IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present:
The Hon'ble JUSTICE ANIRUDDHA BOSE

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

ITA No. 84 OF 2018
ITA No. 85 of 2018

Principal Commissioner of Income Tax, Kolkata-5, Kolkata
Vs.
M/s. West Bengal Housing Infrastructure development Corporation Limited

For the Appellant	:	Mr. Animesh Kanti Ghosal, Sr. Adv. Mr. P. Dudheria, Adv.
For the Respondent	:	Mr. J.P. Khaitan, Sr. Adv. Mr. A. Sengupta, Adv.
Heard on	:	11.07.2018, 13.07.2018 & 20.07.2018
Delivered on	:	09.08.2018

Moushumi Bhattacharya, J. :

This is an appeal filed by the Revenue against an order dated 2nd December 2015 passed by the Income Tax Appellate Tribunal in ITA No.1739/Kol/2013 relating to the assessment year 2005-2006. The following substantial questions of law were framed in the appeal which are set out below:

"(a) Whether on the facts and in the circumstances of the case the Learned Income Tax Appellate Tribunal, 'B' Bench Kolkata erred in law as well as in facts in holding that payment of interest on delayed delivery of plot was not in the nature of interest as defined in Section

2(28A) of the Income Tax Act, 1961 and therefore, the provision of Section 40(a)(ia) of the Income Tax Act, 1961 was not applicable?

(b) Whether the impugned order is bad, arbitrary, illegal, perverse and the same is nothing but a total non-application of mind of the Income Tax Appellate Tribunal, Kolkata and the same is liable to be set aside and/or quashed?"

The appellant (assessee, in this case) is a company engaged in the business of development of land, housing and infrastructural facilities in New Town Projects, Kolkata. The entire shares of the assessee are owned by the Government of West Bengal and all the directors of the assessee are nominated by the Government of West Bengal.

In the course of assessment proceedings for A.Y. 2005-06, a sum of Rs.9,71,17,977/- was debited in the profit and loss account of the assessee. This sum was claimed as deduction in computing the income of the assessee under the head *"income from business"*. The nature of this expenditure was explained by the assessee before the Assessing Officer (AO) as *"compensation for delay, delivery of plots"*. The explanation given was that as per the offer of allotment of plot of land developed by the assessee, the assessee is under an obligation to hand over physical possession of the plot to the allottees on payment of the entire cost of the land. If possession of handing over of the plot is delayed for more than six months from the scheduled date of possession, the assessee has to pay interest on instalments already paid by the allottee during such extended period at the prevailing fixed term deposit rates for similar period offered by the State Bank of India. The relevant clause in the allotment letter (Clause 7), which was the subject matter of

interpretation before the AO, the Commissioner as well as the Tribunal is set out below:

"7. Physical possession of the plot would be handed over only after full payment of the land price and registration of sale deed by the competent Authority. If, however, possession of plot is delayed by HIDCO by more than 6 (six) from the schedule date of possession the Corporation shall pay interest on instalments already paid by the allottee during such extended period at the prevailing fixed term deposit rates for similar period offered by the State Bank of India."

[The Clause, as reproduced by the Revenue in the appeal does not specify whether the stipulated time is six weeks, six months or six years.]

According to the assessee although the clause mentions the expression "interest", the actual nature of payment was in the nature of damages for delayed allotment of a plot and not in the nature of interest.

The above explanation of the assessee was not accepted by the AO who viewed the payment to be in the nature of payment of interest and held that by reason thereof, the assessee should have deducted tax at source at the time of payment or when the payment was credited to the account of the payee whichever is earlier under Section 194A of the Income Tax Act, 1961 (the Act). The AO further held that since the assessee failed to deduct tax at source on the amount, the claim of the assessee for deduction of the said sum cannot be allowed by reason of Section 40(a)(ia) of the Act re "amounts not deductible". The AO accordingly disallowed the claim for deduction of the assessee for a sum of Rs.9,71,17,977/-.

The above order was confirmed by the Commissioner of Income Tax (Appeals) and the assessee's appeal was dismissed.

