

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE**

WRIT PETITION NO.1473 OF 2013

DSL Enterprises Private Limited.

...Petitioner.

Vs.

Mrs.N.C.Chandratre,
Income Tax Officer, TDS-I, Nasik & Ors.

...Respondents.

....
Mr.Chirag Balsara with Ms.Swati Deshpande, Mr.Praveer Shetty and
Mr.Nishith Joshi i/b. RES Legal for the Petitioner.
Mr.Vimal Gupta, Senior Advocate with Mr.Suresh Kumar for the
Respondents.

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**CORAM : DR.D.Y.CHANDRACHUD AND
A.A. SAYED, JJ.**

February 21, 2013.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :

Rule; with the consent of Counsel for the parties returnable
forthwith. With the consent of Counsel and at their request the Petition is
taken up for hearing and final disposal.

2. The Petitioner is a Company incorporated under the Companies'
Act, 1956, in accordance with a scheme for rehabilitation sanctioned by the
Board for Industrial and Financial Reconstruction (BIFR) under the Sick
Industrial Companies (Special Provisions) Act, 1985. The Petitioner is a
successor in interest of a Company by the name of Datar Switchgear Limited
(DSL).

3. DSL had claims against the Maharashtra State Electricity
Distribution Company Limited (MSEDCL) which were referred to an arbitral

tribunal constituted under the Arbitration and Conciliation Act, 1996. The arbitral tribunal made an award on 18 June 2004 in the amount of Rs. 179 crores together with interest at 10% per annum. Initially, the arbitral award was set aside by a Learned Single Judge of this Court, but on appeal, the proceedings were remanded back to the Learned Single Judge for fresh disposal. On 18 March 2009, the Learned Single Judge dismissed a Petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the arbitral award. MSEDCL filed an appeal before the Division Bench. By an order dated 2 May 2009, the Division Bench granted an interim stay of the execution of the award subject to MSEDCL depositing an amount of Rs.179 crores and furnishing a Bank Guarantee for the balance of Rs.86 crores (the contention of DSL being that the total amount due inclusive of interest was Rs.265 crores). Against the order of the Division Bench, Special Leave Petitions were filed before the Supreme Court both by DSL and by MSEDCL. The Supreme Court modified the conditions on which a stay of execution of the award was granted by the Division Bench in the following terms:

“We are of the view that interests of justice would be served if the terms subject to which stay is granted are modified as follows:

(a) MSEDCL shall deposit Rs.65 crores with the Bombay High Court on or before 20.6.2009. DSL will be at liberty to draw the said sum of Rs.65 crores by furnishing an unconditional Bank Guarantee to the satisfaction of the Prothonotary and Senior Master of the High Court.

-(b) MSEDCL shall furnish a Bank Guarantee for the remaining Rs.200 crores on or before 20.6.2009 to the satisfaction of the Prothonotary and Senior Master. The said Bank Guarantee shall be kept current during the pendency of the appeal.

-(c) The Bank Guarantee that is furnished by DSL for withdrawing Rs.65 crores, shall confirm that the Bank shall not object to any claim under the Guarantee on the ground that the matter is

pending before the BIFR or any other ground.”

4. The Petitioner furnished a Bank Guarantee in the sum of Rs.65 crores of the Indian Bank dated 25 June 2009 against a deposit of 100 per cent margin with the Indian Bank. Indian Bank has marked a lien on the fixed deposit to the extent of Rs.65 crores. The Petitioner has received during Financial Years 2009-10, 2010-11 and 2011-12 and subsequently interest on the fixed deposit of Rs.65 crores. The Income Tax Department on an application filed by the Petitioner issued a certificate under Section 197 of the Income Tax Act, 1961, for financial years 2009-10, 2010-11 and 2011-12. On 2 April 2012, the Petitioner filed an application before the Income Tax Officer, TDS-I, Nashik for a certificate of no deduction of tax at source under Section 197 on the interest income for F.Y. 2012-13. On 14 May 2012, this application was rejected by the CIT (TDS) inter alia on the ground that the Company was not carrying on any business so as to generate business income and that the interest which has accrued on the deposits may result in income taxable under the head “Income from other sources” and may result in a demand. Thereafter, a communication was issued by the Income Tax Officer (TDS-I), Nashik on 29 May 2012 informing the Petitioner that his application has been rejected by the CIT on 14 May 2012.

