(1989) 11 KAR CK 0038

In the Karnataka High Court

Case No : Income-tax Referred Cases No''s. 160 and 161 of 1981

Meturit A.G. Ltd. APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 30-11-1989

Acts Referred:
Income Tax Act, 1961 — Section 57 (iii), 9, 9 (1) (i)

Citation : (1990) 82 CTR 345 : (1990) 184 ITR 257 : (1990) 51 TAXMAN 289

Hon'ble Judges : S. Rajendra Babu, J;M. Rama Jois, J

Bench : Division Bench

Advocate : S. Sarangan and H. Raghavendra Rao, for the Appellant;

Judgement

S. Rajendra Babu, J.—In these reference u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), the question of law referred for our opinion is as follows :

"Whether, on the fact and in the circumstances of the case, the Tribunal was right in law in holding that the assessee was not entitled to the deduction claimed u/s 57(iii) of the act of the sum of Rs. 2,38,430 for the assessment year 1972-73 and Rs. 2,06,395 for the assessment year 1973-74 by virtue of section 58(1)(a)(ii) of the Act ?"

2. The circumstance in which these reference arose are as follows : The assessee, a non-resident company, having its registered office in Switzerland, entered into a collaboration agreement with Widia (India Limited, Bangalore, the assessee having borrowed money in Switzerland, from the Swiss Bank Corporation of Switzerland, purchase some machinery and sent it to India to its collaborator for installation of the same in its factory premises, in settlement of this liability, the assessment was allotted certain share in Widia (India) Limited, for sum of Rs. 24 Lakhs and the balance was treated by Widia (India) Limited as loan from the assessee, the assessee claimed a deduction of sum of Rs. 2,38,430 as interest paid on borrowing made for making investment in share in Widia

(India) Limited.

3. The Income Tax Officer rejected the claim as he was of the view that interest can be allowed only if there was some income under the head "Dividend" but there was no such income in the assessee''s case. He further held that the expenses could be followed only if the income in respect of which such expenditure had been incurred was liable to tax. He found that the dividend receivable from the Indian Company was exempt u/s 80K of the act and it was not liable to tax and, therefore, interest paid on investment in share could not allowed as an expenditure for purpose of computing the assessee''s income. So, he disallowed the interest of Rs. 2,38,430 for the assessment year 1972-73 and allowed Rs. 2,06,395 for the assessment year 1973-74.

4. When the matter was taken up in appeal for both the year to Appellate Assistant Commissioner, he discharge with the finding of the Income Tax Officer that there should be taxable income or any income at all for allowance of permissible expenditure and held that the absence of any amount on the credit side would not make the expenditure disallowable and on that ground the interest payable to the Swiss Bank Corporation could not be disallowed. Relying upon a letter dated February 19, 1974 sent from the Swiss Bank Corporation addressed to the assesses, he held that the assessee borrowed a sum of Rs. 24 Lakhs from the Swiss Bank Corporation at different points of time and the credit line granted by the Swiss Bank Corporation was enable the assessee to invest in India Company and the lender being aware of the borrowed money being bought into India for the purpose of investment as aforesaid, the whole activity was an integral part of one composite transaction and, on the basis of the material before him, conclude that the transaction would come within the ratio of the decision of the Federal Court in Wadia''s case [1949] 17 ITR 63 (FC) and, therefore, the provision of section 9 of the Act would be applicable. He took the view that the interest amount was taxable in the hands of the assessee and since no tax had been deducted, the Income Tax Officer was justified in applying the provision of section 58 of the Act. He upheld the disallowance of interest amounting to Rs. 2,38,430 for the assessment year 1973-74 and disallowed a sum of Rs. 2,06,395 which had been allowed by the Income Tax Officer.

5. The assessee preferred second appeals before the Income Tax Appellate Tribunal, the Tribunal agreed with the view expressed by the Appellate Assistant Commissioner and dismissed the appeals and, at the instance of the assessee, these reference have been made to this court on the question of the law referred to above.