Before the Tribunal in appeal, the assessee raised two grounds which are:-

"1. That the Commissioner of Income-Tax (Appeals) was wrong in confirming the Assessing Officer's action in disallowing Rs.9,71,17,977/- u/s 40(a)(ia) in relation to the compensation paid in the form of interest by the appellant to various allottees for delays occurred in delivering the respective plots.

2. That without prejudice to the contention raised in Ground No.1 above, the Commissioner of Income-Tax (Appeals) failed to appreciate the TDS Provisions under Section 194A had not been applicable to the payments made by the appellant."

Upon hearing the parties, the Tribunal held that the amount in question cannot be characterised as interest within the meaning of Section 194A of the Act and hence there was no obligation on the part of the assessee to deduct tax at source. The ITAT also held that consequently, no disallowance could have been made under Section 40(a)(ia) of the Act and directed that the disallowance made by the AO and sustained by the CIT(A) should be deleted.

Aggrieved by the above order, the revenue has preferred the instant appeal in this Court under Section 260A of the Act.

Mr. Ghosal, Counsel for the revenue submits that Section 2 (28A) of the Income Tax Act, 1961 defines "interest" as interest payable in any manner in respect of moneys borrowed or debt incurred (including 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. According to Mr. Ghosal, the amount in question falls under the definition of interest as

provided under the Act on which tax should have been deducted at source and consequently the claim of the assessee for deduction of the said amount could not have been allowed in view of Section 40(a)(ia) of the Act. Counsel relies on **Viswapriya Financial Services and Securities Limited Vs. Commissioner of Income Tax** reported in **(2002) 258 ITR 496**, where a Division Bench of the Madras High Court held that the expression interest would encompass moneys borrowed or debt incurred, deposits, claims and "other similar right or obligation" and further includes any service fee or other charge in respect of the moneys borrowed or debt incurred. Upon considering Section 2(28A), the Madras High Court was of the view that the statutory definition includes amounts which may not otherwise be regarded as interest for the purpose of the statute and even amounts payable in transactions where money has not been borrowed and debt has not been incurred are brought within the scope of the definition as in the case of a service fee paid in respect of a credit facility which has not been utilised. The relevant portion of the Madras High Court Judgment is set out below:-

"The definition of interest, after referring to the interest payable in any manner in respect of any moneys borrowed or debt incurred proceeds to include in the terms money borrowed or debt incurred, deposits, claims and "other similar right or obligation" and further includes any service fee or other charge in respect of the moneys borrowed or debt incurred which would include deposit, claim or other similar right or obligation, as also in respect of any credit facility which has not been utilised. This statutory definition regards amounts which may not otherwise be regarded as interest for the purpose of the statute. Even amounts payable in transactions where money has not been borrowed and debt has not been incurred are brought within the scope of the definition as in the case of a service fee paid in respect of a credit facility which has not been utilised. Even in cases where there is no relationship of debtor and creditor or borrower and lender, if payment is made in any manner in respect of

any moneys received as deposits or on money claims or rights or obligations incurred in relation to money, such payment is, by this statutory definition, regarded as interest.

The scheme under which the assessee induced investors to entrust their moneys to the assessee, under the very terms of the scheme, imposed an obligation on the assessee to repay the investor at the end of the period of 36 months, and also to ensure a monthly payment of 1.5 percent to the investor during that period. The mere fact that the assessee did not choose to characterise such payment as interest will not take such payment out of the ambit of the definition of "interest". The payment made by the assessee being a payment made in respect of an obligation incurred under the terms of the offer/memorandum, is an amount which we have to regard as interest falling within the scope of Section 2(28A). So far as the investor is concerned, the investor is to look to the assessee for repayment of the moneys. The obligation to repay is clearly an obligation which is akin to a claim or a deposit to which reference is made in the definition of interest. The amount paid to the investors therefore was clearly in the nature of interest and the assessee was required to comply with Section 194A of the Act. Section 201 would clearly apply by reason of the assessee's admitted failure to comply with Section 194A. Section 201(1A) being mandatory, that provision also would apply."

