ITEM NO.1 COURT NO.1 SECTION IIIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil)...../2012
(CC 19572/2011)
(From the judgement and order dated 17/02/2011 in ITA No.331/2011 of The HIGH COURT OF DELHI AT N. DELHI)

C.I.T DELHI-I Petitioner(s)

VERSUS

CARGIL GLOBAL TRADING I.P.LTD. Respondent(s)

(With appln(s) for c/delay in filing SLP)

With S.L.P. (C) No...../2012 (CC 21458/2011)
(With appln(s) for c/delay in filing SLP and office report)

Date: 10/05/2012 These Matters were called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.K. PATNAIK
HON'BLE MR. JUSTICE SWATANTER KUMAR

For Petitioner(s) Mr. Gaurab Banerji,ASG.
Mr. Sahil Tagotra,Adv.
Ms. Reena Singh,Adv.
Ms. Anil Katiyar,Adv.
for Mr. B.V. Balaram Das,Adv.

For Respondent(s) Mr. Salil Kapoor,Adv.
Mr. Vikas Jain,Adv.
Mr. Sanat Kapoor,Adv.
Mr. Ankit Gupta,Adv.
Mr. Tashriq Ahmad,Adv.
Mr. Kamal Mohan Gupta,Adv.

UPON hearing counsel the Court made the following
O R D E R

Delay condoned. The special leave petitions are dismissed.

[Alka Dudeja] [Madhu Saxena]
A.R.-cum-P.S. Assistant Registrar

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.331 of 2011**
with
ITA No.204 of 2011

% DECISION DELIVERED ON: **FEBRUARY 17, 2011**

1) ITA No.331 of 2011

COMMISSIONER OF INCOME TAX . . . APPELLANT

through : Ms. Prem Lata Bansal, Sr. Advocate with Mr. Deepak Anand, Advocate.

VERSUS

CARGILL GLOBAL TRADING PVT. LTD. . . .RESPONDENT

through: Mr. Salil Kapoor, Advocate.

2) ITA No.204 of 2011

COMMISSIONER OF INCOME TAX . . . APPELLANT

through : Ms. Prem Lata Bansal, Sr. Advocate with Mr. Deepak Anand, Advocate.

VERSUS

CARGILL GLOBAL TRADING PVT. LTD. . . .RESPONDENT

through: Mr. Salil Kapoor, Advocate.

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. (**ORAL**)

1. In these two appeals filed by the Revenue against the same assessee, the issue is identical and pertains to two assessment years, i.e., Assessment Years 2004-05 and 2005-06. The Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') vide orders dated 09.10.2009 had decided the issue in favour of the assessee and order passed in that case has been followed in the subsequent assessment year. In these circumstances, while dealing with the issues, we may take note of the facts appearing in ITA No.331 of 2001, which pertains to the Assessment Year 2004-05.

2. In this Assessment Year, the respondent assessee filed the income tax return declaring the income at 1.14 Crore. During the assessment proceedings, the Assessing Officer (AO) noticed that the assessee had paid a sum of ₹3.97 Crores to its associate concern, M/s Kargil Financial Services Asia Pvt. Limited (CFSA) Singapore on account of discounted charges for getting the export sale bills discounted. The AO was of the view that the discounting charges were nothing but the interest within the ambit of Section 2(28A) of the Income Tax Act (for brevity 'the Act'). Since the assessee had not deducted tax at

source under Section 195 of the Act, he invoked the provisions of Section 40(a)(i) of the Act and disallowed the sum of ₹3.97 Crores claimed by the assessee under Section 37(1) of the Act.

3. CIT (A) deleted the addition holding that the discount paid by the assessee to CFSA cannot be held to be interest and therefore, provisions of Section 40(a)(i) of the Act would not apply. Accordingly, he allowed the expenditure of ₹3.97 Crores as claimed by the assessee.

4. The Revenue did not accept the aforesaid decision of the CIT (A) and therefore, challenged the same by filing the appeal before the Tribunal, though unsuccessful as the Tribunal has affirmed the order of the CIT (A). The Tribunal observed that discounting charges were not in the nature of interest paid by the assessee, rather assessee had received net amount of bill of exchange accepted by the purchaser after deducting amount of discount. Since CFSA was having no permanent establishment in India, it was not liable to tax in respect of such account earned by it and therefore, the assessee was not under an obligation to deduct tax at source under Section 195 of the Act. Accordingly, the Tribunal held that the said discounting charges could not be disallowed by the AO by invoking Section 40(a)(i) of the Act.

