

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

TUESDAY, THE 23RD DAY OF JUNE 2015/2ND ASHADHA, 1937

ITA.No. 258 of 2014 ()

AGAINST THE ORDER IN ITA 754/COCH/2013 of I.T.A. TRIBUNAL,
COCHIN BENCH DATED 08-08-2014

APPELLANT(S)/RESPONDENT/APPELLANT ASSESSEE:

M/S. BEACON PROJECTS PVT. LTD
EVRA - 450, G-4, GAAN ENCLAVE EASARAVILASAM ROAD
VAZHUTHACAUD, THIRUVANANTHAPURAM - 695 014.
REPRESENTED BY ITS DIRECTOR SRI. SHIYAS SHAHUL HAMEED.

BY ADVS. SRI. PRATHAP PILLAI
SRI. BENOJ C AUGUSTIN

RESPONDENT(S)/APPELLANT/RESPONDENT/REVENUE:

THE COMMISSIONER OF INCOME TAX
AAYAKAR BHAVAN, KOWDIAR, THIRUVANANTHAPURAM - 695 003.

R1 BY ADV. SRI. P. K. R. MENON, SR. COUNSEL, GOI (TAXES)
R1 BY ADV. SRI. JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 04-06-2015,
ALONG WITH ITA. 259/2014, THE COURT ON 23-06-2015 DELIVERED THE
FOLLOWING:

APPENDIX IN ITA.258/14

APPELLANT'S EXHIBITS:

ANNEXURE A: WRITTEN REPLY FILED BY AUTHORISED REPRESENTATIVE DATED 28.1.2013.

ANNEXURE B: DEMAND NOTICE AY 2012-13.

ANNEXURE C: APPEAL TO CIT ITA NO.24/TDS/CT A III 2012-2013.

ANNEXURE D: ORDER DATED 7.8.2013 OF THE COMMISSIONER OF INCOME TAX.

ANNEXURE E: APPEAL FORM 36 AY 2012-13.

ANNEXURE F: CROSS OBJECTIONS FORM 36 A FILED BY THE APPELLANT.

ANNEXURE G: ORDER DATED 8.8.2014 OF IT APPELLATE TRIBUNAL NO.754/2013.

ANNEXURE H: KERALA APARTMENTS OWNERS ACT.

ANNEXURE I: AGREEMENT OF CONSTRUCTION AND TRANSFER FLAT.

ANNEXURE J: CUSTOMER LEDGER SHOWING INSTALLMENTS OF PAYMENTS.

ANNEXURE K: TRUE COPY OF THE MODIFIED ORDER DATED 1.1.2015.

ANNEXURE L: TRUE COPY OF THE DEMAND NOTICE DATED 1.1.2015.

/TRUE COPY/

PS TO JUDGE.

C.R.

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

I.T.A.Nos.258 & 259 of 2014

Dated this the 23rd day of June, 2015

JUDGMENT

Antony Dominic, J.

- 1.The issue raised in these appeals is whether the finding of the Tribunal that the excess payment refund debited in the Profit & Loss Account of the appellant under the head 'indirect expenses' should be treated as interest on the customers' deposits/advances, is legal or not.

- 2.The appellant company is a builder which had entered into construction agreements with various customers. A specimen of such an agreement is produced as Annexure I in these appeals. This agreement states that the purchaser of the apartment specified therein has already purchased the specified extent of undivided share in the land owned by the landlord, whose power of attorney is held by the appellant. The agreement provides for construction of a flat by the appellant for and on behalf of the purchaser. Payments are to be made by the purchaser in instalments which are also specified in the

agreement. The agreement provides that in the event of any failure on the part of the purchaser to perform or observe any one of his obligations, the appellant shall be entitled to re-enter upon and resume possession of the flat and that the agreement shall cease and stand terminated and that all amounts already paid by the purchaser to the appellant shall stand absolutely forfeited to the appellant.

3. In so far as this case is concerned, after entering into the agreement and making certain payments, some purchasers wrote letters to the appellant expressing their inability to fulfil the further obligations under the agreement and requesting for its cancellation. According to the appellant, on receipt of such communications, they identified prospective purchasers and entered into fresh agreements with them for prices which are higher than what was agreed upon with the purchasers who opted out. It is stated that after execution of agreements with the new purchasers, out of the payments made by them, the amounts paid by the purchasers to the appellant together with a portion of the additional amount

received from the new purchasers was refunded. The additional amount thus paid was shown in the P&L account of the appellant.

4. During the course of a survey under section 133A of the Income Tax Act, it was found that the appellant company had debited in the P&L account amounts under the head 'indirect expenses' of an amount of ₹31,37,341/- for the assessment year 2012-13 and ₹43,21,593/- for the assessment year 2013-14 being excess payments refunded. In the proceedings that continued, the Assessing Officer held that the said amount has to be treated as interest paid on deposit liable for TDS under section 194A of the Act and that having failed to do so, appellant is an assessee in default and accordingly, assessment was completed under section 201 of the Act. The order of assessment was set aside by the first appellate authority. However, the said order was reversed by the Tribunal. It is in this background, these appeals are filed.

5. We heard learned counsel for the appellant Sri. Pratap Pillai and the learned senior standing counsel Sri. P. K. Ravindranatha Menon for the Revenue.