Counsel also relies on **Commissioner of Income Tax Vs. Dr. Sham Lal Narula** reported in **AIR 1963 Punjab 411**, where it was held that the amount paid in lieu of delayed payment of compensation to which a person is entitled on the acquisition of his land is in the nature of interest. The aforesaid case was concerned with the Land Acquisition Act, 1894 and on the amount of compensation payable for the period between the deprivation of possession and payment of compensation as a recompense for the delayed payment of the compensation, representing the value of the land; in other words, a quid pro quo for the loss of income which would have been earned

on the investment of the capital sum which has been replaced by the land acquired.

Mr. J.P. Khaitan, learned Counsel for the assessee/respondent submits that the case of the assessee, which has been accepted by the Tribunal, is that the amount payable in terms of the aforesaid clause is in the nature of damages and is not interest within the meaning of Section 2(28A) of the Income Tax Act 1961. Therefore, there was no obligation to deduct any income tax at source under Section 194A and consequently no disallowance can be made under Section 40(a)(ia). According to Counsel the amount payable by the assessee in terms of clause (7) of the letter of allotment is not interest within the meaning of Section 2(28A) since the contract in the instant case was for sale of land by the assessee to the allottee and the assessee did not borrow any money or incur any debt and no money was due by the assessee to the allottee. Hence there was no debtor-creditor relationship between the parties. Notably, the deposit referred to in the definition must be one which is refundable in money. In other words, the right must be to a sum of money and the obligation must also be in respect of a sum of money. The right of an allottee to obtain possession of land and the obligation of the assessee to deliver possession therefore does not fall within the purview of the definition.

He relies on **Commissioner of Income Tax Vs. H.P. Housing Board** reported in **(2012) 340 ITR 388 (HP)**, where on an almost identical set of facts, the question before the High Court of Himachal Pradesh was whether the amount paid by the H.P. Housing Board to the allottees could be

categorised as interest. Upon consideration of the matter, it was held that the amount paid by the assessee (H.P. Housing Board in that case) is not payment of interest but payment of damages to compensate the allottee for the delay in the construction of his house and the harassment caused to him. The reason provided for the aforesaid view is extracted below:-

"In the case in hand it stands proved that in case the houses were ready within the stipulated period the Board would not be liable to pay interest. When construction of a house is delayed there can be escalation in the cost of construction. The allottee loses the right to use the house and is deprived of the rental income from such house. He is also deprived of the right of living in his own house. In these circumstances, the amount which is paid by the Board is not payment of interest but, in our view, his payment of damages to compensate the allottee for the delay in the construction of his house/flat and the harassment caused to him. It may be true that this compensation has been calculated in terms of interest but this is because the parties by mutual agreement agreed to find out a suitable and convenient system of calculating the damages which would be uniform across the Board for all the allottees."

Counsel also relies on a three Judge Bench judgment of the Supreme Court in **The Central India Spinning and Weaving and Manufacturing Co. Limited, The Empress Mills, Nagpur Vs. The Municipal Committee, Wardha** reported in **AIR 1958 SC 341**, for the proposition that taxing statutes must be strictly construed and any doubt must be construed against the taxing authorities and in favour of the taxpayer. In this Commission, a passage from Crawford on Statutory constructions (1940 Edition) can be usefully quoted below:

"Statutes levying taxes or duties upon citizens will not be extended by implication beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon a close analogy, and all

questions of doubt will be resolved against the Government and in favour of the citizen, and because burdens are not to be imposed beyond what the statute expressly imparts."

We have considered the submissions of Counsel for the revenue and the assessee. The limited question which arises in this appeal is whether payment made by the assessee to the allottee by reason of allotment of plots of land beyond the scheduled period within which such allotment was to be made to the allottee, can be construed as interest as defined under Section 2 (28A) of the Act. At this point, Section 2(28A) of the Act is required to be set out:

"(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."