5. We may notice at this stage that the respondent assessee is in the export business. On the exports made by the assessee to its best buyers outside India, the assessee draws bills of exchange on those buyers located outside India. These bills of exchange are discounted by the assessee from CFSA who on discounting the bills immediately remits the discounted amount to the assessee. Thereafter, it is the obligations/headaches of CFSA to release the amounts of those buyers to whom the goods are exported and bills are drawn by the assessee. It is the said discounted charges which were claimed by the assessee as expenses under Section 37(1) of the Act. The discounting facilities offered by the CFSA to the assessee after charging its aforesaid discounted commission are not questioned by the Revenue. Only objection was that on this amount remitted by the assessee to the CFSA, the assessee was to deduct tax at source (TDS) under Section 195 of the Act and since it was not done, invoking the provisions of Section 40(a)(i) of the Act, the expenditure was disallowed.

6. As pointed out above, according to the AO, the aforesaid discounted charges by the assessee to CFSA were treated as 'interest' within the meaning of Section 2 (28A) of the Act.

7. We may also point out at this stage that CFSA is a company incorporated in Singapore and a tax resident of Singapore.

CFSA, *inter alia*, underwrite or otherwise acquire, own, hold, sell or exchange securities or investments of any kind including negotiable instruments, commercial paper etc. Accordingly, as a part of its aforesaid business, it draws, makes, accepts, endorses, discounts, executes and issues promissory notes, BE etc. Further CFSA does not have a permanent establishment (PE) in terms of Articles 5 of the India Singapore Treaty ('the Treaty' or the 'DTAA').

8. We may also record the following nature of the transaction undertaken between the assessee and CFSA, as found by the Tribunal in the following terms:

> "The purchase of BE's on a 'without recourse' basis implies that:
>
> > The appellant sells the BE's to CFSA, typically, on 'without recourse' basis i.e. CFSA purchases the Bes on its own behalf.
> >
> > CFSA collects the payment from the sale/settlement f the BE on its own behalf, and not on behalf of the Indian Companies.
> >
> > CFSA has no right to proceed against the appellant in case of a default by the foreign buyer.
>
> Essential activities involved in the aforesaid bills discounting may also be summarized as under:
>
> > A contract is entered into between the appellant (seller) and buyer (a non-resident) for export of goods, and invoiced accordingly;
> >
> > The appellant drawn BE on the non-resident, buyer which usually has a maturity period of 6 months;

> Above BE is then sold by the appellant to CFSA at a discount, who immediately thereafter, remit the discounted value of the BE (i.e. maturity value les discount) to the appellant.
>
> In fact, this is not a case where payment is made by the resident (i.e. the appellant) to a non-resident (i.e. CFSA).
>
> The non-resident buyer would make the payment towards the settlement of the bills to CFSA outside India. In the alternative, CFSA may further sell the BE to another party (the "New owner") at the prevailing market price; in such a case payment would be made by the non-resident buyer of the new owner of the BE."

9. On the aforesaid facts, it was concluded by the CIT (A) as well as the Tribunal that the discounting charges paid by the assessee is not an interest as neither any money is borrowed nor any debt is incurred. The expression 'interest' is defined under Section 2(28A) of the Act, which reads as under:

> "Interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debit incurred or in respect of any credit facility which has not been utilised."

10. It is clear from the above that before any amount paid is construed as interest, it has to be established that the same is payable in respect of any money borrowed or debt incurred. In the present case, on the aforesaid facts appearing on record, in our opinion, the Tribunal rightly held that the discount charges paid were not in respect of any debt incurred or money borrowed. Instead, the assessee had merely discounted the

sale consideration respectively on sale of goods. The following discussion of the Tribunal in this behalf is relevant:

