

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/TAX APPEAL NO. 1701 of 2007****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS.JUSTICE HARSHA DEVANI****and****HONOURABLE MS. JUSTICE SANGEETA K. VISHEN**

=====

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

=====

ASMAN INVESTMENTS LTD.**Versus****DY. COMMISSIONER OF INCOME TAX**

=====

Appearance:**MR BS SOPARKAR for MRS SWATI SOPARKAR(870) for the Appellant(s)
No. 1****MR MR BHATT, SENIOR ADVOCATE with MRS MAUNA M BHATT(174) for
the Opponent(s) No. 1**

=====

CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI**and****HONOURABLE MS. JUSTICE SANGEETA K. VISHEN****Date : 26/03/2020****ORAL JUDGMENT**

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this appeal under section 21 of the Interest Tax Act, 1974 read with section 260A of the Income Tax Act, 1961, the appellant assessee has challenged the order dated 21.7.2006 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench A, (hereinafter referred to as “the Tribunal”) in Interest Tax Appeal No.56/Ahd/2003.

2. By an order dated 17.1.2008, this court had admitted the appeal on the following substantial question of law:

“Whether in the facts and under the circumstances of the case, the Income tax Appellate Tribunal was right in law in holding that the appellant is liable to pay interest tax on the interest earned by it?”

3. In response to a notice under section 10 of the Interest Tax Act issued on 4.5.2001, the appellant assessee filed return of chargeable interest on 29.1.2002 declaring chargeable interest at ‘Nil’. In the statement attached to the return of chargeable interest, the assessee inter alia claimed that it is not chargeable to interest tax under the Interest Tax Act, 1974 as it is not a credit institution as defined in section 2(5A) read with section 2(5B) of the said Act; that the assessee company is not an investment company; that in the case of the assessee, income is chargeable under the head of business and its income from dealing in shares and securities is and has been assessed as business income; and that the assessee company is not an investment company and it is holding investments worth Rs.55,99,366/- which is 3.76% of the total

assets and the income derived from investments is 1.42% of the total income. The Assessing Officer issued notice under section 8(1) of the Interest Tax Act. After considering the submissions advanced on behalf of the assessee company as well as considering the main objects of the assessee company, the Assessing Officer was of the view that the nature of interest income clearly indicates that the company falls within the parameters laid down in section 2(5B) of the Interest Tax Act and, accordingly, held the company to be a finance company within the meaning of section 2(5B) of the said Act. Being aggrieved, the assessee carried the matter in appeal before the Commissioner (Appeals), who by an order dated 22.7.2003, dismissed the appeal and upheld the order passed by the Assessing Officer. The appellant assessee carried the matter in further appeal before the Tribunal, but did not succeed.

4. Mr. B.S. Soparkar, learned advocate for the appellant submitted that the Tribunal had erred in holding that the principal business of the appellant being that of financing, the Assessing Officer was correct in charging interest earned by the appellant to tax under Interest Tax Act. It was submitted that the Tribunal has failed to appreciate that the appellant was not carrying on the business as mentioned in clauses (i) to (v) or (va) of sub-section (5B) of section 2 of the Interest Tax Act, and, therefore, the provisions of section 2(5B)(vi) of the said Act not being applicable to the appellant, it was not liable to pay any interest tax on the interest earned by it. It was further contended that the appellant company is not an investment company and its main object or principal business is not that of finance as can be viewed from the main objects

of the company listed in the Memorandum and Articles of Association, which clearly demonstrates that the main objects of the company are of mixed nature and, therefore, interest income earned by the appellant is not of such nature so as to attract the provisions of the Interest Tax Act. It was urged that the Tribunal has failed to appreciate that the expenditure on account of interest paid for carrying on business being much more against interest earned on loans and advances would effectively tantamount that the principal business of the appellant would be of carrying on business and not that of finance and thereby not making it liable to pay tax under the provisions of the Interest Tax Act. It was contended that the Tribunal has erred in considering the findings in the income tax proceedings of the appellant company as to the activities of the company being mentioned in the assessment order of financing and trading in shares and securities, as the basis for terming the appellant company as a finance company for the purpose of the Interest Tax Act despite the fact that the Memorandum and Articles of Association clearly demonstrate that the main objects of the appellant company was to render consultancy and services in the field of projects, technologies, finance, capital market instruments to earn business income which as such was taxed as income from business for the purpose of income tax, and hence, the question of treating the appellant company as a finance company so as to tax interest earned by it under the Interest Tax Act would not arise at all.