5. The Petitioner filed a Petition under Article 226 of the Constitution for challenging the order of 29 May 2012. A Division Bench of this Court by an order dated 29 October 2012 noted that no valid reason has been furnished by the Assessing Officer to differ from the earlier decisions for

A.Ys. 2009-10, 2010-11 and 2011-12 in the matter of the grant of a certificate under Section 197. Since no reasons were furnished for taking a view different from the view taken in the earlier years, the order dated 29 May 2012 was set aside and the Assessing Officer was directed to pass a fresh order on merits in accordance with law. Thereafter, a communication was issued by the Income Tax Officer on 22/23 November 2012 rejecting the application of the Petitioner. On a fresh petition filed under Article 226 of the Constitution, a Division Bench of this Court by an order dated 17 December 2012 noted that in the earlier order of the Court, the order of the CIT dated 14 May 2012 was not specifically set aside though it was contained in the communication dated 29 May 2012 to the Petitioner. Consequently, since the order of 14 May 2012 of the CIT had not been specifically set aside, the Income Tax Officer (TDS) was bound by the order of the CIT. In that view of the matter, the Division Bench quashed and set aside the order of the ITO (TDS) dated 22/23 November 2012 and made it clear that by the order of the Court dated 29 October 2012, the order of the CIT dated 14 May 2012 had also been set aside. The ITO (TDS) was directed to pass a fresh order on merits.

6. Thereafter, a notice to show cause was issued to the Petitioner on 21 January 2013 stating inter alia as follows:

“On going through the application dated 3.4.2012 and all other documents submitted from time to time, the following points emerge:

- (i) There is no business income during the FY 2012-13;
- (ii) The applicant company has income from deposits under the head income from other sources aggregating Rs.6,07,07,750/-. The taxability arising out of such income has been stated by you

at Rs. Nil in your application submitted in Form No.13. The fact remains that there is positive income and estimated tax liability would be of Rs.2.06 cr. which is much more than the TDS amount of Rs.60.70 lacs.

(iii) In your case the Arbitral Tribunal has awarded the judgment in your favour and the Hon'ble Supreme Court vide order dated 15.5.2009 has modified the stay order granted by the Division Bench reducing the amount to be deposited by the MSEDCL. Therefore, the quantum of compensation is only in dispute. The Hon'ble S.C. judgment in the case of Hindustan Housing & Land Development Trust Ltd. 161 ITR 524 (SC) relied upon by you in support of your claim is not applicable to your case since the situation arisen as a result of Hon'ble Apex Court's decision above in respect of enhancement or reduction of compensation, has been duly considered vide amendment to Finance Act, 2003 w.e.f. 1.4.2004 to sec. 45(5). Sec.45(5)(c) clarifies the position.

3. In view of the above, it appears that the deductor company has absolute ownership of the funds to the extent of Rs.65 crs. and interest arising out of the said deposit is taxable in the year of receipt as income from other sources."

The Petitioner furnished a reply. Eventually, an order has now been passed rejecting the application for the grant of a certificate under Section 197 by the ITO (TDS-I), Nashik on 5 February 2013. The principal ground on which the application has been rejected is that in the present case, the Petitioner has an absolute right to receive the amount of interest and hence, the interest income is an accrued income of the Petitioner which is subject to the deduction of tax at source.

7. An affidavit in reply has been filed in these proceedings.

8. On behalf of the Petitioner, it has been submitted that: (i) The arbitral award is yet to attain finality since the appeal against the decision of

the Learned Single Judge, rejecting a Petition under Section 34 has been admitted and is pending consideration before the Division Bench; (ii) Unless and until the arbitral award attains finality, the Petitioner has no crystallised entitlement to receive the amount awarded and this cannot be treated as its income; (iii) The order of the Supreme Court dated 15 May 2009 makes it clear that while DSL was permitted to withdraw an amount of Rs.65 crores deposited by MSEDCL, this was subject to its furnishing an additional Bank Guarantee to cover the entire amount; (iv) In the event that the Petitioner fails and the challenge to the arbitral award is upheld, the Petitioner would be liable to refund the entire amount of Rs.65 crores which has been withdrawn and would be liable to provide restitution to MSEDCL under Section 144 of the Code of Civil Procedure, 1908. In the circumstances, it was urged that the interest which has resulted from the fixed deposit maintained with the Indian Bank in respect of the amount of Rs.65 crores is not income which has accrued since the entire amount inclusive of interest is contingent upon the outcome of the pending proceedings.

