

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल' मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

सर्व श्री बी. रामकोटय, लेखा सदस्य एवं श्री विजयपाल राव, न्या.स ।
BEFORE SHRI B. RAMAKOTAIAH, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./I.T.A. No.2878/Mum/2006

(निर्धारण वर्ष / Assessment Year : 2002-03)

Genesis Indian Investment Company Ltd. C/o-S R Batliboi & Co, 18 th Floor, Express Towers, Nariman Point Mumbai-400021	बनाम/ Vs.	Commissioner of Income Tax (Appeals)-XXXIII, Mittal Court, Nariman Point Mumbai-400021
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आयकर अपील सं./I.T.A. No.1565/Mum/2008

(निर्धारण वर्ष / Assessment Year : 2002-03)

ADIT (IT) 3(1), Scindia House, R. No. 132, 1 st Floor, N. M. Road, Mumbai-400038	बनाम/ Vs.	Genesis Indian Investment Company Ltd. C/o-S R Batliboi & Co, 18 th Floor, Express Towers, Nariman Point Mumbai-400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACG6911D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	Mr. F. V. Irani
प्रत्यर्थी की ओर से/Respondent by :	Mr. Neeraja Pradhan
सुनवाई की तारीख / Date of Hearing :	31 st July 2013
घोषणा की तारीख/Date Of Pronouncement:	14 th August 2013

आदेश / O R D E R

PER : विजयपाल राव, न्या.स. / VIJAY PAL RAO, JM

The appeal ITA No. 2878/M/2006 by the assessee is directed against the order dated 3.2.2006 of Commissioner of Income Tax(Appeals) arising from the assessment order passed u/s 143(3) where as the appeal ITA No. 1565/M/2008 is by the revenue against the order dated 14.12.2007 of CIT(A) arising form the penalty order

passed u/s 271(1)(c) of the Income Tax Act for the assessment year 2002-03.

2. The assessee has raised the following grounds in this appeal:

“Aggrieved by the order passed by the Commissioner of Income-tax (Appeals)-XXXIII, Mumbai [hereinafter referred to as ‘the learned CIT(A)’], under section 250 of the Income-tax Act, 1961 (‘Act’) and based on the facts and circumstances of the case, Genesis Indian Investment Company Limited [hereinafter referred to as the ‘Appellant’] respectfully submits that the learned CIT(A) erred in upholding the order of the Assistant Director of Income-tax (International Taxation), Range — 3(1), Mumbai, thereby disposing the appeal of the Appellant on the following grounds.

1. In taxing the compensation received by the Appellant from Castrol UK, for delay in payment of proceeds of shares tendered under the open offer (made as per the terms of the Takeover Regulations) as interest income, as against capital gains.

2. Without prejudice to the contention in Ground No. 1 above, in not treating the aforesaid compensation received from Castrol UK as ‘income received in respect of securities’ under the provisions of section 115AD(1)(a) of the Act taxable at the rate of 20 percent.

3. Without prejudice to the contentions in Ground No. 1 and Ground No. 2 above, in taxing the aforesaid compensation received from Castrol UK as interest income during Assessment Year 2002-03, instead of taxing the same in Assessment Year 2003-04 (on receipt basis).

The Appellant craves leave to add, alter, vary, omit, substitute or amend the ground of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the honourable Income-Tax Appellate Tribunal to decide this appeal according to law.”

3. Ground No. 1 regarding taxing the additional amount of ₹ 7,07,76,547/- received by the assessee as per the order of SEBI being

15% interest for delay in payment of proceeds of shares tendered under the open offer of Castrol UK. The assessee is a company incorporated in Mauritius and has obtained registration with the Securities & Exchange Board of India (SEBI) as a sub-account of Genesis Asset Managers Ltd., registered Foreign Institutional Investor (FII). The assessee was holding the shares of Castrol India Ltd. which is a subsidiary of Castrol Ltd. UK. Due to Global Acquisition of Burmah Castrol Plc by the British Petroleum through the press announcement of its intention to acquire the entire share capital of Burmah Castrol Plc on 14.3.2000, the consequential open offer was announced for acquisition of 20% of the issue capital of Castrol India Ltd. On 10.7.2000 B.P. Plc approached the SEBI seeking exemption from the requirement of making a public offer for acquisition of upto 20% of the shares of Castrol India Ltd. The said exemption application was disposed of by the SEBI vide order dated 7.8.2000 by granting exemption subject to certain conditions which was not acceptable to the holding company. Accordingly, the request for exemption was withdrawn on 6.12.2000 and the holding company proceeded to take steps to make public offer to the shareholders of Castrol India Ltd. On 11.12.2000 Castrol UK made open offer for acquisition of 20% of the issued capital of Castrol India Ltd. with SEBI indicating the offer price of ₹ 311.91 per equity share based on the market price as on 7.7.2000. Thereafter on 16.2.2001 the SEBI *inter alia* directed the Castrol UK to revise the minimum offer price taking 14.3.2000 as the