4.1 The attention of the court was invited to certain provisions of the Interest Tax Act, 1974. Reference was made to section 2(5A) of the said Act which defines “credit institution” as well as section 2(5B) which defines “financial

company". It was submitted that the Assessing Officer is required to record a finding that the appellant falls within any of the categories contemplated under the said provisions. Reference was made to the assessment order, to submit that no such finding as to under which sub-clause of clause (5B) of section 2 of the Interest Tax Act, the appellant assessee falls. It was submitted that merely because the appellant has recovered interest would not bring it within the ambit of the Interest Tax Act. It was contended that for the purpose of bringing the assessee within the ambit of the Interest Tax Act, the first requirement is that it must be a financing company. It was submitted that not every interest earned by an assessee is liable to tax under the Interest Tax Act and, therefore, the first threshold has not been crossed in this case. It was submitted that the assessee is not a financial company and it is not the case of the Assessing Officer that the assessee is an investment company. It was submitted that the Commissioner (Appeals) has examined the objects of the appellant Asman Investments Limited into which the original assessee Pankti Polytex Private Limited had merged and that in fact the real activity of Pankti Polytex Private Limited was of share trading and that it incidentally earned interest also. It was submitted that the Commissioner (Appeals) also has not stated as to under which sub-clause of clause (5B) of section 2 of the Interest Tax Act, the assessee falls.

4.2 Next, it was submitted that the purchases and sale were a dominant part of the activities of the assessee and the activity leading to interest earning is far less the dominant activity and, therefore, the main object of the assessee company cannot be said to that of a finance company.

4.3 Referring to the impugned order, it was submitted that the Tribunal has placed reliance upon the interest tax proceedings in the case of Pinnacle Project and Infrastructure Private Limited, which has also merged with Asman investments Limited, to submit that the interest tax proceedings of Pinnacle Project and Infrastructure Private Limited would have no bearing insofar as the Pankti Polytex Private Limited is concerned. It was submitted that the Tribunal has applied its earlier decision in the case of *Kabra Investment Private Limited* to the memorandum of Pinnacle Project and Infrastructure Private Limited and has examined the memorandum of association of that company and not of the assessee company. It was submitted that the investment made by the assessee that could generate interest income is in equity shares. It is not as if this investment has given interest income. Interest income has come from loans and advances given to Directors and, therefore the entire basis to believe that the assessee has invested in interest bearing securities is clearly negated. It was reiterated that the Assessing Officer has not shown as to in which of the seven categories the assessee company falls and there is nothing to show that the assessee company can be classified as a finance company and that this said issue is required to be decided by this court.

5. Opposing the appeal, Mr. M.R. Bhatt, Senior Advocate, learned counsel for the respondents invited the attention of the court to the findings recorded by the Tribunal in paragraph 27 of the impugned order wherein it has been recorded thus:-

“27. So far as issues involved in ground No.2(a), (b) &

(c), the facts and circumstances in this case being same and similar to the facts and circumstances of the case in Interest Tax Appeal No.5/Ahd/2003 (supra) and the parties having advanced the same arguments and vehemently relied upon the same decisions, we are, for the reasons given while deciding this ground in Interest Tax Appeal No.55/Ahd/2003, reject the assessee's ground and upheld the order of the CIT (Appeals) on this point."

5.1 It was submitted that conscious arguments were made by the learned advocates for the respective parties that the facts and circumstances of Pankti Polytex Private Limited and Pinnacle Project and Infrastructure Private Limited are the same and that a conscious statement has been made before the Tribunal that the facts are identical. It was submitted that no application has been made to the Tribunal for correcting any error nor has any question been raised of perversity in the findings recorded by the Tribunal. The attention of the court was invited to the decision of this court in the case of Asman Investment Limited v. Assistant Commissioner of Income Tax rendered on 28.2.2018 and 1.3.2018 in Tax Appeal No.154 of 2007, to submit that in the case arising out of the common order of the Tribunal from the proceedings relating to Pinnacle Project and Infrastructure Private Limited, all the three authorities as well as this court have held that the assessee is a financial company. The very objects have been considered. It was submitted that the Tribunal has passed a common order in the assessee's case in the matter of erstwhile Pinnacle Project and Infrastructure Private Limited as well as in the matter of erstwhile Pankti Polytax Private Limited, wherein it has been recorded that the facts of both the cases are similar, which is