9. On the other hand, it has been urged on behalf of the Revenue that: (i) While there can be no dispute about the fact that the Petitioner has no vested right in respect of the amount of Rs.65 crores which has been permitted to be withdrawn by the Supreme Court against the furnishing of a Bank Guarantee, the interest which has been earned on the amount is income which has accrued to the Petitioner; (ii) DSL is a sick industrial Company and the Revenue would be justified in securing its interest by declining a certificate under Section 197; and (iii) In any event no prejudice would be caused to the

Petitioner if tax is deducted at source since the Petitioner would be entitled to refund of tax paid together with interest under Section 244A in the event that it is required to pay over the principal amount of Rs.65 crores with interest to MSEDCL.

10. The facts which have been narrated in the earlier part of the judgment would indicate that the challenge to the arbitral award is pending in appeal and the award is yet to attain finality. Though the Learned Single Judge of this Court dismissed a Petition filed by MSEDCL challenging the arbitral award, the appeal filed by MSEDCL has been admitted. A Division Bench of this Court granted a stay on the execution of the award subject to MSEDCL depositing an amount of Rs.179 crores and furnishing a Bank Guarantee for Rs.86 crores. This order was modified in appeal by the Supreme Court. Under the order of the Supreme Court, MSEDCL was required to deposit Rs.65 crores and DSL was permitted to withdraw the amount so deposited subject to furnishing a Bank Guarantee to the satisfaction of the Prothonotary & Senior Master. Consequently, there can be no manner of dispute even as a matter of first principle, about the fact that the amount of Rs.65 crores which was permitted to be withdrawn against a bank guarantee for an equivalent amount does not represent income which has accrued to DSL. So long as the challenge to the arbitral award is alive and is pending, and the legality of the arbitral award has not attained finality, the amount which has been awarded does not represent income which has accrued. Upon the withdrawal of the amount by DSL, the amount has been invested in a fixed deposit of Indian Bank which has marked a lien to the

extent of Rs.65 crores; this corresponds to the amount of the Bank Guarantee which it has furnished. The interest which has accrued on the amount of the fixed deposit cannot be regarded at this stage as income which has accrued to the Petitioner. In view of the provisions of Section 144 of the Code of Civil Procedure, 1908, if the decree in terms of the award is varied or reversed in appeal, the Court which passed the decree or order is under a mandate on the application of any party entitled to any benefit by way of restitution or otherwise to cause such restitution to be made so as to place the parties in the position which they would have occupied but for such decree or order. The Court is empowered to make any orders including orders for the refund of costs and for the payment of interest.

11. The basis on which a show cause notice was issued to the Petitioner on 21 January 2013 is that what was disputed before the Division Bench of this Court is only the quantum of compensation. The show cause notice also proceeded on the basis that the Petitioner has absolute ownership of the funds to the extent of Rs.65 crores. There is a fallacy in both these assumptions. The scope of the appeal before the Division Bench is the validity of the order of the Learned Single Judge dismissing the objection to the arbitral award and it is not only the quantum of compensation which is in dispute in the Letters Patent Appeal that has been filed against the order of the Learned Single Judge. Moreover, it would be fallacious to postulate that the Petitioner has absolute ownership of the funds to the extent of Rs.65 crores. Even the impugned order of the ITO (TDS-I) proceeded on the fallacious assumption that the Petitioner has an absolute right to receive an

amount of interest. So long as an appeal against the order of the Learned Single Judge on the Arbitration Petition is pending, the Petitioner does not have an absolute entitlement either to retain the amount of Rs.65 crores or the interest which has been realised in respect of the fixed deposit placed with Indian Bank.

