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* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA 689 OF 2009
ITA 712 OF 2009
ITA 765 OF 2009

% *Judgment reserved on: 21.7.2011*
Judgment Delivered On: 30.8.2011

(1) ITA 689 OF 2009
COMMISSIONER OF INCOME TAX . . . APPELLANT
Through: Ms. Suruchi Aggarwal, Advocate
VERSUS

VISISTH CHAY VYPAPAR LTD. . ..RESPONDENT
Through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

(2) ITA 712 OF 2009
COMMISSIONER OF INCOME TAX . . . APPELLANT
Through: Ms. Suruchi Aggarwal, Advocate
VERSUS

VISISTH CHAY VYPAPAR LTD. . ..RESPONDENT
Through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

(3) ITA 765 OF 2009
COMMISSIONER OF INCOME TAX . . . APPELLANT
Through: Ms. Suruchi Aggarwal, Advocate
VERSUS

VISISTH CHAY VYPAPAR LTD. . ..RESPONDENT
Through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. In these three appeals, the assessee as well as the questions of law which arose is common. The appeals are admitted on the following substantial question of law:

> "(i) Whether ITAT was correct in law in holding that the interest earned by the assessee from M/s SWC was not chargeable to interest tax u/s 5 of the Interest Tax Act?
>
> (ii) Whether amount given to M/s SWC were in the nature of loans and advances within the meaning of Section 2(7) of the Interest Tax Act?

2. The aforesaid questions have arisen for consideration under the following factual backdrop. The assessee had placed Inter-Corporate Deposits (ICD) with Shaw-Wallace & Company (SWC). Before placing these ICDs with SWC, a Resolution was passed in the meeting of Board of the Directors of the assessee Company which was held on 11-10-1994. As per this Resolution, one of the Directors of the assessee Company Shri

Champa Lal Pareek, informed the Board of Directors that Shri Pareikh was taking ICDs to fund its existing programmes. He thus mooted an idea that even the assessee Company can approach SWC for giving ICDs. Accepting this proposal of Mr. Pareek, the Board authorized Shri Pareek to negotiate and settle such terms and conditions as may be beneficial to the company for placing ICDs for a maximum amount of Rs.22 crores. Armed with this Resolution, Shri Pareek, on behalf of the company, wrote letter dated 1.11.1994 to SWC setting out the terms and conditions, rate of interest and the time period. SWC accepted the same vide letter dated 4th November, 1994. Based on this, a binding agreement was arrived at between the parties and subsequent thereto the assessee Company placed ICDs at ₹ 22 crores at the disposal of SWC.

3. It is also recorded by the Tribunal in the impugned order that in order to stipulate the condition that the assessee company had placed at the disposal of SWP, ICDs, the assessee also filed number of documents in the form of TDS Certificates, accounts of SWC, the letter of SWC, affidavit of the assessing company, etc. In all these documents, the transaction in question was termed as Inter-Corporate Deposit.

4. The assessee also informed that since SWC failed to return back, the said deposit, for recovery of the same, the assessee was forced to file Civil Suits in the High Court of Judicature at Calcutta. The suits were decreed in favour of the Assessee by the said Court. In the judgment and

decree pronounced by Calcutta High Court, the aforesaid transaction wa treated as in the nature of Inter-Corporate Deposit. On the basis of all these materials, the Tribunal came to conclusion that nature of transaction was that of 'deposit' and not 'loan'. These are the findings of facts on which there is a final determination by the Income Tax Appellate Tribunal.