> "9. The word "interest" is differently defined under Interest-tax Act. As per Section 2(7) of Interest-tax Act, "interest" means interest on loans and advances made in India and includes-(a) commitment charges on unutilized portion of any credit sanctioned for being availed of in India and (b) discount on promissory notes and bill of exchange drawn or made in India. Thus where the legislature was conscious of the fact that even the discount of bill of exchange is to be included within the definition of interest, the same was basically so provided for. However, under the scheme of IT Act, the word "interest" defined under Section 2(28A) does not include the discounting charges on discounting of bill of exchange. Though the Circular No. 65 was rendered in relation to deduction of tax under Section 194A, in respect of payment to a resident, the same will be relevant even for the purpose of considering whether the discount should be treated as interest or not. The CBDT has opined that where the supplier of goods makes over the usance bill/hundi to his bank which discounts the same and credits the net amount to the supplier's account straightaway without waiting for realization of the bill on due date, the property in the usance bill/hundi passes on to the bank and the eventual collection on due date is a receipt by the bank on its own behalf and not on behalf of the supplier. For such cases of immediate discounting the net payment made by the bank to the supplier is in the nature of a price paid for the bill. Such payment cannot technically be held as including any interest and therefore, no tax need be deducted at source from such payment by the bank. The decision relied by the AO in the case of Vijay Ship Breaking Corpn. (supra) has been reversed by the Hon'ble Supreme Court as reported in the case of Vijay Ship Breaking Corpn. v. CIT (2008) 219 CTR 639 (SC): (2008) 14 DTR (SC) 74. The Hon'ble Supreme Court held that usance interest payable outside India by an undertaking engaged in the business of ship breaking is exempt from payment of income-tax by virtue of Expln. 2 added to Section 10(15)(iv)(c) with retrospective effect from 1st April, 1962 and hence the assessee was not liable to deduct tax at source under Section 195 of the Act, The discounting charges are not in the nature of interest paid by the assessee. Rather after deducting discount the assessee received net amount of the bill of exchange

accepted by the purchaser. CFSA, not having any PE in India, is not liable to tax in respect of such discount earned by it and hence the assessee is not under obligation to deduct tax at source under Section 195 of the Act. Accordingly, the same amount cannot be disallowed by invoking Section 40(a)(i) of the Act."

11. We are in agreement with the aforesaid discussion on the legal aspect. It may be pointed out that the CBDT has issued one Circular No.65 way back on 02.09.1971 clarifying the position in respect of income by way of interest under Section 194 read with Section 197(1) and (2) of the Act as under:

> "1.....Where the supplier of goods makes over the usance bill/hundi to his bank which discounts the same and credits the net amount to the supplier's account straightaway without waiting for realization of the bill on due date, the property in the usance bill/hundi passes on to the bank and the eventual collection on due date is a receipt by the bank on its own behalf and not on behalf of the supplier. For such cases of immediate discounting the net payment made by the bank to the supplier is in the nature of a price paid for the bill. Such a payment cannot technically be held as including interest and therefore no tax need be deducted at source from such payments by the bank. Further, the buyer need not deduct any tax from the payment made by him on due date to the bank in respect of such discounted bill inasmuch as these payments are to a bank or a banking co-operative society, conforming to the exemption granted by section 194A(3)(iii)(a) of the Income-tax Act, 1961.
>
> 2. On the other hand where there is no immediate discounting and the bank merely acting as agent receives on the expiry of the period the payment for the bill from the buyer on behalf of the supplier and credits it to him accordingly, the bank receives interest on behalf of the supplier and the instructions contained, in Board's above-mentioned Circular 7th November, 1970, would apply and the buyer will have to deduct the tax from the interest."

12. There is another Circular No.674 dated 22.03.1993 directly on the point as it relates to TDS on interest other than "interest on securities". In this Circular, the Board has clarified the issue in the following manner:

> "3. A question has been recently raised as to whether the difference between the issue price and face value of these instruments should be treated as 'interest' in which case it would be liable to deduction of tax at source under section 194A of the Income-tax Act, 1961, or, it should be treated as 'discount' which is not liable to deduction of tax at source.
>
> 4. It is clarified for the information of all concerned that the difference between the issue price and the face value of the Commercial Papers and the Certificates of Deposits is to be treated as 'discount allowed' and not as 'interest paid'. Hence, the provisions of the Income-tax Act relating to deduction of tax at source are not applicable in the case of transactions in these two instruments."

13. Having regard to the aforesaid, we are of the opinion that no substantial question of law arises, as the matter stands settled by the dicta of the Supreme Court as well as clarification of CBDT itself.

14. These appeals are accordingly dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

FEBRUARY 17, 2011
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