relevant date and the price as on that date is ₹ 350.02. The holding company challenged the order of SEBI by filing an appeal before the Securities Appellate Tribunal (SAT). The Securities Appellate Tribunal upheld SEBI's directions vide order dated 27.4.2001 against which the holding company filed an appeal before the Hon'ble Jurisdiction High Court. In the mean time, on 23.7.2001 the SEBI directed the merchant banker to proceed with the offer formalities and pay interest @ 15% per annum on offer price period from 14.3.2000 till the actual date of payment of consideration. The Hon'ble High Court upheld the SEBI directions to revise the offer price based on the price on 14.3.2000 @ ₹ 350.02 per equity share vide its decision dated 8.8.2001. The holding company also challenged the direction of the SEBI to pay interest @ 15% before the Securities Appellate Tribunal but could not succeed. The Tribunal held that Castrol UK is liable to pay interest to the successful offer at 15% per annum on open offer price however from 8.8.2000 till the actual date of payment of consideration instead of 14.3.2000 directed by the SEBI. The holding company again filed an appeal before the Hon'ble High Court against the Securities Appellate Tribunal order upholding payment of interest @ 15%. The Hon'ble High Court upheld the orders of the SAT regarding payment of interest. Subsequently, Castrol UK posted offer letter to shareholders of Castrol India Ltd. on 21.9.2001. The assessee tendered 2053552 equity shares on 17.10.2001 under the open offer however 1042518 equity shares of the assessee were accepted by the Castrol UK on 23.11.2001. Thus,

the assessee received additional amount of ₹ 7,07,76,547/- and net amount after deduction of TDS at ₹ 4,10,50,397/- on account of interest @ 15% per annum. The Assessing Officer while completing assessment treated the said amount of ₹ 7,07,76,547/- as interest income and taxed the same @ 48%. The assessee challenged the order of the Assessing Officer before the CIT(A) *inter alia* contended that the additional consideration received from Castrol UK is exempted under the provisions of Article 13(4) of Indo Mauritius Treaty because the said amount was nothing but capital gain arising to the assessee from transfer of shares. Alternatively the assessee contended that the receipt of the amount in question is not the interest under Article 11 of the Indo Mauritius Treaty because it is not an income from debt claim and there is no debtor-creditor relationship between the assessee and Castrol UK. The CIT(A) did not accept the contention of the assessee and upheld the action of the AO.

4. Before us the Ld. Counsel for the assessee has submitted that the term interest as given under Article 11(5) means the income from debt claim and penalty charges for late payment shall not be regarded as interest for the purpose of Article 11. The payment received by the assessee is not for debt claim from Castrol UK. The payments are received being additional consideration of shares tendered by the assessee. The Ld. Counsel has further contended that at the most the SEBI order can be regarded as penalty charges for late payment and not as interest. He has further contended that the assessee has

received the payment of additional consideration from the period 8.8.2000 to 22.11.2001 whereas the assessee tendered the shares on 17.10.2001 therefore, the additional amount has been received in respect of the period prior to the tender of the shares by the assessee. Hence this amount cannot be regarded as interest on delayed payment after the transfer of shares because prior to 23.11.2001 when the shares tendered by the assessee were accepted in the open offer by the Castrol UK there cannot be debt claim. The Ld. AR has pointed out that it was not certain whether the shares tendered by the assessee would be accepted by the Castrol UK because finally only 50% of the shares tendered by the assessee were accepted in the open offer. He has referred para 6.2 of the impugned order of CIT(A) and submitted that the CIT(A) has given a finding that the amount was in the nature of consideration received for use of money after the shares were accepted by the Castrol UK and a debt was created in favour of the assessee. This findings of the CIT(A) is contrary to the fact because the shares were accepted by the Castrol UK only on 23.11.2001 whereas the additional amount has been paid @ 15% per annum from 8.8.2000 to 22.11.2001 which is prior to the acceptance of the shares. Thus, the Ld. AR has submitted that there is no question of creating any debt in favour of the assessee prior to the acceptance of the shares tendered by the assessee. In support of his contention the Ld. AR has relied upon the following decision:

- CIT Vs Govinda Choudhury and Sons 203 ITR 881(SC), DDA Vs ITO 53 ITD 19
- CIT Vs Vidyut Corporation, Mumbai dated 21.4.2010
- Ruling of AAR dated 22.3.2010 in Royal Bank of Canada
- decision dated 30.7.2010 of Hon'ble Madras High Court in case of Cauvery Spinning and Weaving Mills Vs DCIT and others in writ petition No. 7978/2001.

The Ld. AR has further contended that even otherwise the interest does not arise in India. In support of his contention he has relied upon the decision of this Tribunal in case of SET Satellite (Singapore Pte Ltd.) dated 25.6.2010.