5. It is on the basis of aforesaid findings of facts that the question of law which arises for consideration is as to whether on such deposit there can be chargeable interest tax, and whether this amount deposited by the assessee with SWC can be covered by the expression 'loan advanced' within the meaning of section 2(7) of the Act. The Question of Law No.2 relate to this aspect. Only when this deposit is covered by section 2(7) of the Act, it will be chargeable interest tax under Section 5 of the Interest Tax Act. Both these provisions are reproduced below:

> "2. In this Act, unless the context otherwise requires,
> xxxxx
> *(7)* interest means interest on loans and advances made in India and includes
> (*a*) commitment charges on unutilised portion of any credit sanctioned for being availed of in India; and
> (*b*) discount on promissory notes and bills of exchange drawn or made in India, but does not include
> (*i*) interest referred to in sub-section (1B) of section 42 of the Reserve Bank of India Act, 1934 (2 of 1934);

(1)

(*ii*) discount on treasury bills;]

(*8*) prescribed means prescribed by rules made under

Section 5 of the Interest Act states as under:-

> "Scope of chargeable interest – subject to the provisions of this Act, the chargeable interest of any previous year of a credit institution shall be the total amount of interest (other than interest on loan and advances made to other credit institutions or to any cooperative society engaged in carrying on the business of banking) accruing or arising to the credit institution in that previous year."

6. According to Ms. Suruchi Aggarwal, learned counsel appearing for the Revenue the chargeable interest is one which accrues or arises to the credit institution in the previous year and that is liable for tax. The only exception is that carved out is when the interest is earned on loan or advance made to other credit institutions or to any cooperative society engaged in carrying out the business of bank. In the present case, the assessee had taken monies from M/s SWC and had shown interest earned/accrued thereupon in its profit and loss account, M/s SWC had even deducted tax at source on this interest income which had been taken by the assessee in the Income-Tax Return. Therefore, following the mercantile principle of accounting the assessee itself had on accrual basis shown the said interest income in the profit and loss account and thus the assessee was liable to interest tax as well. She also submitted

that in the appeal preferred by the assessee before the CIT (A) the only basis for seeking commission from interest tax was loans and advances were made by the assessee to M/s SWC which itself was a credit institution and the said contention was rejected as no evidence was adduced to substantiate that SWC was a finance company. She also referred to the reasoning of the CIT (A) holding that ICD would fall within the ambit of expression "loan and advances". According to the CIT (A) the distinction between loan and deposit crucially depends on the needs of lender and receiver and the factum of use of funds by the receiver. The needy person approaches the lender for seeking loan at the terms of the lender while in the case of deposit; it is the depositor, who goes to the depositee for investing his money primarily with the intention to earn interest. These two elements constitute the crux of the distinction between loan and deposit. The question whether a deposit amount to a loan depends upon the terms of the contract under which the deposit is made (AIR 1962 SC 1764). The question in a given case whether the debit is deposit or a loan will be on of fact, which will have to be decided on the facts and circumstances of each case. The use of the term 'loan' or 'deposit' may not itself be conclusive, though, if course, it is a circumstance which would be taken into account. What should be regarded is the cumulative effect of the evidence, which bears on the character of the debt as a loan or a deposit. After formulating this test,

the CIT (A) concluded that on the basis of various correspondence exchanged between the assessee and SWC, the term "Inter Corporate Deposit" had been used ornamentally. The CIT (A) formed the opinion that from the correspondences it was clear that the assessee had lent money to M/s SWC for helping the borrower to tide over its short term liquidity crunch. The needy person in this transaction was definitely M/s Shaw Wallace & Co. Ltd. The terms of contract was decided by the lender. The nomenclature of "inter corporate deposit" was used ornamentally in various correspondences without taking into account the substance of the term. Therefore, the cumulative effect of the evidence confirmed the fact that the transaction between the appellant company and M/s Shaw Wallace & Co. Ltd. is not deposit but a loan.

7. Mrs. Aggarwal strongly relied upon the aforesaid reasoning of the CIT (A). She also referred to the decision of Tribunal in 28 ITR (AT) 154.

8. Mr. Vohra, learned counsel for the Assessee countered the aforesaid submissions. In addition to relying upon the impugned decision of ITAT wherein it is held that the deposit is different from the loan or advance and the expression 'loan' would not include deposit. He has also referred to various other judgments by which this very issue has been decided by various courts.

