# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# ORDINARY ORIGINAL CIVIL JURISDICTION

## INCOME TAX APPEAL NO.1491 OF 2019
## (A.Y. 1989-1990)

CCIT(OSD)/Pr. Commissioner of Income Tax, Central – 2, R.No.1920, Air India Building, 19th Floor, Nariman Point, Mumbai – 400 021 ) ….Appellant

V/s.

Bhupendra Champaklal Dalal, PAN : AABPD3308H, Bhupen Chambers, Ground Floor, Dalal Street, Fort, Mumbai – 400 001 ) ….Respondent

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Mr. P. C. Chhotaray for appellant.
Ms. Dinkle Hariya a/w. Ms. Simoni Chauhan & Ms. Rashi Vyas for respondent.

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CORAM : K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 6th MARCH 2024

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.) :

1 By an order pronounced on 9th November 2016, the Income Tax Appellate Tribunal (ITAT) disposed five appeals, i.e., three appeals filed by assessee for Assessment Years 1987-1988, 1988-1989, 1989-1990 and two appeals filed by Revenue for Assessment years 1988-1989 and 1989-1990.

2 Respondent/Assessee, an individual, was carrying on business as sole proprietor in the name and style of M/s B.C. Devidas. Assessee, who was a registered broker of Bombay Stock Exchange, was also engaged in trading in securities and shares. In addition to the profit, assessee also

received salary and commission from CIFCO Limited and Food and Inns Limited in which he was a director.

3 Following the allegation of involvement in multicrore securities transactions scam of nineties infamously known as Harshad Mehta Scam, Assessee got labelled as notified party on 2nd July 1992 under the Special Court's (TORTS) Act, 1992. Assessee was investigated by Central Bureau of Investigation in June 1992 followed by the search and seizure action conducted by the Income Tax Department on 16th October 1992.

4 The assessment was originally completed after the search operations. Both assessee as well as Revenue filed appeals before the ITAT. The ITAT restored the matters to the file of the Assessing Officer for *denovo* assessments with the directions that before passing any order, assessee shall be provided all materials on which reliance was being placed to make the additions. Consequently, the assessment order dated 31st December 2007 was passed under Section 143(3) read with Section 254 of the Income Tax Act 1961 (the Act), wherein, certain additions to the income were made. Aggrieved by the said order, assessee filed an appeal before Commissioner of Income Tax (Appeals) [CIT(A)]. The CIT(A) partly allowed the appeal. To the extent appeal was allowed by the CIT(A), Revenue preferred an appeal before the ITAT and to the extent it was not allowed by CIT(A), assessee preferred an appeal before the ITAT. By the impugned order, which

is a common order for the three assessment years mentioned earlier, one could say that ITAT partly allowed the contentions of assessee. So far as order under consideration is concerned, i.e., AY-1989-1990, the contentions of assessee were accepted and aggrieved by the same, the present appeal has been filed by the Revenue under Section 260A of the Act. The appeals filed by the Revenue for Assessment Year 1987-1988 and Assessment Year 1988-1989 in this Court under Section 260A of the Act have been dismissed.

5 The following three substantial questions of law have been proposed :

> *6.1. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in deleting the addition made on account of interest expenses incurred for non-business purposes by relying on the decision of the Jurisdictional High Court in the case of Reliance Utilities & Power Ltd. (313 ITR 340) without appreciating the fact that the decision relied upon is not applicable to the facts of the Assessee's case?*
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> *6.2. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in deleting the addition made under 68 of the Act by holding that the additions were made by the AO without proper examination of evidences furnished and proper reasoning; without appreciating the fact that the assessee had failed to meet all the three criteria i.e. identity, creditworthiness and genuineness of the transaction?*
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> *6.3. Whether, on the facts and in circumstances of the case and in law, the Hon'ble ITAT was right in deleting the addition made by the AO in his order under various heads totaling to Rs.10.89 crore by holding that the matter was reached finality by the order of CIT(A) which was not contested by the Revenue as such the same disallowance cannot be made while completing the set aside assessment, without appreciating the fact that there is no evidence in support of the claim of finality of the addition?*

6 The first issue relates to disallowance of interest expenses incurred for non business purposes. The Assessing Officer has disallowed interest of Rs.12,19,181/- paid to banks and others on the ground that assessee diverted interest bearing funds for giving interest free advances. During Assessment Year 1988-1989 also the Assessing Officer had disallowed a sum of Rs.8,99,443/- on same grounds. The ITAT came to a factual finding that assessee had huge interest free sundry creditors balance with him and the Assessing Officer has failed to recognize the same. The ITAT came to a finding, with which we agree, that when interest free funds and interest bearing funds are mixed together, they loose their respective identity and hence, the presumption should be that assessee has used interest free funds to give interest free advances. The ITAT in the impugned order has given a table of the position of funds and has concluded that even for Assessment Year 1989-1990 interest free funds available with assessee was sufficient to take care of interest free advances made. Therefore, the ITAT is justified in coming to the conclusion that the interest expenditure claimed by assessee was allowable.

