

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 22.04.2016

Pronounced on: 22.07.2016

+ **REV. PET.308/2015 IN ITA 110/2005**

COMMISSIONER OF INCOME TAX DELHI Petitioner

Through : Sh. Rahul Chaudhary, Sr. Standing
Counsel with Sh. Anup Kesari, Advocate.

versus

M.M. AQUA TECHNOLOGIES LTD. Respondent

Through : Sh. Bishwajit Bhattacharyya, Sr.
Advocate with Sh. Chandrachur Bhattacharyya,
Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT

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1. This review petition by the assessee seeks recall of the judgment and order of this court, dated 18.05.2015, allowing the revenue's appeal under Section 263-A of the Income Tax Act ("the Act").

2. The brief facts are that the assessee claimed deduction to the tune of ₹ 2,84,71,384/- under Section 43B of the Act, in the computation of income. The interest was paid to the financial institutions during the assessment year in question by issuing non-convertible debentures to such institutions. The Assessing Officer (AO) had rejected the assessee's claim for deduction, holding that the issue of debentures for the interest payable does not amount to actual payment of interest and conditions of Section 43 B of the Act were,

therefore, not satisfied. The Commissioner of Income Tax (CIT), who allowed the appeal, accepted the assessee's contentions. The Income Tax Appellate Tribunal (ITAT) rejected the revenue's appeal- it, therefore, approached this court, under Section 263-A. This court had admitted the appeal and framed the following question of law, on 20-04-2005:

"Whether the funding of the interest amount by way of a term 'debenture' amounts to actual payment of as contemplated by Section 43B of the Income Tax Act, 1961?"

3. In the judgment, the court upheld the contentions of the revenue that it was only actual payment of amounts, which qualified for the benefit under Section 43-B. The assessee had succeeded before the CIT and the ITAT in saying that issuance of debenture amounted to payment, qualifying for the claim under Section 43-B. In so holding, the said two authorities held that the issue of debentures equivalent to the amount of outstanding interest amounted to actual payment of the interest liability and, therefore, it has to be allowed as a deduction. Reliance was placed on the judgment of the Supreme Court in the case of *J.B. Boda Co. (P.) Ltd v Central Board of Direct Taxes* 223 ITR 271; the assessee had successfully contended that in a case involving receipt as well as payment, a single entry for the net effect would suffice instead of a two way traffic of separate entries of receipt and payment. The assessee had in addition, in the appeal before this court, relied on *Standard Chartered Bank v Andhra Bank*, 2006 (6) SCC 94 which had held that a debenture amounted to an actionable claim. The revenue had relied on the decision reported in *Kalpna Lamps and Components Ltd. v. DCIT*, (2001) 255 ITR 491, where it was held that mere postponement of the liability to pay interest does not amount to discharge, whether actual or

constructive and, therefore, the conversion of the outstanding interest into a term loan liability, though with the consent of the lender, cannot be considered as a constructive discharge of the interest liability.

4. This court- in the judgment under review- negated the assessee's contentions. It firstly noted that by virtue of Explanation 3C to Section 43-B (d) there was no room left for doubt that actual payment of amounts "payable" was essential, in view of the clear terms (*"any interest referred to in that clause which has been converted into a loan or borrowing shall not be deemed to have been actually paid."*). The court also noticed that the explanation, as well as Explanation 3D were introduced by the Finance Act, 2006 *"with retrospective effect, from 01.04.1989 and 01.04.1997 respectively. Thus, these two explanations were not present at the time the impugned order was passed."* The Court held that:

"Explanation 3C, having retrospective effect with effect from 01.04.1989, would be applicable to the present case, as it relates to AY 1996-97. Explanation 3C squarely covers the issue raised in this appeal, as it negates the assessee's contention that interest which has been converted into a loan is deemed to be "actually paid". In light of the insertion of this explanation, which, as mentioned earlier, was not present at the time the impugned order was passed, the assessee cannot claim deduction under Section 43-B of the Act."

5. It is urged in the review, and contended by learned senior counsel Mr. Bishwajit Bhattacharyya, that there are glaring errors in the judgment of which review is sought. It is urged that this Court failed to attach due importance to the binding *dicta* in *Standard Chartered* (supra). It was submitted that the Court held that since there is no prescribed mode of transfer of debenture under the Transfer of Property Act and given that it is

an actionable claim, the issuance of debentures by the assessee amounted to discharge of its interest liability which qualified its claim under Section 43-B. Learned counsel placed great reliance on *Sunrise Associates vs Govt. of NCT of Delhi & Ors.* 2006 (5) SCC 603, where it was observed as follows:

“Consequently an actionable claim is movable property and 'goods' in the wider sense of the term but a sale of an actionable claim would not be subject to the sales tax laws.

*Distinct elements are deducible from the definition of 'actionable claim' in Section 3 of the Transfer of Property Act. An actionable claim is of course as its nomenclature suggests, only a claim. A claim might connote a demand, but in the context of the definition it is a right, albeit an incorporeal one. Every claim is not an actionable claim. It must be a claim either to a debt or to a beneficial interest in movable property. The beneficial interest is not the movable property itself, and may be existent, accruing, conditional or contingent. The movable property in which such beneficial interest is claimed, must not be in the possession of the claimant. An actionable claim is therefore an incorporeal right. That goods for the purposes of Sales Tax may be intangible and incorporeal has been held in *Tata Consultancy Services Vs. State of Andhra Pradesh* (2005) 1 SCC 308.*