9. We find that the Tribunal, in support of its conclusion has referred the judgment of this Court in ***Baidyanath Plastic Industries (P) Ltd. and Others*** v ***K.L. Anand, Income Tax Officer (1998) 230 ITR 522*** and that of High Court of Judicature at Allahabad in *CIT* v ***Sahara India Saving & Investment Corporation (2003) 264 ITR 646***.

In addition, Mr. Vohra has referred to the following judgments:

(i) ***CIT*** v ***Vikramajit Singh:*** *292 ITR 274 (Del)*

(ii) ***CIT*** v ***Lakshmi Vilas Bank Ltd:*** *228 ITR 697 (Mad)*

10. Mr. Vohra has gone to the extent of arguing that the interest on securities is held to be not taxable under Section 2(7) of the Interest Tax Act as held by the Supreme Court in *CIT* Vs. ***Corp. Bank and other 295 ITR 193(SC)*** which judgment is followed by the Apex Court in *CIT* Vs. ***Ratnakar Bank Ltd.*** *306 ITR 257* wherein it has been held that the expression 'loan' under Section 2(7) has to be given strict interpretation and the words included thereunder namely 'deposit' in the instant case could not be covered by Legislative interpretation.

11. We have considered the submissions of counsel for both the parties.

12. We have already stated that the Tribunal has recorded a finding of fact, on the basis of analysis of various documents that transaction in

question between the assessee and M/s SWC was in the nature of deposi and not loan. For this purpose the Tribunal referred to the judgment and decree passed by the Calcutta High Court in the suits filed by the assessee for recovery of the amount in question from M/s SWC where judicial recognition is given to the said amount treating as in Inter Corporate Deposit. Therefore, the reliance placed by the learned counsel for the Revenue on the reasoning on the finding given by the CIT (A) that transaction in question was that of loan and not deposit would not cut any ice.

13. In fact, the entire decision of the CIT (A) rested on this aspect namely transaction between the assessee and M/s SWC was treated as loan and not deposit and on this premise it was held that interest earned on said loan would be covered by the provisions of section 2 (7) of the Interest Act. Once we find that it was a deposit and loan, in fact, no further discussion, is even required.

14. In any case, we would like to point out that there is a settled distinction between the loan and deposit. It is rightly held by the Tribunal, on the analysis of various judgments of our Courts which are referred to by Mr. Vohra as well and already noticed above, there are three main test between the loan and deposit. These are:-

(i) A loan is payable immediately on receipt thereof as per the directions of the lender, while a deposit has a term for repayment, which may be a fixed date or it may be as per terms and conditions of the agreement,

(ii) The loan is obtained at the request of the borrower while a deposit is made at the instance of the depositor and

(iii) The limitation period in case of a loan starts from the date of the loan, while it starts from the date of repayment in the case of deposit.

15. These distinctions are brought out in a judgment rendered by this Court in ***Baidyanath Plastic Industries (P) Ltd.*** *(supra)* in the following words:-

> "Now the only question which remains to be determined is whether the repayment was towards 'deposit' or the same was towards 'loan'. In order to determine this question it will be necessary to consider whether the meaning of the term 'deposit' ascribed by the Expln. to s. 269T includes the term 'loan' in its ambit. The distinction between the loan and the deposit is that in the case of the former it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement and in the case of the latter it is generally the duty of the depositor to go to the banker or to the depositee, as the case may be, and make a demand for it. This distinction was adopted by the Lahore High Court in the

case of Gurcharan Das & Anr. vs. Ram Rakha Mal & Ors. AIR 1939 Lah 81. Similar view was expressed by a Division Bench of the Oudh High Court in the case of Chaturgun vs. Shahzady AIR 1930 Oudh 395. While drawing the distinction between the words 'deposit' and 'loan', the Court relied upon two earlier decisions of the Madras High Court in V. Balakrishnudu vs. Narayanaswamy Chetty 24 IC 852, and Kishtappa Chetty vs. Lakshmi Ammal 72 IC 842. In this regard it held as follows :