From the above definition it appears that the term 'interest' has been made entirely relatable to money borrowed or debt incurred and various gradations of rights and obligations arising from either of the two. The parenthesis in the section is in the nature of a qualification of the borrowing of money/incurring of debt and what it includes. The issue which falls for decision therefore is whether payment for delayed allotment of a plot of land by the Housing Board to an allottee will fall under the definition of 'interest' under section 2 (28A) of the Act.

The decision of the Himachal Pradesh High relied on by Mr Khaitan is on a very similar set of facts. In that case, the H.P. Housing Board floated a scheme under which flats were to be constructed by the Board/assessee from the money deposited by the allottees and which stipulated that the

assesse would have to pay interest to the allottees if the flats were not provided within a certain time frame. Upon there being a delay in the construction of flats, the assessee paid interest at the agreed rate to the allottees in terms of the letter of allotment. The AO viewed the payment to be interest under section 2(28A) which was set aside by the Commissioner who held that the payment made was in the nature of compensation for the delay in handing over possession of the flats. This view was affirmed by the Tribunal. Confirming the decision of the Tribunal, the High Court held that the money was paid on account of damages suffered by the allottee for delay in completion of the flats. Notably, in coming to its finding, the High Court considered the decision of the Madras High Court in Viswapriya – relied on by Mr Ghosal for the Revenue in the instant case- and held that the nature of the assessee's business in Viswapriya involved a return on investment made by the investor which was assured to be over and above a fixed percentage. The High Court in H.P.Housing Board also relied on a decision of the Hon'ble Supreme Court reported in (1997) 224 ITR 551 where the interest paid to persons whose land had been compulsorily acquired was held to be a revenue receipt (and not a capital receipt) and therefore not falling within the purview of section 194A. The Court also relied on **Ghaziabad Development Authority v. Dr N.K.Gupta** reported in **(2002) 258 ITR 337** where it was held that section 194A had no application to payment of interest made to the allottees for delayed completion of flats. Hence, although the Madras High Court decision in **Viswapriya** gives a more inclusive definition of the term 'interest', the Himachal Pradesh High Court decision is more persuasive having considered the former and resting on an

identical set of facts. Even if there were to be a doubt in the face of these two decisions, that doubt must be resolved in favour of the assessee tax-payer; Reference may be made to the Apex Court in **The Central India Spinning and Weaving; Empress Mills v Municipal Committee** reported in **AIR 1958 SC 341**. Besides agreeing with the reasons given by the Himachal Pradesh High Court for holding that payment for delayed allotment of flats cannot be brought under Section 2(28A) of the Act, the said decision is of a co-ordinate Bench and subsequent to the Madras High Court decision in **Viswapriya**, and hence has greater persuasive value bearing in mind the principle of comity of Courts.

We accordingly are of the view that the payment made by the assessee to the allottee was in terms of the agreement entered between them where the liability of the assessee would arise only if it failed to make the plots available within the stipulated time. Hence, the payment made under the relevant clause was purely contractual and as rightly held by the Tribunal, in the nature of compensation or damages for the loss caused to the allottee in the interregnum for being unable to utilise or possess the flat. The flavour of compensation becomes evident from the words used in the particular clause. The expression 'interest' used in Clause 7 (reproduced above) may be seen merely as a quantification of the liability of the assessee in terms of the percentage of interest payable by the State Bank of India. Since there is neither any borrowing of money nor incurring of debt on the part of the assessee, in the present factual scenario, interest as defined under section 2 (28A) of the Act can have no application to such payments. Consequently, there was no obligation on the part of the assessee to deduct tax at source

and consequently no disallowance could have been made under section 40 (a) (ia) of the Act.

In view of the above, we confirm the decision of the Tribunal dated 2nd December 2015.

I.T.A. No. 84 of 2018 is accordingly dismissed.

Since identical issues are involved in I.T.A. No. 85 of 2018, except that the said appeal relates to the Assessment Year 2006-07, the said appeal, namely ITA No.85 is also dismissed. There shall be no order as to costs.

(ANIRUDDHA BOSE, J.)

(**MOUSHUMI BHATTACHARYA, J.**)