V.M. Salgaocar And Bros. Pvt. Ltd. Etc. ... vs Commissioner Of Income Tax Etc on 10 April, 2000

Author: D.P. Wadhwa

Bench: D.P. Wadhwa, S.S. Mohammed Quadri

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           CASE NO.:
Appeal (civil)  657 of 1994

PETITIONER:
V.M. SALGAOCAR AND BROS. PVT. LTD. ETC. ETC.

RESPONDENT:
COMMISSIONER OF INCOME TAX  ETC.

DATE OF JUDGMENT: 10/04/2000

BENCH:
D.P. WADHWA & S.S. MOHAMMED QUADRI

JUDGMENT:
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JUDGMENT 2000 (2) SCR 1169 The Judgment of the Court was delivered by D.P. WADHWA, J. Civil Appeal No. 657 of 1994 is directed against the judgment dated February, 7, 1992 of the Division Bench of the Karnataka High Court (now reported as (1992) 198 ITR 738) delivered on Reference made to it by the Income Tax Appellate Tribunal ("Appellate Tribunal" for short) under Section 256(2) of the Income Tax Act, 1961 (for short, the 'Act'). Reference was at the instance of Revenue. Following questions arose for the determination of the High Court :

> (1) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in deleting addition of Rs. 5,21,241 made by the Income Tax Officer under section 40A(5) and sustained by the Commissioner of Income tax (Appeals)?
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> (2) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in holding that non-charging of interest on the debit balance in the running account of the directors would not constitute a perquisite?"
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> High Court answered both the questions in negative and in favour of the Revenue. The assessee, a Company, fell aggrieved and sought leave to appeal under Article 136 of the Constitution which was granted. In this case for the assessment year 1979-80, the Income-tax Officer had disallowed a sum of Rs. 5,21,241 being 15% of the amount standing to the debit of the directors in the books of the assessee company by applying the provisions of Section 40A(5) and Section 17(2) of the Act The Income-tax Officer found that the assessee, which was a company, was borrowing

large sums by paying interest @ 15 per cent per annum. This interest was claimed by the assessee as deductible expenditure. Income-tax Officer found that the directors of the assessee company were drawing amount from the company without paying interest He, therefore, held that when the company borrowed loans by paying 15 per cent interest and it advanced loans to its directors without any interest, to the extent of the interest the company could have charged, a benefit was granted to the directors and hence the said amount of interest on the amount advanced to the directors was not to be deducted as an expenditure in view of Section 40A(5). On appeal filed by the assessee, the Commissioner of Income Tax (Appeals) upheld the orders of the Income-tax Officer. Assessee took the matter further in appeal before the Appellate Tribunal which deleted the additions made by the Income-tax Officer. Appellant Tribunal held that no evidence had been laid by the Revenue to show mat borrowed funds were directly diverted for the benefit of the directors and non-chargeable Interest on the debit balance in running account would not amount to providing perquisite. The Appellate Tribunal also observed that the Taxation Laws (Amendment) Act, 1984 for the first time provided that the difference in interest between the prescribed rate and that charged by an employer to the employee should be treated as perquisite. The stand of the Revenue was that as long as there was a benefit whether direct or indirect the provisions of Section 40A(5) were attracted. High Court in coming to its decision relied on two cases of the Madras High Court in Commissioner of Income Tax v. C. Kulandaivelu Konar, (1975) 100 ITR 629 and Addl. Commissioner of Income Tax v. Late A.K. Lakshmi, (1978) 113 ITR 368. Appellate Tribunal had also observed that non-

charging of interest on the debit balance in running account of the directors would not constitute perquisite and that if such a general proposition is accepted, the disallowance under Section 40A(S) would be on par with the disallowance under Section 36(l)(iii) which provision provides for deduction to be allowed in respect of the amount of interest on capital borrowed for the purposes of the business or profession.

In Civil Appeal Nos. 4012-13 of 1998 it is the revenue which is aggrieved. For the Assessment Years 1980-81 and 1981-82 in the case of the respondent Sri Shivanand v. Salgaocar, a director of M/s. V.M. Salgaocar & Brothers Pvt. Ltd. following question of law was referred to the High Court by the Appellate Tribunal under Section 256(1) of the Act :

> "Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the action of the A.A.C. who held that non-charging of interest could not be regarded as being a perquisite in the hands of me employee directors who were advanced interest-free loans by the company?"