*What then is the distinction between actionable claims and other goods on the sale of which sales tax may be levied? The Court in *Vikas Sales* (supra) said "when these licenses/scrips are being bought and sold freely in the market as goods and when they have a value of their own unrelated to the goods which can be imported thereunder, it is idle to contend that they are in the nature of actionable claims". It was assumed that actionable claims are not transferable for value and that that was the difference between 'actionable claims' and those other goods which are covered by the definition of 'goods' in the Sale of Goods Act, 1930 and the Sales Tax Laws. The assumption was fallacious and the conclusion in so far as it was based on*

this erroneous perception, equally wrong. The Transfer of Property Act, 1882, deals with transfer of actionable claims in Chapter VIII of that Act. Section 130 of the Transfer of Property Act provides that an actionable claim may be assigned for value. A right on the fulfillment of certain conditions to call for delivery of goods mentioned in a contract is an actionable claim and assignable under Section 130. (See Jaffer Meher Ali Vs. Budge-Budge Jute Mills Co.(1906) 33 Cal.702). There may also be assignments of an actionable claim dehors Section 130 (See Bharat Nidhi Ltd. Vs. Takhatmat (1969) 1 SCR 595). Negotiable Instruments, another species of actionable claim, are transferable under the Negotiable Instruments Act 1881. Transferability is therefore not the point of distinction between actionable claims and other goods which can be sold. The distinction lies in the definition of actionable claim. Therefore if a claim to the beneficial interest in movable property not in the vendee's possession is transferred, it is not a sale of goods for the purposes of the sales tax laws.

An actionable claim would include a right to recover insurance money or a partner's right to sue for an account of a dissolved partnership or the right to claim the benefit of a contract not coupled with any liability (see Union of India v Sarada Mills (1972) 2 SCC 877, 880). A claim for arrears of rent has also been held to be an actionable claim (State of Bihar v Maharajadhiraja Sir Kameshwar Singh <https://indiankanoon.org/doc/49043/> 1952 SCR 889, 910). A right to the credit in a provident fund account has also been held to an actionable claim (Official Trustee, Bengal v L. Chippendale AIR 1944 (Cal.) 335; Bhupati Mohan Das v Phanindra Chandra Chakravarthy & Anr AIR 1935 (Cal.) 756). In our opinion a sale of a lottery ticket also amounts to the transfer of an actionable claim.”

6. Mr. Bhattacharyya, learned senior counsel submitted that debentures are securities, by virtue of their definition and they are freely tradable. If the holder of a debenture so desires, it can secure the underlying amount; in fact

they are marketable securities. Therefore, this court fell into error in answering the question of law against the assessee and in favour of the revenue. He lastly faulted the judgment inasmuch as it proceeded to answer a question different from what was originally framed. It was highlighted that instead of deciding whether funding of interest liability through debenture qualified for benefit under Section 43-B, this court erroneously answered the following question:

“Whether the funding of the interest amount by way of a term loan amounts to actual payment as contemplated by Section 43-B of the Income-tax Act, 1961?”

7. The question which has to be decided is whether the decision of this court, which held that because of Explanation 3C to Section 43-B, any adjustment other than actual payment does not qualify for deduction under Section 43-B. As is evident from the discussion, the assessee’s review is premised on two major arguments, i.e. that the judgments of the Supreme Court have categorically held that debentures (issued in favour of the bank, in this case to discharge interest liability) amounted to payment and that such debentures, being actionable claims and securities, were to be deemed paid once issued.

8. As to the main submission of the assessee’s argument that issuance of debentures amounted to payment, it is noteworthy that the Supreme Court ruled as to what is the true nature and character of a debenture. In *R.D. Goyal v. Reliance Industries Ltd* 2003(1) SCC 81 it was held that:

“‘Share’ has been defined in Section 2(46) of the Companies Act to mean a share in the share capital of a company which in turn would mean that it would represent contribution of the shareholder towards the share capital of the company. On the other hand, a debenture is an instrument of debt executed by

the company acknowledging its receipt to repay the same at a specified rate and also carrying an interest. It is in sum and substance a certificate of loan or a bond evidencing the fact that the company is liable to pay a specified amount with interest and although the money raised by the debentures becomes a part of the company's capital structure yet it does not become a share capital. In any event, a debenture would not come within the purview of the definition of goods, inasmuch as, although the shares and stocks are included in the definition of goods but debentures are not."

Thus, though debentures are securities and are actionable claim the essential fact is that they are instruments of debt, by the company acknowledging its indebtedness to pay the amount specified. Does this amount to "payment" under Section 43-B. This court is of opinion that there is no question of any error in the judgment under review. The clear purport of the statute- i.e. Section 43-B (d) is that any amount payable towards interest liability would qualify for deduction; however Explanation 3C acts to insist on a rider:

"Explanation 3C.- For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause(d) of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or borrowing shall not be deemed to have been actually paid."

Quite possibly the assessee's arguments would have been convincing and the court might have been persuaded that actual payment of amounts is inessential and a composition of the kind involved in this case, would have sufficed- but for Explanation 3C. Now, this provision was inserted with retrospective effect and clearly operated for the period in question. The assessee does not dispute that. Furthermore, this court's judgment cited the rulings of other courts- Andhra Pradesh & Telangana and the Madhya

Pradesh High Courts- which held that actual payment is the *sine qua non* for applicability of Section 43-B. In the circumstances, the decisions in *Standard Chartered (supra)* and *Sunrise Associates (supra)*, which declared the nature and character of debentures, are of little avail.

9. In view of the foregoing discussion, this court is satisfied that there is no error apparent on the face of the record, nor is there any sufficient cause, for reviewing its judgment. The review petition has to fail and is consequently dismissed.

JULY 22, 2016



**S. RAVINDRA BHAT
(JUDGE)**

**R.K. GAUBA
(JUDGE)**