IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(STATUTORY ORIGINAL JURISDICTION)

INCOME TAX REFERNCE APPLICATION

Nos. 82 of 2002 & 180 of 2002.

IN THE MATTER OF:
An application under section 160(1) of the Income Tax Ordinance, 1984.

AND

IN THE MATTER OF :
INCOME TAX REFERENCE APPLICATION No. 82 of 2002:

The Commissioner of Taxes,
Taxes Zone-6,
Dhaka.
-Versus-
Transfin Trading Ltd.
52, Motijheel C/A, Dhaka

-And-

IN THE MATTER OF :
INCOME TAX REFERENCE APPLICATION No. 180 of 2002:

The Commissioner of Taxes,
Large Taxpayer Unit (LTU), Dhaka
-Versus-
East West Property Development Ltd.
195,Motijheel C.A. (14th floor), Dhaka

Mr. S. Rashed Jahangir, D.A.G
Mr. Titus Hillal Rema, A.A.G. with
Ms. Mahfuza Begum, A.A.G.
…. For the applicants in both the cases
No one appears for respondent in Income Tax Reference Application No.82 of 2002
Mr. M.A. Noor, Advocate
…. For the respondent in Income Tax Reference Application No.180 of 2002

Present:
Ms. Justice Zinat Ara with
Mr. Justice Sheikh Hassan Arif
&
Mr. Justice J.N. Deb Choudhury

Heard on: 13.05.2015 and
Judgment on: 14.05.2015.

Sheikh Hassan Arif, J:

Since similar questions of law and facts are involved in the aforesaid two reference applications (which have been sent to this Full Bench by the Hon'ble Chief Justice for disposal), the same have been taken up together for hearing and are now being disposed of by this single judgment.

Background Facts:

Reference Application No.82 of 2002 has arisen out of an order dated 28.03.2001 passed by the Taxes Appellate Tribunal, Division Bench-2, Dhaka in Income Tax Appeal No. 3850 of 1999-2000 in relation to the assessment year 1997-98.

The background facts of this reference application are that the assessee-Transfin Trading Limited (hereinafter referred to as "the assessee") filed its income tax return for the assessment year 1997-98 before the Deputy Commissioner of Taxes, Companies Circle-18,Taxes Zone-6, Dhaka ("the DCT", in short) claiming deduction, amongst other expenses, of bank inertest on the borrowed fund at Tk. 18,94,460.00. The DCT issued notices under section 83(1) and 79 of the Income Tax Ordinance, 1984 on the assessee. Thereafter, upon hearing, the DCT found that the assessee had obtained bank loan of Tk. 3,84,53,914/-, but the assessee transferred an amount of Tk. 75,90,734/- one of the same to some persons and sister concern without interest and that too was not for business purpose of the assessee and as such the interest thereon are not allowable expenses. With such findings, the DCT disallowed expenses of Tk. 15,00,000/- out of the bank's interest paid by the assessee on the said loan. Being aggrieved,

the assessee filed an appeal, being আয়কর আপীল পত্র ৭৩/কোং-১৬/১৯৯৮-৯৯, before the Commissioner of Taxes (Appeals),Taxes Appeal Zone-2, Dhaka ("the Commissioner of Appeal", in short), whereupon the Commissioner of Appeal agreed in principle with the observations and decision of the DCT, but reduced disallowance from Tk. 15 lac to Tk.10 lac on the ground that the earlier disallowance was disproportionate to the amount of extra-business lending made by the assessee. The assessee then filed second appeal, being Income Tax Appeal No. 3850 of 1999-2000, before the Taxes Appellate Tribunal, Division Bench-2, Dhaka ("the Tribunal", in brief). Thereupon, the Tribunal, in view of the judgment passed by the High Court Division in Income Tax Reference Application Nos.179/2002, 134/2002, 137/2002, 136/2002, 135/2002 and 446/2003 (the Commissioner of Taxes Vs. Concord Engineers), allowed the said appeal and thereby treated the entire bank interests as deductible expenditure of the assessee. This has resulted in this reference application at the instance of the Commissioner of Taxes concerned.

Reference Application No.180 of 2002 has arisen out of an order dated 20.5.2001 passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka in Income Tax Appeal No. 4995 of 2000-2001 in relation to the assessment year 1997-98.

The facts, in brief, are that the assessee, East West Property Development Limited (hereinafter stated as "the assessee") submitted its income tax return for the assessment year 1997-98 before the Deputy Commissioner of Taxes ,Circle-4, Directorate of Intelligence & Investigation, Dhaka ("the DCT", hereinafter) claiming deduction, amongst other

expenses, of bank interest at Tk. 3,44,96,067/- on the bank loan obtained. The DCT found that the assessee had transferred an interest free loan of Tk.2,60,08,965/- to other companies (sister concern) and to a director and , as such, he disallowed proportionate interest of Tk. 44,00,941/- on the contention that if the assessee had not granted the aforesaid amount of loan to sister companies and a director, its expenses on account of interest would have decreased to that extent. Being aggrieved, the assessee filed Income Tax Appeal, being আয়কর আপীল পত্র ২৫/গোঃ ও তদন্ত সাঃ-৪/৯৯-২০০০, before the Commissioner of Taxes (Appeals), Taxes Appeal Zone-3, Dhaka ("the Commissioner of Appeal," in brief), whereupon the Commissioner of Appeal, agreeing with the view taken by the DCT, affirmed the said disallowances. The assessee then filed second appeal, being Income Tax Appeal No.4995 of 2000-2001, before the Taxes Appellate Tribunal, Division Bench-1, Dhaka ("the Tribunal"). The Tribunal, upon hearing, allowed the appeal and deleted the disallowance of bank interest on the loan advanced to the sister companies of the assessee, but not on the amount given to a director. This has resulted in the aforesaid income tax reference application at the instance of the Commissioner of Taxes concerned.

Questions initially framed:

Originally, the questions posed in Reference Application No.82 of 2002 for opinion by this court are as under:

> *"(i) Whether an expenditure, not incurred for the purpose of business of an assessee, is deductable in computing income from business of that assessee?*

(ii) Whether the expenditure incurred by the respondent on account of bank interest for the chunk of bank loan transferred to others is deductible under section 29(1)(iii) of Income Tax Ordinance,1984 from the income of the respondent ?"

The questions originally framed in Reference Application No.180 of 2002 for answers of this court are as follows:

"(i) Whether an expenditure, not incurred for the purpose of business of a company , is deductible in computing the income of that company for assessment to income tax ?

(ii) Whether the expenditures incurred by the assessee on account of bank interest for the fund borrowed to replenish the fund allowed to be used without any commercial expediency by its sister concerns is deductible under section 29(1)(iii) of Income Tax Ordinance 1984 for assessment of income tax?"

Earlier Division Bench:

Both the reference applications were taken up for hearing by a Division Bench comprising of her Lady-ship Ms. Justice Zinat Ara and his Lordship Mr. Justice J.B.M. Hassan. The said Bench, after hearing the parties, disagreed with the views adopted earlier by two different Division Benches of the High Court Division in ***Commissioner of Taxes vs. Titas Gas Transmission, 46 DLR-332*** and ***Concord Engineers vs. Commissioner of Taxes, 52 DLR-562*** and, accordingly, referred both the applications to the Hon'ble Chief Justice in view of the provisions under Chapter-VII of the

Supreme Court (High Court Division) Rules, 1973 vide order dated 07.02.2013. Thus, the reference applications have been sent to this Full Bench by the Hon'ble Chief Justice for disposal.

It may be noted that while sending the instant Reference Applications to the Hon'ble Chief Justice, their Lordships vide order dated 07.02.2013 framed a new question of law, namely-

> *"Whether an assessee is entitled to deduction of full bank interest on the loan obtained by the assessee for its own business but part of the borrowed capital/money was given to a sister company for the later's use without assessee's own business purpose as contemplated in section 29(1)(iii) of the Income Tax Ordinance,1984?"*

Before framing the above question, the said Division Bench considered the decisions of this Court in ***M/S. Carew & Co. Vs. Commissioner of Income Tax 20 DLR-318, Commissioner of Taxes Vs. Titas Gas Transmission 46 DLR-332*** and the case of ***Concord Engineers Vs. Commissioner of Taxes, 52 DLR-362*** ("**Carew and Co**," **Titas Gas**" and **Concord Engineers**" cases, in short). Upon discussing the facts and circumstances of those three cases in short, their Lordships disagreed with the decisions in **Titas Gas Case** and **Concord Engineers Case** and finally concluded that the ratio decided in the **Carew and Co.** case was the correct position of law in the field and as such the point of difference should be decided by a larger bench.

Submissions:

We have heard at length Mr. S. Rashed Jahangir, learned Deputy Attorney General, representing Commissioner of Taxes in both the matters and Mr. M.A.Noor, learned senior counsel, representing the respondent-East West Property Development Ltd in Income Tax Reference Application No. 180 of 2002. In the course of hearing, Mr. S. Rashed Jahangir, learned DAG, reiterated his submissions made earlier before the said Division Bench. He argues that since the loan was obtained by the assessee for the purpose of its own business, if any part of the same is transferred to any other entity or sister concern, it will not be entitled to get benefit of deductions of the interests paid on that part while calculating total income. In this regard, he relies on the proviso to Clause (iii) of sub-section (1) of Section 29 of the Income Tax Ordinance, 1984 ("the said Ordinance"). Learned DAG further argues that since their Lordships in **Titas Gas Case** and **Concord Engineers Case** did not consider the said proviso to Clause (iii) of sub-section (1) of Section 29, the ratio decided in those cases should not be the guiding principles of law for reaching a proper conclusion. According to him, since the decision in **Carew & Co. Case** was not placed before the said earlier Division Benches, the said Benches reached erroneous conclusion as regards the deduction of interests paid by the assessee on the part of loan obtained by it/him, though the said part was not used for its own business purpose.

Mr. M. A. Noor, learned senior counsel appearing on behalf of the assessee-Concord Engineers, on the other hand, submits that the issue of applicability of the proviso to Clause (iii) of sub-section (1) of Section 29

was earlier raised before the same Bench which referred this matters for the Full Bench while deciding similar applications (ITRA Nos. 179,134-137/2002 and 446/2003) between the same parties on the same issue, and in those applications the same Bench did not accept it as a relevant provision and, accordingly, reached a conclusion on the premise that the said proviso was not applicable. According to Mr. Noor, the same Bench, later on, referred these matters for Full Bench virtually holding that since the proviso to Clause-(iii) of Section 29(1) was not considered in **Titas Gas Case** and **Concord Engineers Case**, the said decisions suffered from legal impropriety. Mr. Noor further argues that in the facts and circumstances of the case it is very much clear that the proviso to Clause-(iii) of Section 29(1) was never an issue in those reference applications and it is not an issue in the instant reference applications as well inasmuch as that the same is not applicable at all. Referring to the decisions of this Court in **Titas Gas Case** as well as the **Concord Engineers Case**, Mr. Noor submits that since the proviso was not applicable in the facts and circumstances of those cases, it was not required by their Lordships in those Division Benches to consider the said proviso and as such, according to him, the ratio decided in those cases are still good law.

Observations and Findings of the Court:

For better understanding of the relevant provisions of law involved in the instant reference applications, let us just make a cursory glance at the main provisions of the said Ordinance. Charging of income tax on the assessee has been mandated under **Chapter IV** of the said Ordinance under the heading **'Charge of Income Tax'**. According to Section 16 under the said Chapter, income tax may be charged on the assessee in accordance with

the procedure as provided by the statutes enacted by the parliament. The subsequent Chapters of the said Ordinance elaborated the provisions as to how the income of an assessee has to be calculated and how the said income is to be reduced upon deducting allowable expenses of the assessee from the total income for taxation purpose. Accordingly, Section 20 provides seven heads of income being (a) Salaries, (b) Interest on securities, (c) Income from house property, (d) Agricultural income, (e) Income from business or profession, (f) Capital gains and (g) Income from other sources. In the instant reference applications, we are concerned with the **'income from business or profession'** which is dealt with under Sections 28 and 29. While Section 28 describes different categories of income from business or profession, Section 29 provides as to how some expenses are allowed to be deducted from those income in calculating the total income of the assessee for the purpose of assessment of tax.

Though the provisions under Section 29 are elaborate involving several issues, we are only concerned with Clause (iii) along with its proviso under sub-section (1) thereof. It appears that the said proviso to Clause (iii), which is the crux of dispute, is structured in a little bit complicated way. Sub-section (1) of Section 29 at first provides three clauses under it in almost same language and terms, though regarding different aspects. For better understanding of the structure of the said proviso to Clause (iii), we need to examine the similar provisos which have been used after Clause (i) and Clause-(ii) of the same sub-section (1) of Section 29 as it is necessary to understand the entire Clauses- (i), (ii) and (iii) along with the provisos to each of them for reaching a proper conclusion as to the correct interpretation of the said proviso to Clause-(iii). In view of above, the said

three Clauses, namely Clauses-(i), (ii) and (iii) along with their provisos under sub-section (1) of Section 29, are quoted below:

*"**29. Deductions from income from business or professions.-***

(1) In computing the income under the head " Income from business or profession", the following allowances and deductions shall be allowed, namely:-

(i) the amount of any rent paid for the premises in which the business or profession is carried on:

Provided that if a substantial part of the premises is used by the assessee as a dwelling-house, the amount shall be a proportionate part of the rent having regard to the proportionate annual value of the part so used;

(ii) the amount paid for the repair of the hired premises in which the business or profession is carried on if the assessee has undertaken to bear the cost of such repair;

Provided that if a substantial part of the premises is used by the assessee as a dwelling-house, the amount shall be a proportionate part of the sum paid for such repair having regard to the proportionate annual value of the part so used;

(iii) the amount of any interest paid or any profit shared with a bank run on Islamic principles in respect of capital borrowed for the purpose of the business or profession :

Provided that if any part of such capital relates to replenishing the cash or to any other asset transferred to a newly set up industrial undertaking or to an extension of an existing industrial undertaking <u>whose</u>

<u>income is exempted from payment of tax</u>, the amount shall be proportionate part of the interest so paid or the profit so shared having regard to the proportion of such capital so used:

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It appears from Clause-(i) of the said sub-section (1) that the Legislature allowed deduction of rent of an assessee paid for the premises in which the business or profession of the assessee is carried on. However, by the proviso to Clause-(i), that part of the said rent paid by the assessee has been excluded from such allowance which was used by the assessee not for the business purpose but for its/his dwelling house. By Clause-(ii), the same exercise has been done, namely that the cost of repair of the hired premises of the assessee has been allowed to be deducted from the total income except the part of the cost which has been spent for the repair of the dwelling part of the said premises. Interestingly, though Clause-(iii), as quoted above, provides for deduction of interest paid on the capital borrowed by the assessee for the purpose of the business or profession, the proviso to the said Clause-(ii) is a little bit more complicated than the previous two provisos discussed above. In other words, though the said proviso to Clause-(iii) used the same sentence style, the first part of the same mentioned three categories of uses of the said borrowed capital of the assessee, such as:—(a) the part relates to replenishing the cash or (b) the part relates to any other asset transferred to a newly setup industrial

undertaking or (c) the part relates to extension of an existing industrial undertaking. After mentioning the said three categories of uses, the Legislature qualified the use of said categories by inserting the words "whose income is exempted from payment of tax". Therefore, while enacting this proviso to Clause-(iii), the Legislature, though excluded the scope of allowance of deduction of interest on the borrowed capital in respect of three categories of uses, at the same time it qualified the said three categories by qualifying words "whose income is exempted from payment of tax". Thus, it is clear that, the said proviso excluded the benefit from the assessee for deduction of interest paid in respect of the said three categories of uses of the borrowed capital by transferring any part of it to an entity whose income is exempted from payment of tax. Only in such uses, the assessee is not entitled to allowance of deduction of interest paid on the borrowed capital. This being the apparent meaning of the proviso to Clause-(iii) of sub-section (1) of Section 29, we have no option but to agree with the submissions of Mr. M.A. Noor that this proviso does not have any application at all in the facts and circumstances of the present cases in-as-much as that it is not the case of anybody that the recipient entity, which got the transferred capital of the assessee, was an entity which was exempted from payment of tax.

