
(1992) 11 BOM CK 0044

In the Bombay High Court

Case No : Income-tax Reference No. 273 of 1977

Kaycee (Bermuda) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 26-11-1992

Acts Referred:

Income Tax Act, 1961 — Section 10(15)

Citation : (1993) 202 ITR 444 : (1993) 68 TAXMAN 497

Hon'ble Judges : U.T. Shah, J; B.P. Saraf, J

Bench : Division Bench

Advocate : I. Munim, for the Appellant; V. Balasubramaniam, for the Respondent

Judgement

Dr. B.P. Saraf J.

1. By this reference u/s 256(1) of the Income Tax Act, 1961, made at the instance of the assessee the Income Tax Appellate Tribunal had referred the following questions of law to this court for opinion :

"(1) Whether, on the facts and circumstances of the case, the Tribunal erred in law in holding that the amount of Rs. 1,80,000 adjusted by the Indian company out of the foreign exchange loan as "calls received in advance" changed the character of the foreign loan ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in holding that the interest of Rs. 10,800 which accrued to the assessee on the amount of Rs. 1,80,000 adjusted by the Indian company as "calls received in advance" out of the foreign exchange loan could not enjoy the exemption u/s 10(15)(iv)(c) of the Income Tax Act, 1961 ?"

2. The assessee is a non-resident company and the assessment years involved are 1968-69, 1969-70 and 1970-71. The assessee, with the approval and sanction of the Government of India, entered into an agreement with Messrs. Pilky Footwear Co. Pvt. Ltd. (hereinafter referred to as the "Indian company"),

for the supply of machinery to it. It also obtained permission from the Government of India to utilise a part of the sale proceeds of the machinery for subscribing to the share capital of the Indian company. On the balance amount, the Indian company was to pay to it interest at the rate approved by the Government. In the accounts of the Indian company relevant to the assessment year 1968-69, there was to the credit of the assessee an opening balance of Rs. 5,54,597.40. From this balance with which the accounts of the year were opened on September 1, 1966, the Indian company transferred on the same date a sum of Rs. 3,60,000 to what it termed as account No. 2 of the assessee company. There were further supplies by the assessee to the Indian company during the year. There was also interest payable by the Indian company to assessee on the value of such machinery supplied till then. All these resulted in the sum of Rs. 7,73,008.30 as balance to be carried forward to the credit of the assessee for the next year. It appears that in June, 1966, itself, the Indian company had obtained the sanction of the Reserve Bank of India to issue equity shares of the value of Rs. 3,60,000 to the assessee. On the basis of that sanction, but of Rs. 3,60,000 that the Indian company had transferred to the credit of the assessee's account No. 2 Rs. 1,80,000 being 50% of the paid up value of the shares allotted to the assessee, was taken by the Indian company into its share capital account. The balance Rs. 1,80,000 was also taken by the Indian company into its accounts as receipts from the assessee by way of calls in advance. It is the interest which accrued to the assessee during the three years on this amount of Rs. 1,80,000 credited by the Indian company in its accounts as calls in advance that formed the subject-matter of the controversy between the Department and the assessee. The assessee claimed that this interest income was not liable to be included in its income by the virtue of the provisions contained in section 10(15)(iv)(c) of the Income Tax Act. The Income Tax Officer rejected the assessee's contention that the interest amount was exempt u/s 10(15)(iv)(c) of the Act and hence not liable to be taxed.

3. In appeal, the Appellate Assistant Commissioner upheld the contention of the assessee and reversed the findings of the Income Tax Officer. The Revenue filed an appeal before the Tribunal. The contention of the Revenue before the Tribunal was that once the amount was made over to the Indian company as calls in advance, it ceased to be a debt due from the Indian company on account of the value of machinery supplied to it and, as such, it did not fall within the purview of the exemption granted by section 10(15)(iv)(c) of the Act. The assessee's contention was that the sum of Rs. 1,80,000 lying to its credit in the Indian company's accounts as calls in advance was really part of the value of the machinery supplied by it to the Indian company and hence it was entitled to the benefit of the aforesaid proviso. The Tribunal accepted the contention of the Revenue. It was of the opinion that once the amount was transferred by the assessee to the Indian company and credited in the accounts of the Indian company as calls in advance, it lost its original character and as such it was no more entitled to the benefit of the said provision.