12. Under the Income Tax Act, 1961, income chargeable to tax is income that is received or is deemed to be received in India in the previous year relevant to the year in which assessment is made or the income that accrues or arises or is being accrued in India during such year. In **CIT vs. Shoorji Vallabhdas and Co.**,¹ the Supreme Court held that “the substance of the matter is the income”. Similarly in **Poona Electric Supply Co. Ltd. vs. CIT**,² the Supreme Court held that “Income-tax is a tax on the real income i.e., the profits arrived at on commercial principles subject to the provisions of the Income Tax Act.”. These principles were followed by the Supreme Court in the judgment in **Godhra Electricity Co.Ltd. vs. Commissioner of Income Tax**,³ in holding that even though the assessee was following a mercantile system of accounting and had made entries in its books regarding enhanced charges for the electric supply made to the consumers, no real income had accrued in respect of those enhanced charges in view of the fact that soon thereafter the assessee had been subjected to litigation in a suit filed by the consumers. The Supreme Court held that “the question whether there was real accrual of income to the assessee-company in respect of enhanced

1 (1962) 46 ITR 144

2 (1965) 57 ITR 521

3 (1997) 225 ITR 746

charges for supply of electricity has to be considered by taking the probability or improbability of realisation in a realistic manner". The Supreme Court held that the claim at increased rates on the basis of which necessary entries were made represented only hypothetical income and the amounts as brought to tax by the Income Tax Officer did not represent the income which had really accrued to the assessee-company during the relevant previous years". In

Commissioner of Income Tax vs. Hindustan Housing and Land Development Trust Ltd.,⁴ the Supreme Court cited with approval the following principle laid down in **Khan Bahaddur Ahmed Alladin & Sons vs. C.I.T.**⁵

"Income-tax is not levied on a mere right to receive compensation; there must be something tangible, something in the nature of a debt, something in the nature of an obligation to pay an ascertained amount. Till such time, no income can be said to have accrued..."

13. The submission of the Revenue is that the order of the Supreme Court only required the Petitioner to furnish a Bank Guarantee of Rs.65 crores in respect of the amount which was deposited by the MSEDCL and withdrawn. However, it is urged that there was no direction in regard to the interest which would accrue on the amount of Rs.65 crores and there is no link as such between the fixed deposit upon which interest has been earned and the Bank Guarantee which was required to be furnished for the withdrawal of Rs.65 crores. In our view, it would not be possible to accede to the submission for the simple reason that the interest on the fixed deposit does not represent a crystallised entitlement of the Petitioner during the financial year in question.

4 (1986) 161 ITR 524

5 (1969) 74 ITR 651

The Petitioner would have an indefeasable entitlement in respect of the principal amount of Rs.65 crores as well as the interest earned only if the proceedings which are pending in regard to the challenge to the arbitral award conclude in its favour. Unless those proceedings attain finality, the Petitioner would be subject to a possible order of restitution not merely in respect of the principal amount of Rs.65 crores, but also the interest which has been generated on the amount withdrawn in view of the mandate of Section 144 of the Code of Civil Procedure, 1908 to provide restitution if a decree is modified in appeal. In that view of the matter, it would be wholly unreasonable to deduct tax at source on an amount which has not accrued to the Petitioner as income during the financial year in question, the entitlement of the Petitioner being contingent on the outcome of the challenge to the arbitral award. Moreover, it has also not been disputed on behalf of the Petitioner and it is fairly conceded by Counsel for the Petitioner that if the challenge to the arbitral award ends in favour of the Petitioner, the Revenue would be entitled to bring to tax the amount accrued in the corresponding year.

14. For these reasons we are of the view that the ITO (TDS-I), Nashik was not justified in denying a certificate under Section 197 despite the fact that such a certificate has been issued earlier for three preceding F.Ys. 2009-10, 2010-11 and 2011-12. Having regard to the several orders of remand that have been passed by the Court on two previous occasions, no useful purpose will be served by a further order of remand. No other objection to the grant of a certificate under Section 197 has been asserted on behalf of the Revenue at the hearing. We accordingly make the rule absolute by directing

the First Respondent to issue a certificate under Section 197 for financial year 2012-13. Rule is made absolute in these terms. There shall be no order as to costs.

(Dr.D.Y.Chandrachud, J.)

(A.A. Sayed, J.)