It further appears that by enacting this proviso to Clause-(iii), the Legislature impliedly allowed an assessee to have the benefit of deduction of interests

even after transferring some parts, out of the capital borrowed by it for its business purposes, to another entity. The only restriction under which it is not entitled to get exemption is where the said part of capital is given to an entity in the above mentioned three categories of uses when the income of the said recipient entity is exempted from payment of tax. Therefore, we are unable to agree with the submissions of learned DAG that an assessee, upon borrowing capital for its own business purposes, will not get the benefit of deduction of interest once any part of the said capital is transferred to another entity. The basic requirement of law is that so long as the assessee is borrowing capital for the purpose of its business and paying interest there-on, he is entitled to get allowance of deduction for the said interest paid by him. The only exception is in respect the said categories of uses in favour of an entity whose income is exempted from payment of tax. In **Titas Gas case** and **Concord Engineers** case, two different Division Benches of the High Court Division have only confirmed this position of law, though without saying anything as regards the said proviso to Clause-(iii) of Section 29 (1). However, in giving interpretation to a relevant provision, the proviso, if any thereto, should also be interpreted. At least it should be said that the proviso is not relevant for deciding the case concerned.

In reaching above conclusion, we have also considered the decision of this Court in **Carew & Co. Case (20 DLR-318)**. In that case though a similar provision, namely Section 10(2) (Clause-iii) of the then Income Tax Act, 1922, was interpreted, the same was done in response to a different set of

questions as framed by the Pakistan Supreme Court. Again, though the facts involving the question no.1 in that income tax reference case are similar to our present facts, yet the question was whether the Darshana branch of the assessee Company could be regarded as an agent of the non-resident payee of the interest on the over-draft account from which accommodation was given to the said Darshana branch from Dhaka branch of the then Imperial Bank of India (State Bank of India). Therefore, the main issue was whether the Darshana branch of the assessee Carew and Co. could be regarded as an agent of the non-resident payee (State Bank of India) of the interest paid by the assessee within the purview of Section 43. Thus, the question no. 1 and the context in that reference case were totally different. Further, question no.2 was relating to the allowance of interest paid by the asessee on the loan availed through issuance of debentures held in Calcutta. This question and the context on which the same was decided were also different from the facts and circumstances of the cases before us in that the concerned taxable territory was Pakistan and the debentures issued to borrow money was in Calcutta. On the other hand, though it was held by the Court in answering the said second question that the capital borrowed must be a capital which was utilized for the purpose of the business of the assessee (see para-14, p-321), yet it is evident that the proviso to Clause-(iii) of sub-section (2) of Section 10 of the then Income Tax Act, 1922 was totally different from the proviso in question to Clause-(iii) of Section 29(1) of the Income Tax Ordinance, 1984. This being so, the ratio decided in **Carew and Co.** case having been decided on a different

context, different provisions and on different facts, the same is not applicable in the facts and circumstances of the instant reference applications.

Regard being had to the above discussions of law and facts, since admittedly the part of the borrowed capital in the instant applications have not been given to an entity which is exempted from payment of tax, our answer to the question as reframed by the said Division Bench by order dated 07.02.2013 is in the affirmative i.e. against the revenue.

The Registrar, Supreme Court of Bangladesh is directed to take steps under Section 161(2) of the Income Tax Ordinance, 1984.

(Sheikh Hassan Arif,J)

Zinat Ara,J:

I agree.

J.N. Deb Choudhury,J:

I agree.