essentially a finding of fact. It was submitted that the decision of the Tribunal in relation to Pinnacle Project and Infrastructure Private Limited has been tested by this court in the above referred decision whereby the appeal has been dismissed. It was submitted that, therefore, the said decision would squarely cover the present case and hence, for the reasons recorded in that decision; the present appeal is also required to be dismissed. It was submitted that in all, three authorities below have evaluated the evidence and there is no scope of any further debate. It was, accordingly, urged that the appeal being devoid of any merit, deserves to be dismissed.

6. Before advertng to the rival contentions, it may be germane to briefly refer to the facts of the case.

7. In response to the notice issued under section 10 of the Interest Tax Act for assessment year 1997-98, the assessee Pankti Polytex Private Limited (now merged with the appellant Asman Investment Limited) filed return of chargeable interest on 29.1.2002, declaring chargeable interest at nil. It was the case of the assessee that it is not chargeable to interest tax under the Act as it is not a credit institution as defined in section 2(5A) read with section 2(5B) of the Interest Tax Act; that the company would be an investment company if its gross total income consists mainly of income which is chargeable under the heads "Interest on Securities", "Income from House Property", "Capital Gains" and "Income from other sources"; that the assessee is not an investment company as its income is chargeable under the head 'business' and being income from dealing in shares and securities is and has been assessed as business income; the assessee is not an investment

company as it is holding investments worth Rs.55,99,366/- which is 3.76% of the total assets and the income not derived from investments is 1.42% of the total income; and that the assessee is trading in shares and securities and has been assessed under the head business income even in the income tax assessment. By an assessment order dated 28.11.2002 made under section 10 of the Interest Tax Act, the Assessing Officer, after referring to the objects of the company, has held that the nature of interest income clearly indicates that the company falls within the parameters laid down in section 2(5A) of the Interest Tax Act and held the assessee to be a finance company within the meaning of section 2(5B) of the Interest Tax Act and computed the chargeable interest at Rs.67,83,837/-.

8. The Commissioner (Appeals), after considering the assessment order and the submissions advanced on behalf of the assessee, noticed that the assessee had mainly relied upon the objects clause as mentioned in the Memorandum of Association in support of its claim that it is not a finance company and is not liable to interest. However, the Commissioner (Appeals) was of the view that the Memorandum of Association does not show the activity carried out by the assessee. What is to be seen is the income earned by the assessee during the year. The Commissioner (Appeals) found that it is not the case of the assessee that it has carried out any activity of project implementation as claimed on the basis of the Memorandum of Association. On the other hand, it was an admitted fact that the assessee had carried out the activity of investment and purchase and sale of shares and had earned huge interest income. The Commissioner (Appeals) was,

therefore, of the view that it cannot be denied that the assessee company is having mainly activities which are referred to in section 2(5B) of the Interest Tax Act. After considering these facts, the Commissioner (Appeals) did not find any justification for interfering with the order passed by the Assessing Officer and dismissed the appeal.

9. The Tribunal has passed a common order in two cases filed by the assessee on behalf of two erstwhile companies, namely, Pinnacle Project and Infrastructure Private Limited (55/Ahd/2003) and Pankti Polytex Pvt. Ltd. (56/Ahd/2003) because these two companies have merged with the assessee M/s. Asman Investments Limited. Before the Tribunal, the grounds raised on behalf of the appellant assessee was that the Commissioner (Appeals) failed to appreciate that the assessee company was incorporated with an object of carrying on manufacturing and trading of textile items which is evident from the name of the assessee company and it was not incorporated with the object of conducting finance business. That before concluding that the appellant is a finance company, the Commissioner (Appeals) ought to have appreciated the circumstances under which the activities that are held to be in the nature of finance business were carried out vis-à-vis the main object as well as business carried on in the past by the company. It was also contended that the assessee is not an investment company as mentioned in section 73 of the Income Tax Act, 1961. It may be noted that the same grounds were also raised in the appeal arising from the order passed by the Commissioner (Appeals) in the case of Pinnacle Project & Infrastructure Pvt. Ltd.