6. The question referred for our opinion is only weather the deduction claimed by the assessee was hit by section 58(1)(a)(ii) of the Act. The assessee claimed deduction u/s 57(iii) of the Act. That section provides for deduction of any expenditure laid out or expended wholly or exclusively for the purpose of making or earning such income. Section 58 overrides section 57 and declare that certain amounts shall not be deductible in computing the income chargeable under the

held "Income from other sources", namely, any interest on money borrowed for investment when such interest is payable outside India to a non-resident and the deduction would not be permitted unless the prayer of interest deducts tax therefore at the time of payment or, secondly, the tax is paid by the non-resident. Or, thirdly, there is some person in India who may be treated as a statutory agent of such non-resident, the only exception being in respect of loans issued for public subscription before April 1, 1938, it is clear from a persual of the provision that deduction of tax is required only with a view to charging interest in India, not otherwise. Where the loan is transacted outside India and borrower brings the money into India with the knowledge of the lender, the lender is chargeable to tax in respect of the interest he receives by reason of section 9(1)(i) of the Act. In that event, interest paid by the borrower is not allowable as a deduction even though the tax has not been deducted therefor. However, Shri Sarangan, learned counsel for the assessee, relying upon a decision of the Supreme Court in The Commissioner of Income Tax, Madras Vs. Sri Meenakshi Mills Ltd., Ors., contended that, on order to attract tax on interest on interest paid on borrowing effected in a sign country, the following circumstance must be present. They are :

(i) money had been lent at interest outside India;

(ii) income should accrue or arise directly through or such money or lent at interest; and

(iii) money should be brought into India in cash or kind.

7. It was submitted that, unless all these condition are fulfilled, the interest cannot be deemed to be income accuring or arising in India.

8. Now, on an examination of the fact the instance case, it is clear that the assessee had borrowed money at interest outside India and income had accured or arisen from such money so lent at interest. But the only question that needs to be examined here is weather the money is brought into cash or kind. Learned counsel for the assessee intended that the Tribunal had recorded that the assessee, after taking the loan from the Swiss Bank Corporation, purchased some machinery and sent them to India and it is only in settlement of liability that the assessee was allowed certain share in Widia (India Limited and, therefore, the investment in Widia (India) Ltd. was only the balance of the sale price on the machinery and not the amount borrowed by the assessee from the Swiss Bank Corporation and hence money had not brought into India either in cash or kind, elaborating his submission and relying on the decision in CIT v. National and Grindlays Bank Ltd. [1968] 72 ITR 121 (Cal), Learned counsel submitted that "money that was brought into India in the form of cash or kind" only meant that which retained it character of mone; which meant money is recognized commercial form like bills of exchange, I.O.Us. and even gold and silver but not goods or machinery. He also submitted that the letter dated February 19, 1974 written by the Swiss Bank Corporation to the assessee did not

indicate any arrangement or scheme as referred to in the decision of the Federal Court in A. H. Wadia v. CIT [1948] 17 ITR 63 and the decision of the Supreme Court in The Commissioner of Income Tax, Madras Vs. Sri Meenakshi Mills Ltd., Ors., or even in the decision of the Calcutta High Court in Sutlej Cotton Mills Ltd. Vs. Commissioner of Income Tax, and it simply indicate that the lending bank was aware of the investment made by the assesses company in share of Widia (India) Ltd. and that could be construed as establishing an arrangement which must be an obligation on the assessee to invest in share of Widia (India) Ltd. and, in the absence of such arrangement or device adopted the assessee and Swiss Bank Corporation. The provision of section 9(1) were not attracted and, consequently the interest in the question should not be disallowed on the basis of section 58(1)(a)(ii) of the Act.

9. The two question that emerge for consideration are firstly what is the effect of the letter dated February 19, 1974, written by the Swiss Bank Corporation to the assessee and, secondly weather the importation of the money borrowed in cash or kind is confined to currency alone in the light of the provision of section 9(1) of the Act.

10. For a proper appreciation of the first limb of the problem, we will set out the letter sent by the Swiss Bank Corporation :

"Swiss Bank Corporation M/s. Meturit A.G. Seefeldstrasse 7 8008 Zurich Our dept/ref Credit 2501 Bienne, February 19, 1974. we have granted to you credit line utilised on 3-5-1965 with Swiss Francs 547,586.15 10-6-1966 with Swiss Francs 284,802.25 8-8-1966 with Swiss Francs 623,904.55 19-9-1966 with Swiss Francs 117,348.05 ---------------------- Total 1,573,641.00 ----------------------- to enable you to invest in the share of Messrs. Widia (India Ltd., of a value of Rs. 24 Lakhs..."