4. We have heard counsel for the assessee. The submission of learned counsel is that money paid as calls in advance cannot be equated with payments made by way of call money. In respect of such amount, the relationship between the company and the shareholder is different. Such amount remains with the company not as money paid by the shareholder but by a creditor. In support of this contention, reliance is placed on a decision of the House of Lords and on the provisions of sections 91 and 92 of the Companies Act, 1956. We do not propose to deal with this aspect of the matter at length as we find that even if it is accepted that it is a debt due to the assessee by the company, it does not help in any way in resolving the controversy before us because that by itself is not enough to bring the interest income within the purview of section 10(15)(iv)(c) of the Act as the further requirement that it must be a debt incurred in respect of purchase of raw materials or capital plant or machinery must also be fulfilled. At this stage, it may be expedient to refer to the provisions of section 10(15)(iv)(c) of the Act as it stood at the relevant time :

"10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included -

(c) by an industrial undertaking in India on any moneys borrowed by debt incurred by it in a foreign country in respect of the purchase outside India of raw materials or capital, plant and machinery, to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan or debt and its repayment;"

5. From a plain reading of this clause, it is clear that in order to fall within the purview of this clause, the interest must be payable by an industrial undertaking in India (i) on any moneys borrowed or debt incurred by it in a foreign country; (ii) in respect of the purchase outside India of raw materials or capital plant and machinery. These are the two basic requirements that must be fulfilled. Both these requirements are cumulative. Interest payable by an industrial undertaking on moneys borrowed or debts incurred by it in a foreign country is not to be excluded in computing income under the clause unless the second condition is also present, viz., that such money has been borrowed or the debt has been incurred in respect of the purchase outside India of Raw materials or capital plant and machinery. In the instant case, there is no dispute that originally the debt was incurred in a foreign country in respect of the purchase outside India of capital plant and machinery. Thus both the conditions contained in this clause were fulfilled and there was no controversy between the assessee and the Revenue in regard to non-inclusion of the interest payable on this amount in the income of the assessee. The controversy arose only when a sum of Rs. 3,60,000 was transferred to the other account termed as account No. 2, Rs. 1,80,000 out of it was straightaway paid as call money. In regard to that amount of Rs. 1,80,000 which was paid by the assessee to the Indian Company by the way of calls in advance because, according to the assessee this payment did not assume the

character of call money, it continued to be a debt due to it by the Indian company and, as such the interest payable on this amount cannot be treated different from the interest on the balance amount due on account of purchase of the machinery.

6. We have carefully considered the submission. We find it difficult to accept the submission of the assessee as, in our opinion, the moment the amount of Rs. 3,60,000 was transferred to the account No. 2 of assessee, the relationship between the assessee and the Indian company completely changed so far as this amount is concerned. The transfer of this amount or payment of this amount to the Indian company by the assessee as two consequences. It amounted to the discharge of debt that was incurred by the Indian company in respect of purchase of plant and machinery outside India to the extent of this amount and new relationship was created. According to assessee the relationship was different in regard to the two sums, viz., the first amount of Rs. 1,80,000 transferred towards paid up value of shares and balance of Rs. 1,80,000 which was transferred to calls in advance account. This distinction, in our opinion, is not relevant for deciding the present controversy. For the purpose of deciding the claim of the assessee to the exemption u/s 10(15)(iv)(c) of the Act, it is sufficient to note that the original nature of the debt which was the debt incurred in respect of plant and machinery outside India had changed so far as this amount is concerned. That being so the second condition laid in the clause (c) was no more fulfilled and, therefore, it cannot be treated as a loan contemplated by the sub-clause (c) of clause 15 (iv) and, accordingly, the interest payable on such amount cannot be exempt by the virtue of section 10(15)(iv)(c) of the Act.

7. In the light of the foregoing discussion, we answer both the question in the negative and in favour of Revenue.

8. No order as to costs.