10. A perusal of the impugned order reveals that the same grounds were also raised in the appeal arising from the order passed by the Commissioner (Appeals) in the case of Pinnacle Project & Infrastructure Private Limited. In the case of Pinnacle Project and Infrastructure Private Limited, the objects of the company were:-

- (i) That the first main object of the assessee was to render consultancy and services in the field of projects, technologies, finance, capital market instruments;*
- (ii) To undertake activities relating to finance industrial projects and business activities, and also*
- (iii) To undertake all types of financing, finance/securities related activities.*

The contention of the assessee was that the main object is not finance and that the main object of the company was of mixed nature and if the proposition arrived at by the Tribunal in the case of *Kabra Investment Private Limited* is applied to the assessee's case, the assessee would not be covered and would not be liable to pay interest under the Interest Tax Act. It was further contended that in the previous year relevant to assessment year 1997-98, the assessee's purchases were to the tune of Rs.66,82,89,965/- as against which loans and advances given for earning interest were to the tune of Rs.21,79,10,600/-; the expenditure on account of interest paid was Rs.5,48,96,043/- for carrying on the business as against interest earned on loans and advances amounting to Rs.1,70,23,307/-; and that the sale proceeds during the course

of the assessee's business was to the tune of Rs.15,71,45,417/-. It was submitted that the above details show that the purchase/sales expenditure on account of interest for carrying on the business activity of financing and trading as well as interest earned therefrom being more the assessee's principal business should be considered for carrying on all the business are not of finance. Therefore, the principal business of the assessee was sale and purchase of shares and, therefore, the assessee was not liable to pay any interest tax.

11. The Tribunal considered the facts of Pinnacle Project and Infrastructure Private Limited and examined the objects of the said company and found that the company had three main objects as referred to hereinabove. The Tribunal was of the opinion that carrying on one or more activities relating to one or more objects cannot overshadow each other and each main object will retain its independent identity, purpose and existence; meaning thereby that if the assessee carries on consultancy as well as financing then both the objects being independent main objects, the assessee will be said to carry on principal business of consultancy on the one hand and principal business of financing on the other. The Tribunal, accordingly, did not accept the submissions of the assessee that the assessee's deployment of funds in business, that is, by way of purchase and expenditure for carrying on such business on account of interest being more than the funds deployed for loans and advances and earned therefrom the principal business should be considered as of "business nature".

12. Insofar as the present case namely, Asman Investment Limited (erstwhile Pankti Polytex Pvt. Ltd.) is concerned, the

Tribunal observed thus:

"26. Interest Tax Appeal No.56/Ahd/2003

26.1 So far as ground Nos. 1(a) & (b) are concerned, the learned counsel for the assessee having not pressed the same, are therefore, rejected as not pressed.

27. So far as issues involved in ground No.2(a) (b) & (c), the facts and circumstances in this case being same and similar to the facts and circumstances of the case in Interest Tax Appeal No.5/Ahd/2003 (supra) and the parties having advanced the same arguments and vehemently relied upon the same decisions, we are, for the reasons given while deciding this ground in Interest Tax Appeal No.55/Ahd/2003, reject the assessee's ground and upheld the order of the CIT (Appeals) on this point.

28. Similarly, ground Nos.4(a) & (b) are rejected for the reasons stated against ground Nos.3(a) & 3(b) of Interest Tax Appeal No.55/Ahd/2003 (supra)."

13. Thus, the Tribunal, upon perusal of the record of the case, has found as a matter of fact that the facts and circumstances in Interest Tax Appeal No.55/Ahd/2003 and the facts and circumstances of this case are similar and the parties had advanced the same arguments and, accordingly, for the reasons assigned in Interest Tax Appeal No.55/Ahd/2003 has also dismissed the appeal being Interest Tax Appeal No.56/Ahd/2003 from which the present appeal arises.