It will be useful to reproduce paragraph 10 of the judgment of this Court in ***Commissioner of Income Tax V/s. Reliance Utilities & Power Ltd.***[1] which reads as under :

> *10. If there be interest free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest free funds available. In our*

1 2009 (178) taxmann.com 135 (Bombay)

> *opinion the Supreme Court in East India Pharmaceutical Works Ltd.'s case (supra) had the occasion to consider the decision of the Calcutta High Court in Woolcombers of India Ltd.'s case (supra) where a similar issue had arisen. Before the Supreme Court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in Woolcombers of India Ltd.'s case (supra) the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the overdraft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle therefore would be that if there are funds available both interest free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest free fund generated or available with the company, if the interest free funds were sufficient to meet the investments. In this case this presumption is established considering the finding of fact both by the CIT (Appeals) and ITAT.*
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> *(emphasis supplied)*

7 The second issue relates to the addition made under Section 68 of the Act in respect of cash credits. In the first round of proceedings, the Assessing Officer has added a sum of Rs.33,26,921/- under Section 68 of the Act and in the set aside proceedings, reduced the addition to Rs.20,20,367/-. The CIT(A) had also confirmed the same. The cash credit entries relating to six individuals have been added under Section 68 of the Act. The first relates to one Paresh Patel amounting to Rs.14,15,157/-. During the year under consideration, the aggregate amount of credit available in this account was Rs.15,53,929/-. The Assessing Officer found that the confirmation letter

referred to only Rs.1,38,772/- and the difference of Rs.14,15,157/- was considered as unexplained cash credit. The ITAT has accepted, and rightly so, the explanation of assessee that the confirmation letter for Rs.1,38,772/- only referred to the closing balance at the end of the year and the same was carried forward in the succeeding year. The ITAT has also come to a factual finding that Paresh Patel has confirmed the balance available on 31st March 1991 also and the amount was repaid on 14th June 1991.

Similarly with regard to cash credit of Rs.31,840/- from one Nitin Patel, there is a factual finding that there was a confirmation letter for the year ending 31st December 1986 and the ledger account furnished showed that the outstanding balance was repaid subsequently. The ITAT also has come to a factual finding that there was no reason to suspect this cash credit.

The next item related to cash credit of Rs.20,000/- from one Ranak Patel. The ITAT has come to a finding on facts that the creditor was having a opening balance of Rs.1,25,000/- and interest have been regularly paid and this creditor is continuing from the earlier years.

Similarly with regard to cash credit of Rs.1,22,555/- from one Sudha Patel, Rs.3,94,415/- from one V.C. Patel and Rs.30,400/- from one Vithalbhai Patel, the ITAT has come to a factual finding that the Assessing Officer has not properly examined the ledger account of assessee because

these parties also had share trading transactions and major portion of the credit has been repaid during the year and the Assessing Officer has accepted the debit entries of the trading transactions as genuine. Therefore, no case is made out for interference.

8 The third and final issue is in the appeal filed by the Revenue before the ITAT that relates to deletion of various additions aggregating to Rs.10,89,30,545/-. It is noted by the ITAT that various types of additions aggregating to this amount were made by the Assessing Officer in the original assessment proceedings and in the appeal filed by assessee, the CIT(A) deleted these additions. The Revenue did not prefer an appeal challenging the order of the CIT(A) and hence, the same has attained finality. The ITAT has noted only assessee went in appeal before ITAT challenging the additions confirmed by the CIT(A) and the ITAT has also restored those additions, which were confirmed by the CIT(A), to the file of the Assessing Officer for fresh examination. We would, therefore, agree with the ITAT that the Assessing Officer could not have assessed these various additions aggregating to Rs.10,89,30,545/- again since the CIT(A) had deleted the same in the first round of proceedings and the concerned matters have attained finality. We would also agree with the ITAT that the CIT(A) in the second round of proceedings correctly held that the Assessing Officer was not legally entitled to make these additions again in the second

round of proceedings. Therefore, on this issue no substantial question of law arise.

9 In the circumstances, we find no merit in this appeal.

10 Appeal dismissed.

(DR. NEELA GOKHALE, J.) (K. R. SHRIRAM, J.)