High Court answered the question so referred in the affirmative in favour of the assessee and against the revenue with the following observ-ations :

"Counsel for the parties are agreed that the aforesaid question stands concluded against the revenue and in favour of the assessee by a judgment of this Court in ITRC No. 4/92 decided on 1st August, 1977 (C.I.T. v. M/s. V.M. Salgaocar & Brvs. Ltd., Vascoda gama, Goa). In the aforesaid case three questions had been referred to this Court for its opinion and question No. 1 of the said petition corresponds to the question referred in the present case. Their Lordships answered question No. 1 which corresponds to the question in the present case in the following terms :

"So far as the first question is concerned, it needs to be stated that this Court in I.T.R. No. 20 of 1989 (Reported as Commissioner of Income-Tax v. V.M. Salgaocar and Brothers Pvt. Ltd, (1992) 198 ITR 738), now being impugned before us in Civil Appeal No. 657 of 1994) disposed of on 7th February, 1992 in respect of this very assessee, and taken the view that deletion of a sum of Rs. 90,640 made by the Income-tax Officer would be correct. But the matter has not rested there. Thereafter, two decisions have been rendered by this Court in P. Krishna Murthy v. CIT & Anotlier, (224 ITR 183) and CIT v. M.K. Vaidya, (224 ITR 186) in which interest free loan or loan at a concessional rate given to employee for building house is not a perquisite. Once it is held to be not a perquisite for purpose of Section 40-A(5), it becomes clear that the deduction will have to be granted in favour of the assessee, because in an earlier occasion in ITRC No. 20/1989 this Court proceeded on the basis that it is a perquisite. We have no option but to following the later decision of this Court where the matter has been decided after considering the decision in ITRC No. 20/ 1989. Therefore, following the said two decisions, we answer the question in the affirmative and against the department"

Leave to appeal was granted by this Court to the revenue and this appeal was to be heard along with Civil Appeal No. 657 of 1994.

Assessee Shivanand V. Salgaocar was a director of M/s V.M. Salgaocar Brothers Pvt. Ltd. During the assessment years in question the company 1 advanced certain sums to the assessee without charging any interest thereon. Income-tax Officer held that non-charging of interest on the debit balance would amount to perquisite in the hands of the assessee within the meaning of Section 17(2) of the Act. He computed the value of the perquisite at the rate of 15% of the debit balance standing in the name of the assessee in the accounts of the company and brought the same to tax in the hands of the assessee. On appeal filed by the assessee, Commissioner of Income Tax (Appeals) relying on the decisions of the Appellate Tribunal in the case of the assessee himself for the earlier year held that non- charging of interest on the debit balance could not be regarded as perquisite in the hands of the assessee and deleted the addition made by the Income-tax Officer. Revenue took the matter to the Appellate Tribunal in appeal, who upheld the order of the Commissioner of Income Tax (Appeals) holding that no ground had been made out by the revenue to depart from the view taken by the Appellate Tribunal earlier. On the reference made to the High Court by the Appellate Tribunal at the instance of the revenue the same was dismissed by order dated December 12, 1997, which we have noted above.

There are two matters which would be of relevance while considering these appeals and which we note :

> (1) For the Assessment Year 1980-81 in the case of the company itself the Income-tax Officer found that there were debit balances in the accounts of three directors in the books of the company for which the company had not charged any interest from the directors. Income-tax Officer calculated the interest at the rate of 15% on the debit balance of the directors and came to the conclusion that this amounted to perquisite. By applying the provisions of Section 40A(5) he disallowed the amount of interest so calculated. Company had advanced various sums to its sister concerns. The balance outstanding as on the last date of the accountancy year was over Rs. 2.50 lakhs. Company raised borrowings on which it had paid interest.

Income-tax Officer disallowed the interest calculated at the rate of 15% per annum on this amount which was due from the sister concerns. This disallowance was made on the ground that the amount borrowed by the assessee company on which it had paid interest part of which was not being used for the purposes of its own business. On appeal by the company Commissioner of Income Tax (Appeals) deleted the additions made under Section 40A(5) as they stood at that relevant time could have no application unless the assessee had incurred an expenditure which had resulted in a benefit to the employee. In respect of the disallowance of interest on the amount advanced to sister concerns Commissioner of Income Tax (Appeals) taking into consideration the fact that no finding had been given by the Income-tax Officer that the amount borrowed had not been used for business purposes and considering that assessee had substantial funds on which it had not paid any interest deleted that addition as well. On appeal the Appellate Tribunal following its decision in the earlier years, rejected the appeal of the revenue. Revenue then took the matter to the High Court on reference under Section 256(1) of the Act. Following three questions were referred to the High Court :-

> "(1) whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the order of the Commissioner (Appeals) who deleted the addition of Rs. 93, 640 made by the Income-tax Officer under Section 40A(5)?
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> (2) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in confirming the order of the CIT (Appeals) who deleted the disallowance of Rs. 39,11,054 out of interest payment?
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> (3) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the order of the CIT (Appeals) who held that the amount of Rs. 43,320 paid as compensation to agriculturist is allowable as revenue expenditure?"

High Court by order dated August 1, 1997 answered the first question in the affirmative in favour of the company relying on its two decisions in Commissioner of Income Tax v. U.K. Vaidya, (1997) 224 ITR 186 and P. Krishna Murthy v. Commissioner of Income Tax and Ann, (1997) 224 I'l'K 183.

Second and third questions were also answered in the affirmative in favour of the assessee holding that these questions were covered by its earlier decisions in IJRC No. 24/92.

Still aggrieved revenue came to this Court on appeal (C.A. No. 424 of 1999) on a certificate granted by the High Court under Section 261 of the Act. This Court by order dated January 25, 1999 dismissed the appeal just stating "The appeal is dismissed".

(2) Sections 17(2) and 40A of the Act were amended by the Taxation Laws (Amendment) Act, 1984. Sub-clause (vi)1 of clause (2) of section 17 of the Act, as inserted by the said Amendment Act of 1984, provides that where the employer has advanced any loan to the employee for the purpose of building a house or purchasing a site or a house and a site or for purchasing a motor car, and either no interest is charged by the employer on the amount of such loan or interest in charged at a rate lower than the rate of interest which the Central Government may, having regard to the rate of interest charged by it from its employees on loans for such purpose granted to them, specify in this behalf by notification in the Official Gazette, an amount calculated on the following basis will be regarded as "perquisite" received by the employee and charged to tax accordingly -

(a) in a case where such loan is advanced without charging any interest, the interest calculated in the prescribed manner on such loan at the rate so specified;

(b) in a case where such loan is advanced by charging interest at a rate lower than the rate so specified, the difference between the rate of interest calculated in prescribed manner on such loan at the rate so specified and the interest charged by the employer.

An amendment on similar lines was also made in section 40A2 of the said Act to provide that the amount of interest referred to in item (a) or item

1. (vi)where the employer has advanced any loan to the employee for the purposes of building a house or purchasing a site or a house and a site or for purchasing a motor car, and either no interest is charged by the employer on the amount of such loan or interest is charged at a rate lower than the rate of interest which the Central Government may, having regard to the rate of interest charged by it from its employees on loans for such purpose granted to them, specify in this behalf by notification in the Official Gazette, an amount equal to, -

(a) in a case were such loan is advanced without charging any interest, the interest calculated in the prescribed manner on such loan at the rate so specified;

(b) in a case where such loan is advanced by charging interest at a rate lower than the rate so specified, the difference between the interest calculated in the prescribed manner on such loan at the rate so specified and the interest charged by the employer :

Provided that this sub-clause shall not apply in the case of -

(1) an employee of the Central Government or any State Government, or (2) an employee, not being an employee referred to in paragraph (a) or paragraph (b) of sub-clause (iii), whose income under the.head "Salaries", exclusive of the value of all benefits or amenities not provided for by way of monetary payment, does not exceed eighteen thousand rupees. (b), as the case may be, of sub-clause (vi) of section 17(2) of the said Act, shall be regarded as perquisite provided by the assessee to his employee for the purposes of section 40A(5) of the said Act. These amendments were intended to take effect from April 1, 1985. However, subsequently, the Finance Act, 1985, sought to omit both the aforesaid provisions with effect from the date of their insertion, namely, April 1, 1985. Clause 20 of the Memorandum explaining the provisions of the Finance Bill, 1985, stated mat, as a measure of relief to salaried taxpayers, the Bill seeks to omit the aforesaid provisions with effect from the date of its proposed insertion, namely, April 1, 1985. In consequence thereof, sub-clause (vi) of clause

(b) in Explanation 2 to section 40A(5) of the Income-tax Act, which defines the term "perqui-site" for the purposes of the said section to include the perquisite value represented by interest-free loans or loans at concessional rates of interest, was also deleted along with the deletion of sub-clause (vi) of clause (2) of section 17 of the said Act. Thus clause .(vi) was to be in operation from April 1, 1985. However, it was omitted by enacting the Finance Act, 1985. Thus, it is omitted from the very date of its insertion, i.e. April 1, 1985. Central Board of Direct Taxes (CBDT) issued Circular incorporating the objectives sought to be achieved by omission of clause (vi). It is Circular No. 421 dated June 12, 1985.

Earlier CBDT had issued a Circular No 387 dated October 16, 1984 explaining the objectives in inserting new sub-clause (vi) in Section 17(2). It may also be noted that after clause (vi) was inserted in Section 17(2) by the Amendment Act, 1984, Income Tax Rules were also amended by incorporating Rule 3(a) to work out enacted clause (vi). This Rule 3(a) was also deleted after the omission of clause (vi).