14. It is an admitted position that the assessee had challenged the common order dated 21.7.2007 passed by the Tribunal in Interest Tax Appeal No.55/Ahd/2003 in the matter of erstwhile Pinnacle Project and Infrastructure Private Limited, before this court in Tax Appeal No.154 of 2007. By a judgment and order dated 28.2.2018 and 1.3.2018, this court had

dismissed the said appeal by holding that the Tribunal had correctly held the assessee company to be a finance company. The court further held thus:-

21. xxx *The contention of the counsel for the assessee that not the objects of the company but its real activities during a financial year which should be used as a parameter to decide the status of the company, cannot be accepted. Firstly, his contention was that awaiting other projects, the company has parked its available funds in shares and stocks and yet further surplus was invested in fixed deposits. Accepting the contention as presented before us would lead to a situation where for the purpose of ascertaining whether a company is a financial company or not, its category from year to year would have to be examined ignoring the objects for which the company is incorporated. This, in turn, would mean for a particular year the company would be a financial company whereas during the later year, it may not fit the description. Clearly something that cannot be easily envisaged.*

22. *This brings us to the question whether the interest earned by the assessee company can still be taxed under the said Act. In this context, the contention of the counsel for the Revenue, we may recall that the interest was not earned by the company on any loan or advance made but was generated out of its deposits. We are conscious of a clear distinction between a loan or an advance and a deposit. This has been elaborately discussed by Delhi High Court in case of Visisth Chay Vypapar Ltd. (supra). Had adequate facts being brought on record, in this respect, we would have analyzed such material. However, this appears to be an argument raised for the first time. In fact, the stand of the assessee before the lower authorities was evidently different. We have reproduced the portion of the contention of the assessee before the Commissioner of Income Tax (Appeals), recorded by the Commissioner of Income Tax (Appeals). It was argued that the year under consideration was an initial year of the company. No good project was coming forth and therefore in order to avoid keeping the funds idle, the assessee had advanced money and earned interest income and also carried out activities in trading*

in shares and securities. Thus, clearly even according to the assessee, the interest was earned by advancing its funds. The case now put up before us that such investment was in the nature of a deposit and not by way of advance was never raised earlier. We do not dispute that the term "interest" defined under section 2(7) of the Act would mean interest on loans and advances and if therefore in a given case it is established that the interest earned by the assessee was not out of either loan or advance but through some other source, the interest tax would not apply to such interest. However, when no such factual dispute was raised, no material on record to hold contrary to what the assessee itself had contended before the Commissioner of Income Tax (Appeals), the contention of the counsel for the assessee must be rejected.

15. It may be pertinent to note that even in the present appeal no dispute has been raised that the facts and contentions in Interest Tax Appeal No.55/Ahd/2003 and Interest Tax Appeal No.56/Ahd/2003 were different or that the finding of the Tribunal that the facts and contentions in both the cases are similar is perverse to the record of the case. No question has been raised challenging the impugned order on the ground of perversity. Therefore, the finding recorded by the Tribunal that the facts and contentions in Interest Tax Appeal No.55/Ahd/2003 and Interest Tax Appeal No.56/Ahd/2003 are similar is essentially a finding of fact, which has not been challenged by the appellant.

16. From the facts noted hereinabove, it is evident that more or less similar contentions had been raised by the assessee before the Commissioner of Income Tax (Appeals). Therefore, considering the finding recorded by the Tribunal that the facts and contentions in the case of Interest Tax Appeal No.55/Ahd/2003 and Interest Tax Appeal No.56/Ahd/2003, are

more or less similar and the fact that in both the cases similar contentions were advanced by the assessee before the Commissioner (Appeals); the controversy involved in the present case would clearly stand covered by the decision of this court rendered on 28.2.2018 and 1.3.2018 in the case of Asman Investment Limited v. Assistant Commissioner of Income Tax in Tax Appeal No.154 of 2007. Under the circumstances, it is not necessary to deal with the facts and contentions in detail.

17. For the reasons recorded by this court in Asman Investment Limited v. Assistant Commissioner of Income Tax in Tax Appeal No.154 of 2007 (supra), the question is answered in the affirmative, that is, in favour of the revenue and against the appellant assessee. It is held that in the facts and under the circumstances of this case, the Income Tax Appellate Tribunal was right in law in holding that the appellant is liable to pay interest tax on the interest earned by it. The appeal, therefore, fails and is, accordingly, dismissed with no order as to costs.

THE HIGH COURT
OF GUJARAT

WEB COPY

(HARSHA DEVANI, J)

(SANGEETA K. VISHEN, J)

Z.G. SHAIKH