6. As stated earlier, the issue that arises for consideration is whether the amount debited in the P&L account of the appellant company under the head 'indirect expenses' being excess payments refunded is interest as provided under section 2(28A) of the Act.

7. Section 2(28A) of the Act defines 'interest' and this section reads thus:

"(28A): "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 debt incurred or in respect of any credit facility which has not been utilised;"

8. While understanding the scope of this provision, it is important to remember the principle laid down by the Apex Court in Polestar Electronic (Pvt.) Ltd. v. Addl. CST [(1978) 41 STC 409] that 'if there is one

principle of interpretation more well settled than any other, it is that statutory enactment must ordinarily be construed according to the plain natural meaning of its language and that no words should be added, altered or modified unless it is plainly necessary to do so in order to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute' is to be considered. If this is the principle to be borne in mind, the term 'interest' as defined in section 2(28A) of the Act has to be construed strictly. On such literal construction, it can be seen that before any amount paid is construed as interest, what is required to be established is that the sum paid is in respect of any money borrowed or debt incurred and that there is debtor-creditor relationship between the parties. These are the necessary ingredients of section 2 (28A).

9. The scope of this provision came up for consideration before various High Courts as well as the Apex Court. In Bikram Singh v. Land Acquisition Collector [224

ITR 551(SC)], in the context of interest paid on delayed payment of compensation due under the Land Acquisition Act, the Apex Court held that such payment is a revenue receipt and that section 194A of the Income Tax Act has no application. Commissioner of Income-tax v. Sahib Chits (Delhi) (Pvt.) Ltd. [(2010) 328 ITR 342 Delhi] is a case where the question considered was whether section 2(28A) was attracted in the case of surplus on discount of chit funds. In that judgment, the Delhi High court referred to the judgment of this Court in Janardhana Mallan v. Gangadharan [AIR 1983 Ker 178] which was approved by the Apex Court in Shriram Chits & Investments (P) Ltd. v. Union of India [AIR 1993 SC 2063], where, it was held that on entering into a chit agreement, a debt for the amount of future instalments is not incurred by the subscriber and that in respect of such amount, there is no debtor-creditor relationship. On that basis, the Delhi High Court held that when the amount contributed every month is given back to the chit subscribers themselves in the manner as agreed, the amount contributed cannot be treated as deposit with the

company, much less money borrowed by the company. Accordingly, the Delhi High Court held that the payment made cannot be treated as interest as provided under section 2(28A), attracting the provisions of section 194A of the Act.

10. Commissioner of Income-tax v. Cargill Global Trading P. Ltd. [2011 335 ITR 94] is another judgment of the Delhi High Court where the question considered was whether discounting charges can be treated as interest and this was answered in the negative by holding 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. Commissioner of Income-tax, Shimla v. M/s.HP Housing Board, Shimla [(2012) 340 ITR 388] is a case where the question considered was whether interest paid/credited by the Housing Board on the amount deposited by the allottees on account of delayed allotment of flats is covered by section 2(28A). This again was answered by the Himachal Pradesh High Court following the Apex Court judgment in Bikram Singh (supra). Commissioner of Income

Tax, Kolkata v. M/s.MKJ Enterprises Limited [2014 (12) TMI 682] is a judgment of the Division Bench of the Calcutta High Court which also considered the question whether section 2(28A) is attracted to discounting charges of bill of exchange or factoring charges of sale. That was also answered in the negative, holding that interest is a term relating to a pre-existing debt which implies a debtor-creditor relationship.

11.From the principles laid down in the decisions referred to above, it is obvious that section 2(28A) is not attracted to every payment made and that the provision can be attracted only in cases where there is debtor-creditor relationship and that payments are made in discharge of a pre-existing obligation.

12.In so far as these cases are concerned, facts stated by us itself would show that the purchaser had paid certain amounts to the appellant. At a later point of time, the purchaser opted out of the agreement and the appellant entered into fresh agreements with new buyers for prices that are higher than what was

agreed with the purchasers. Out of the receipts from the new buyers, the appellant refunded to the purchasers the amount paid by them and a portion of the excess amount received. The amount thus refunded to the purchasers represents the consideration the purchasers paid towards the undivided shares in the property agreed to be purchased and also the cost of construction of the apartment, which work was entrusted to the appellant, being the builder. Such a relationship does not spell out a debtor-creditor relationship nor is the payment made by the appellant to the purchaser one in discharge of any pre-existing obligation to be termed as interest as defined in section 2(28A).

13. Further, there is no finding in the assessment order or in the order of the Tribunal that the amount paid by the purchasers, which was refunded, was accounted as deposit or advance received from them or that there is any debtor-creditor relationship between the parties, obliging the appellant to pay the amount to the purchasers. There is also no case for the revenue that the excess amount paid by the

appellant was based on any agreement between them or that it was quantified at rates that were already agreed between the parties. In such circumstances, the payments made do not qualify to be interest as defined in section 2(28A) of the Act and the appellant did not have the obligation to deduct tax at source as provided under section 194A nor can they be proceeded against under section 201A, treating them as an assessee in default.

For the aforesaid reasons, we are unable to sustain the order of the Tribunal which is impugned in these appeals. The order of the Tribunal is, therefore, set aside. Appeals are allowed.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
SHAJI P. CHALY, Judge.

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