11. This letter dated February 19, 1974, indicates that the Swiss Bank Corporation, Switzerland, have granted to the assessee a credit line to enable it to invest in the share of Widia (India) Limited of the value of Rs. 24 Lakhs.

12. The assessee is claiming a deduction in respect of interest on the borrowed company''s advance of the assessee is that, after having borrowed the money, machinery was purchased which was installed in the factory premises of Widia (India) Limited and the share were granted to the assessee in lieu of payment of part of the sale price of the machinery. Whatever may be the explanation offered by the assessee, it is clear from the letter dated February 19, 1974, that the money was advanced to assessee by way of loan or interest for the purpose of investing in the share of Widia (India) Ltd. Weather the assessee converted that money into machinery and imported that machinery into India and thereafter part of the sale price had been issued in the share would be irrelevant for the purpose of our consideration. From the letter quoted above, it is clear that, right form inspection, the idea was to given a credit line to the assessee to enable it into invest in the share of Widia (India) Ltd. The letter not merely states so, but

refers to various dates on which money has been given for said purpose. Hence, the inference is irresistible that the object was to lend money to the assessee for the purpose of investment in share. Therefore, the contention advanced on behalf of the assessee that there was no arrangement between the bank and the assessee and Widia (India) Ltd., as to investment in share falls the ground.

13. Now we shall consider the effect of the expression "bringing borrowed money into India in cash or Kind", in order to appreciate this limb of the argument, the ratio of the decision in Commissioner of Income Tax, W.B. I Vs. National and Grindlays Bank Ltd., Calcutta, (Cal is necessary to be borne in the mind. The expressions used in that context are : money, currency or money in cash or kind. Money is generally accepted as medium of exchange, a measure of value or means of payment (see : Webster''s Third New International Dictionary, Volume II-1976 Edition), "currency" is understood to include all coins notes, bank notes, postal notes, money order, cheque, bank draft. Traveler'' cheque, letter of credit, bills of exchange, promissory notes as per section 2(f) of the foreign Exchange Regulation Act, 1973. Cash is understood to be ready money such as coin, public money or instrument as token of money like a cheque or draft. The expression "in kind" is defined in most of the dictionary as goods or commodities as distinguished from money, that, is, an economic measure which is other than cash. The Calcutta High Court''s view confines the concept of money only to currency, when the section specifically states that important of borrowed money in cash or kind, the idea is that there should have been a lending of money as a loan and not a mere debt arising out of transaction such as balance of unpaid price of goods on sale, money is the broad cast sense as ready money and the other as not merely other types of currency but as goods or commodities as distinguish from money. To accept the view expressed by the Calcutta High Court as aforesaid would only mean that money in kind has to be brought into the country only in other forms of currency which would, in our opinion, be the contradiction in terms for the economic concept of "in kind" as distinct from "in cash" is under expression "money" referred to in the earlier part of the section would also mean cash, that is money in cash, would be tautological in effect and suffer from redundance. No such fallacy could be attributed to the legislature. Therefore, with great respect to the learned judges of the Calcutta High Court, we cannot subscribe to their view that the expression "money lent on interest and brought into India in cash or kind" would only mean currency in various forms. To say so would unnecessarily scuttle down true effect of the provision.

14. Learned counsel relied upon a decision of this court in Addl, Addl. Commissioner of Income Tax, Mysore Vs. Bharat Fritz Werner Private Ltd., as decision of the Gujarat High Court in CIT v. Saurashtra Cement and Chemical Industries Ltd. [1976] 101 ITR 502. But in our opinion, neither of these decision has any application to fact of the present case for, in the former, this court was not concerned with the controversy with which we are concerned presently, in that case, there was no business connection and the question of borrowed money being d into India never fell for consideration. In the Gujarat decision,

what was consider was only a transaction of debt and not a case of borrowing as in the case here. In that view of the matter, we find no grounds to distribute the finding records by the Tribunal in this case. We answer the question referred to us in the affirmative and against the assessee.