5. On the other hand, the Ld. DR has relied upon the orders of the authorities below and submitted that in the decision of Securities Appellate Tribunal as well as Hon'ble High Court it has been clearly set out that the nature of payment is interest and not the penalty. The rate of interest has been determined by comparing it with the rate of interest payable on refund of application money u/s 73 of the Companies Act and this aspect has been considered by the SEBI as well as SAT which has been upheld by the Hon'ble High Court. The payment of interest @ 15% per annum has been paid because of deprivation of the use of money.

6. We have considered the rival submissions as well as relevant material on record. The order of SEBI for payment of interest and particularly the rate of interest was challenged by the holding company before the SAT as well as Hon'ble High Court. It is clear that the payment of interest was directed by the SEBI under regulations 22 and therefore it was held that this is not a penalty but the payment of interest on account of failure to make the payment by the acquirer as per the time schedule prescribed under SEBI regulations. It is clear that this payment of interest @ 15% was not on account of any accretion in the value of the asset in question because the market price of the share is determine as per the rates prevailing on stock exchange. The consideration for acquiring the shares under open offer was determined at ₹ 350.02 which was the market price as on 14.3.2000 when the holding company made a public announcement of acquisition. However, the case in hand the interest received by the assessee is for the period prior to the tendering of shares and acceptance of the same therefore, the interest relates to the delay in completing the process of buy back of shares under open offer. There is a difference between the interest which can be treated at par of consideration and the interest which is different form compensations or consideration. If the interest is paid for delay in making the payment then it cannot be treated as part of consideration. In the case in hand the delay for which the interest has been received by the assessee is in the process of buy back of shares in the open offer after

announcement of the intention of acquiring of shares. It is not a case of delay in making the payment of the determined consideration after the transaction of purchase of sale is over. Therefore, in our considered view this amount of interest which relates to the period prior to tendering and acceptance of the shares falls within the ambit of consideration received by the assessee against the shares tendered in the open offer. In the case of CIT Vs Govinda Choudhury and Sons (supra) the Hon'ble Supreme Court has decided the nature of income received as interest as under:

"This brings us to a consideration of the second question. The sum of Rs. 2,77,692 was received by the assessee as interest on the amounts which were determined to be payable by the assessee in respect of certain contracts executed by the assessee and in regard to the payments under which there was a dispute between the two parties. The assessee is a contractor. His business is to enter into contracts. In the course of the execution of these contracts, he has also to face disputes with the State Government and he has also to reckon with delays in payment of amounts that are due to him. If the amounts are not paid at the proper time and interest is awarded or paid for such delay, such interest is only an accretion to the assessee's receipts from the contracts. It is obviously attributable and incidental to the business carried on by him. It would not be correct, as the Tribunal has held, to say that this interest is totally de hors the contract business carried on by the assessee. It is well settled that interest can be assessed under the head "Income from other sources" only if it cannot be brought within one or the other of the specific heads of charge. We find it difficult to comprehend how the interest receipts by the assessee can be treated as receipts which flow to him de hors the business which is carried on by him. In our view, the interest payable to him certainly partakes of the same character as the receipts for the payment of which he was otherwise entitled under the contract and which payment has been delayed as a result of certain disputes between the parties. It cannot be separated from the other amounts granted to the assessee under the awards and treated as "income from other

sources". The second question is, therefore, answered in favour of the assessee and against the Revenue."

7. In the case in hand the interest is received in pursuance to the directions of the SEBI and due to delay in completion of the process of buy back of shares as prescribed under the SEBI regulations. The real acquisition of shares took place only in the month of November 2001 and prior to the said date it cannot be said that the interest was paid due to delay in the payment of consideration. Therefore, we held that the additional amount received by the assessee being 15% interest from 8.8.2000 to 22.11.2001 is part of sale consideration and accordingly will be treated as part of capital gain and not the income from interest. The other decisions relied upon by the assessee are not applicable on the facts of the case because in those cases the issue was either the interest received on delayed trade receipts and therefore there was no dispute of revenue or capital receipt or the payment was as compensation for delay in construction.

8. Since the Ground No. 1 is decided in favour of the assessee therefore the other grounds raised by the assessee in this appeal becomes infructuous and academic in nature and accordingly we do not propose to decide the same.

ITA No. 1565/M/2008

9. The Revenue has raised only ground in this appeal as under:

"1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the penalty of ₹ 3,39,72,743/- levied u/s 271(1)(c) by holding that the assessee has either concealed nor furnished inaccurate particulars of income."

10. In the quantum appeal of the assessee we have decided the issue in favour of the assessee therefore, we do not find any reason to interfere with the order of the CIT(A) in deleting the penalty.

11. In the result, the appeal of the assessee is allowed and the appeal of revenue is dismissed.

Order pronounced in the open Court on this 14th day of August 2013

आदेश की घोषणा खुले न्यायालय में दिनांक: 14th अगस्त को की गई ।

Sd/- (बी. रामकोटय) लेखा सदस्य (B. RAMAKOTAIAH) Accountant Member	Sd/- (विजयपाल राव) न्यायिक सदस्य (VIJAY PAL RAO) Judicial Member
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Place: Mumbai : Dated: 14th August 2013

Subodh

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai