assertion (i.e., of the said interest income as being a part of the assessee's business income). The reliance on the decisions by the hon'ble jurisdictional high court, which we have found to be in fact supportive of the Revenue's case, with the law in the matter being, in fact, well settled, is only a false plea or a ruse. Reliance on the decision by the tribunal for a

subsequent year (AY 2000-01) is, under the circumstances, again, completely misplaced. A plausible explanation towards its' claim/s saves penalty u/s. 271(1)(c), in view of, again, the settled law in the matter, for which we may rely on the following decisions, which though is completely missing in the present case:

Mak Data (P.) Ltd. vs. CIT [2013] 358 ITR 593 (SC); *CIT v. Atul Mohan Bindal* [2009] 317 ITR 1 (SC); *Union of India v. Dharmendra Textile Processors* [2008] 306 ITR 277 (SC); *Guljag Industries v. CTO* [2007] 293 ITR 584 (SC); *K.P. Madhusudhanan vs. CIT* [2001] 251 ITR 99 (SC); *B.A. Balasubramaniam and Bros v. CIT* [1999] 236 ITR 977 (SC); *Addl. CIT vs. Jeevan Lal Shah* [1994] 205 ITR 244 (SC); *CIT vs. K. R. Sadayappan* [1990] 185 ITR 49 (SC); and *CIT vs. Mussadilal Ram Bharose* [1987] 165 ITR 14 (SC), besides by the hon'ble high courts as well, viz: *CIT vs. Mohd. Mohtram Farooqui* [2003] 259 ITR 132 (Raj); *CIT vs. Sree Krishna Trading Co.* [2002] 253 ITR 645 (Ker); *Shiv Kumar Tak vs. CIT* [2001] 251 ITR 373 (Raj); *CIT vs. Vidyagauri Natverlal* [1999] 238 ITR 91 (Guj); *CIT vs. Nathulal Agarwala & Sons* [1985] 153 ITR 292 (Pat)(FB)

6. The only other ground in the assessee's appeals, relates to the disallowance of section 10-B benefit on payment to Cybertech International Corporation Ltd. (CIC Ltd.) and its subsidiaries. The penalty stands upheld on this expenditure as the claim for deduction u/s.80-B was found as not *bona fide*. The same was not pressed before us by the Id. AR, so that the same is dismissed as not pressed.

This decides the assessee's appeals for all the years.

Revenue's Appeals

7. The Revenue appeals relate to the receipts on which deduction u/s.10B has since been allowed by the tribunal, as to UNISYS, vide its combined order for the years under reference dated 02.03.2012 (PB pgs. 1-43), i.e., after recalling its earlier order dated 07.04.2005 disallowing the same (PB pgs. 44-101). The only plea adopted by the Revenue is that it having contested the said deletion, i.e., in the quantum

proceedings, before the Hon'ble jurisdictional High Court, which has since admitted the appeals, the matter may be kept in abeyance till the disposal thereof by the Hon'ble Court. Reliance is placed on the decision in *CIT vs. Popular Jewellers* [1999] 238 ITR 676 (Del). We find the plea misplaced. The issue cannot be kept undecided only for the reason that the same is in appeal before a higher appellate forum. However, in-as-much as we are dismissing the Revenue's appeals at the threshold, i.e., without examining on merits, on which no arguments took place, nor are considered necessary at this stage for the reason that there is no subsisting ground for penalty on disallowance which stands deleted, we consider it proper to also protect the Revenue's interest, i.e., in the eventuality of the Revenue's appeals being decided in its favour by the hon'ble Court, reversing the decision by the tribunal. The Revenue shall in that case be at liberty to pursue the matter on merits before the tribunal, which shall decide the same on merits after hearing the parties. We, accordingly, dismiss its appeals *in limine*, while at the same time reserve the said right to the Revenue in the facts and circumstances of the case, in the interest of justice and the consideration of maintaining an even ground. Further, in view of our having saved the said right, reliance on the decision in the case of *Popular Jewellers* (supra), wherein the hon'ble court only found the dismissal of the Revenue's appeals in the penalty proceedings in view of the assessee having succeeded in the quantum proceedings, as justified, is rendered of no consequence. We decide accordingly.

8. In the result, both the assessee's and the Revenue's appeals are dismissed.

Order pronounced in the open court on August 07, 2015

Sd/-
(D. Manmohan)

उपाध्यक्ष / Vice President

Sd/-
(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 07.08.2015

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai