IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

1.Income Tax Reference No.43 of 1991

Smt.Trishla Jain, Faridabad ---Petitioner

Versus

Income Tax Commissioner, Rohtak ---Respondent

2.Income Tax Reference No.44 of 1991

Smt.Nandita Jain, Faridabad ---Petitioner

Versus

Income Tax Commissioner, Rohtak ---Respondent

3.Income Tax Reference No.45 of 1991

Smt.Sangya Jain, Faridabad ---Petitioner

Versus

Income Tax Commissioner, Rohtak ---Respondent

4.Income Tax Reference No.46 of 1991

Ashok Jain, Faridabad ---Petitioner

Versus

Income Tax Commissioner, Rohtak ---Respondent

5.Income Tax Reference No.47 of 1991

Smt.Ritu Jain, Faridabad ---Petitioner

Versus

Income Tax Commissioner, Rohtak ---Respondent

6.Income Tax Reference No.48 of 1991

Parash Dass Jain, Faridabad ---Petitioner

Versus

Income Tax Commissioner, Rohtak ---Respondent

Date of Decision:-6.1.2009

CORAM:- HON'BLE MR.JUSTICE J.S.KHEHAR
HON'BLE MR.JUSTICE NAWAB SINGH

PRESENT:-S/Shri Arihant Jain and Arun Jindal, Advocates for the petitioners.

Mr.Yogesh Putney, Advocate for the respondent.

J.S.KHEHAR, J.(ORAL)

The instant order will dispose of Income Tax Reference Nos.43 to 48 of 1991. The controversy in each of the cases being identical, a common order is being passed to dispose of all the six references. It is not a matter of dispute that the assessees in all the six references are individuals being non-residents in terms of Section 6 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). In so far as the factual matrix is concerned, all the assessees had subscribed to two sets of debentures issued by M/s Oswal Agro Mills Limited. The first set of debentures was issued on 2.7.1984; whereas the second set of debentures was issued on 23.6.1986. The assessees had paid for these debentures through convertible foreign exchange by remittances from abroad. As such, the assets in the hands of the assessees were in the nature of foreign exchange assets as defined in Section 115 C of the Act. The controversy in the present references pertains to the interest income derived by the assessees from the aforesaid debentures. The claim of the assessees is that the aforesaid income derived as interest from debentures should be assessed on receipt basis, and not on accrual basis. The claim of the Revenue is to the contrary.

Interest on the aforesaid two sets of debentures was payable biannually. Interest on the debentures accrued on 1st July and 31st December of every year. The issue to be adjudicated upon in the instant six references

is, whether interest on the debentures would be deemed to have accrued/arisen to the assessees on 1st July and 31st December, or whether the assessees would be liable to payment of tax on the actual receipt of the interest from the said debentures.

On the receipt of interest by the assessees in the financial year 1986-87 (which had accrued/arisen to the assessees in the preceding financial year 1985-86), the assessees were desirous of including the same as taxable income for the financial year 1986-87, and not as income for the preceding financial year i.e. 1985-86 (even though the aforesaid interest had accrued to them on Ist July and 31st December of the preceding financial year i.e. 1985-86). Accordingly, in their returns for the assessment year 1987-88, the assessees included the component of interest on the debentures referred to above as they have actually received the same in the financial year 1986-87.

On the same analogy as has been noticed here-in-above, the assessees did not include their income derived from interest on debentures, which had accrued/arisen to them during the financial year 1986-87 for the same reason, namely, that they were not in receipt of the same during the said financial year. The same factual position continued for later years as well, which are the subject of consideration in the connected references.

The Assessing Officer did not agree with the plea raised on behalf of the assesses. The Assessing Officer took the view that the interest income from the debentures payable to the assessees by M/s Oswal Agro Mills Limited was assessable on accrual basis. The Assessing Officer, accordingly, added to the taxable income of the assessees, interest from the debentures, which had accrued to the assessees in the financial year 1986-

87, even though the same had not been received by the assessees during the said financial year. The Appellate Authorities i.e. the Commissioner of Income Tax (Appeals) as well as the Income Tax Appellate Tribunal affirmed the view assessed by the Assessing Officer. It is in the aforesaid factual background that the instant references have been made to this Court. The question of law referred to this Court is being extracted hereunder:-

> "Whether in the facts and circumstances of the case, the Income-tax Appellate Tribunal was right to hold that income from interest on debentures which was a "foreign exchange asset" was assessable on accrual basis and not on receipt basis.?"

We have considered the submissions advanced by the learned counsel for the rival parties. In fact, the entire controversy revolves around the interpretation of Section 5 (2) of the Act. Section 5 (2) of the Act is being extracted here as under:-

> "5.**Scope of total income**-(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which-
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> (a) is received or is deemed to be received in India in such year by or on behalf of such person, or
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> (b) accrues or arises or is deemed to accrue or arise to him in India during such year.
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> Explanation 1- Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into

account in a balance-sheet prepared in India.

Explanation 2- For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

Since it is not a matter of dispute that from the two sets of debentures, the assessees were earning interest, which accrued to them on Ist July of every year, as well as, on 31st December of every year. The component of income, which accrued to the assessees (as interest on debentures) on the aforesaid two dates stood crystalized on Ist July and 31st December every year. Thus viewed the aforesaid income clearly accrued to the assessees on 1st July 1986 and 31st December 1986, and likewise in every subsequent year. Both these components of interest, which accrued/arose to the assessees in the financial year 1986-87, were assessed as their income for the assessment year 1987-88.

To repudiate the aforesaid claim, it is the vehement contention of learned counsel for the assessees that in spite of accrual of the aforesaid interest on the debentures purchased by the assessees, they did not receive the same during the financial year 1986-87. It is the case of the assessees that they had to approach this Court through Company Petition No.51 of 1998 and as a consequence of the directions issued by this Court therein, vide order dated 31.10.1998, the assessees eventually received the interest on the aforesaid debentures. It is, therefore, the vehement contention of the learned counsel for the assessees that it is neither just nor appropriate to

compute the interest component on the debentures purchased by them, as income in the hands of the assessees for computing income-tax for the financial year 1986-87 i.e. the assessment year 1987-88.

We have also analyzed scope of Section 5 (2) (b) of the Act. A plain reading of clause (b) of Section 5 (2) of the Act, reveals that the total income of a non-resident in the previous year will include such income which "accrues or arises to him", as well as, such income which is "deemed to accrue or arise to him", in the previous year. The aforesaid interpretation of the provision on its plain reading is affirmed by reading Explanation 2 (recorded under Section 5 (2) of the Act), which clarifies that the income of a person, who is a non-resident, once subjected to determine the liability of tax on accrual basis, shall not again be added to the income of the assessee as and when the same is received by him at a later juncture, in a subsequent financial (assessment year). In other words, the provision leaves no room for any doubt or ambiguity, that if an effective and final conclusion can be drawn, on the issue of accrual of income to a non-resident, the actual date of receipt is inconsequential. In view of the above, we are satisfied that the income of a non-resident has to be included in the previous year on accrual basis, i.e. as and when such income arises (or is deemed to have arisen) to the assessee, in a specific definite and crystalized measure.

The debentures purchased by the assessees from M/s Oswal Agro Mills Limited bore interest receivable by the assessees on the 1st day of July of every year as well as on the 31st December of every year. In the aforesaid view of the undisputed factual position, the interest income from the debentures purchased by the assessees must be deemed to have accrued or arisen to the assessees, in specific definite and crystalized amount on 1st

July 1986, as also on, 31st December 1986, and as such, was required to be added to income received by the assessees during the financial year 1986-87 (i.e. the assessment year 1987-88). The same factual position applies to the subsequent financial years as well. In the aforesaid view of the matter, it is inevitable to answer the reference in favour of the revenue and against the assessees.

In spite of the submissions (and conclusions) recorded here-in-above, learned counsel for the petitioners also invited our attention to the scope of Section 195 (1) of the Act. Section 195 (1) of the Act is being extracted here under:-

> **195. Other sums**--(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries" shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other made, whichever is earlier, deduct income-tax thereon at the rates in force.
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> Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.
>
> Provided further that no such deduction shall be made in

> respect of any dividends referred to in section 115-O.
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> Explanation- For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Based on Section 195 of the Act, it is the submission of the learned counsel for the petitioners, that liability of deducting income tax on the interest component of debentures purchased by the assessees from M/s Oswal Agro Mills Limited, rested on the shoulders of the said Company, and that, when M/s Oswal Agro Mills Limited eventually released the interest component of the debentures to the assessees, it had made income-tax deductions therefrom. It is the contention of the learned counsel for the petitioners that the assessees cannot be made liable to pay tax twice over for the same income.

It is not possible for us to accept the submission advanced by the learned counsel for the petitioners based on Section 195 (1) of the Act. The assessment towards income-tax is an issue separate and distinct from the actual payment of tax. It is for the purposes of determining the year of assessment to which the income of a non-resident is to be added, that the mandate of Section 5 (2) of the Act makes a specific provision, requiring income which has accrued (or which arises) to a non-resident, to be treated as income for the previous year in which such income has accrued (or has arisen), and as such, reference to Section 195 (1) of the Act at the hands of

the learned counsel for the petitioners is wholly irrelevant. Secondly, Explanation 2 under Section 5 (2) of the Act removes all ambiguity from the issue under reference. Even if it is accepted that the assessees in the present case were paid the interest component on the debentures purchased by them from M/s Oswal Agro Mills Limited, after deduction of income-tax in terms of the mandate to Section 195, it is open to the assessees to claim an appropriate reduction in terms thereof, during the course of assessment of the aforesaid income towards tax, as the said income has already been subjected to tax on accrual basis under Section 5 (2) (b) of the Act.

It would be relevant to mention that during the course of hearing, learned counsel for the rival parties placed reliance on the decision rendered by Madras High Court in Commissioner of Income-Tax, Madras-I v. Standard Triumph Motor Co.Ltd. 1979 Vol.119 ITR 573, as also, the decision rendered by the Apex Court in Standard Triumph Motor Co.Ltd. v. Commissioner of Income-Tax, (1993) Vol.201 ITR 391. Relying on the aforesaid decisions, learned counsel for the assessees vehemently contended that the issue canvassed and adjudicated upon by the Madras High Court, as well as by the Apex Court, pertained to the method of accounting adopted by the assessee for determination of the tax liability of the assessee. It was, therefore, submitted that the aforesaid judgments were irrelevant to the facts and circumstances of the present reference. Whereas, learned counsel for the revenue submitted that the Madras High Court as well the Apex Court had affirmatively concluded that for a non-resident, income which accrues or arises “during such year” must be treated as income for that “previous year” irrespective of the consideration whether it has actually been received, or it has actually been deemed to be received, or even it has not been received.

While we are in agreement with the learned counsel for the petitioners that the primary determination rendered in the judgments referred to here-in-above was based on a plea in respect of method of accounting, yet we have no doubt in our mind that the judgments referred to here-in-above clearly and ambiguously hold that for a non-resident, income which accrues or arises “during such year” shall be treated as income for that “previous year” for the purposes of income-tax assessment irrespective of the method of accounting adopted by the assessee. As such, we hereby affirm the submissions advanced by the learned counsel for the revenue.

References are, accordingly, disposed of.

(J.S.Khehar)
Judge

(Nawab Singh)
Judge

6.1.2009
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