"The word "deposit" as pointed out by the Madras High Court in V. Balakrishnudu vs. Narayanaswamy Chetty 24 IC 842 is derived from the Latin depositor, a technical word used in the Roman law of bailment for a bailment of a specific thing to be kept for the bailor and returned when wanted, as opposed to commodious where a specific thing is lent to the bailee to be used by him and returned. In popular language commodious is translated by the word "loan" and the distinction between deposit and loan is this : that a deposit is to be kept by the depositee for the depositor and the loan is to be kept by the borrower for himself. Thus I deposit my hat in the cloak room. My hat is not to be used by the depositee, but is to be kept for me and returned to me on my demand; but I lend my money to a friend and he can do what he likes with it as long as he returns it to me either on demand or at some specified time. It may be, as observed by Sir Walter Schwa be when Chief Justice of the Madras High Court, in Kishtappa Chetty vs. Lakshmi Ammal, 72 IC 842 that Art. 145 covers more than the depositor of Roman Law, and his Lordship observed that the framers of the Indian Limitation Act "meant to use simple and plain language," but I take this to mean that the word "deposit" is used in the ordinary

> sense of the word in the English language, and as far as I am aware the word "deposit" does not cover a transaction of the nature of a loan. The transaction that we have to consider is a loan. The plaintiff lent the defendant these ornaments to be used by the latter in a religious procession. There was no question of trust or quasi-trust. It was a mere loan for the benefit of the borrower and in my opinion Art. 145 has no application".
>
> It may also be noted that while Arts. 19 and 21 of the Limitation Act fix the period within which suit for recovery of loan can be filed, Art. 22 deals with the period of limitation for suit for money on account of deposit. The starting period of limitation under Arts. 19 and 21, on the one hand, and Art. 22, on the other, are different. Under Arts. 19 and 21 the cause of action in the case of money lent arises from the date of loan, whereas under Art. 22 the cause of action in the case of a deposit arises from the date of demand. Therefore, it is necessary to distinguish a deposit from a mere loan."

16. The aforesaid view was followed by this Court in *CIT* Vs. ***Vikramajit Singh*** *(supra).* The Madras High Court has taken the same as toed line following ***Baidya Nath Plastic Industries*** (supra) and ***A.M. Shamsuddin*** Vs. ***UOI & Ors.*** 244 ITR 266 (Mad.)

17. Once we find that monies given by the assessee to SWC did not fulfill the aforesaid criteria thereby bringing it within the expression

"loan", the question of applicability of Section 2 (7) of the Interest Tax Act would not arise.

18. Section 2 (7) of the Act uses the expression "loan and advances". Therefore, we have also to determine is as to whether the said deposit in the form of ICD can be treated as "advance" so as to attract the provisions of Section 2 (7) of the Act. We are of the opinion that expression "advance" occurring in Section 2 (7) alongwith the expression "loan" should take its colour from "loan" and cannot be given wider interpretation to include deposit as well. Otherwise, money deposits given in the form had been investments etc. would also qualify as "advances" and interest thereon would become exigible to Interest Tax Act. such a situation was never contemplated by the Legislature. In fact, in ***Corporation Bank and Ors.*** (supra) the Supreme Court has specifically held that interest on securities is not taxable under Section 2 (7) of the Interest Tax Act which view is rendered in the case of ***CIT Vs. Ratnakar Bank Ltd.****(supra).*

19. We also find that wherever Legislature has intended that deposit be treated as loan, specific statutory provision is made in this behalf. Section 372A of the Act is one such example.

20. The aforesaid discussion led us to hold that ICD given by the assessee to M/s SWC was not in the nature of loan or advances within the meaning of Section 2 (7) of the Interest Act and, therefore, not chargeable to Interest Tax Act under Section 5 of the said Act. As a consequence, both the questions are answered in favour of the assessee and this appeal is accordingly dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

AUGUST 30, 2011
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