Different considerations apply when a special leave petition under Article 136 of the Constitution is simply dismissed by saying 'dismissed' and an appeal provided under Article 133 is dismissed also with the words 'the appeal is dismissed'. In the former case it has been laid by this Court that when special leave petition is dismissed this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought.

Amendment to Section 40-A - In Section 40-A of Income tax Act, in sub- section (S), in clause (b) of Explanations -

(a) in sub-clause (iv), the word "and" shall be omitted;

(b) in sub-clause (v), for the words "an annuity", the words "an annuity; and" shall be substituted;

(c) after sub-clause (v). the following sub-clause shall be inserted, namely -"(vi) the amount treated as a perquisite under sub- clause (vi) of clause (2) of Section 17." But what the court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non speaking order. Here the doctrine of merger applies. In that case, the Supreme Court upholds the decision of the High Court or of the Tribunal from which the appeal is provided under clause (3) of Article 133. This doctrine of merger does not apply in the case of dismissal of special leave petition under Article 136. When appeal is dismissed order of the High Court is merged with that of the Supreme Court. We quote the following paragraph from the judgment of this Court in the case of Supreme Court Employee's Welfare Association v. Union of India and Another, [1989] 4 SCC 187 :

> "22. It has been already noticed that the special leave petitions filed on behalf of the Union of India against the said judgments of the Delhi High Court were summarily dismissed by this Court. It is now a well settled principle of law that when a special leave petition is summarily dismissed under Article 136 of the Constitution, by such dismissal this Court does not lay down any law, as envisaged by Article 141 of the Constitution, as contended by the learned Attorney-General. In Indian Oil Corporation Ltd. v. State of Bihar, [1986] 4 SCC 146, it has been held by this Court that the dismissal of a special leave petition in limine by a non-speaking order does not justify any inference that, by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected by the Supreme Court. It has been further held that the effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that the Supreme Court had decided only that it was not a fit case where special leave petition should be granted, in Union of India v. All India Services Pensioners' Association, [1988] 2 SCC 580 this Court has given reasons for dismissing the special leave petition. When such reasons are given, the decision becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. It, therefore, follows that when no reason is given, but a special leave petition is dismissed simpliciter, it cannot be said that there has been a declaration of law by this Court under Article 141 of the Constitution." It was, therefore, contended that once this Court in Civil Appeal No. 424 of 1999 has dismissed the appeal it has upheld the order of the High Court in the case of Assessment Year 1980-81 and it cannot take a different view for the Assessment Year 1979-80. There appears to be subsistence in the submission of the assessee.
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> There has been difference of opinion among the High Courts on the question if non-charging of interest could be considered as perquisite under Section 17(2) or Section 40A(5). We may refer to some of the judgments of the High Courts.
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> In the case of CIT v. C. Kulandaivelu Konar, (1975) 100 ITR 629 (Mad.) the assessee who was the managing director deposited various moneys and was also withdrawing

> moneys from an account in his name. For the year ending on 31st March, 1963, there was an overdrawal to the extent of about Rs. 60,000. The company did not charge any interest on these overdrawings, though it was paying interest on its borrowings. The Income-tax Officer disallowed the interest-free advance to the director in the hands of the company. He added also the relevant amount as a perquisite in the hands of the assessee who was a director. When the matter came on appeal to the Tribunal it set aside the assessment and at the instance of the Commissioner the matter was brought to this court on reference. It was held that in order to bring a benefit or advantage within the provisions of Section 17(2)(iii), it must have a legal origin and since any unauthorised advantage taken by an employee without the authority of the employer would creat a legal obligation to restore such advantage, it would not amount to a benefit or advantage within the meaning of Section 17(2)(iii).
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> In Additional Commissioner of Income Tax v. Late A.K. Lakshmi and Others, (1978) 113 ITR 368 (Mad.) the question before the High Court was if the Appellate Tribunal was right in holding that a particular sum was not includible in the hands of the assessee as perquisite under the provisions of Section 17(2) of the Act. The case related to the assessment to Income-

tax of a director of a company. The Income Tax Officer considered the use of the amounts made available by the company free of any interest payable to the company as a benefit derived by the assessee without cost coming within the ambit of Section 17(2)(iii). The Income-tax Officer had also relied on Section 17(2)(iv). The Appellate Tribunal considered both the aspects and came to the conclusion that neither Section 17(2)(iii) nor Section 17(2)((iv) had any application and, therefore, held that the amounts in question for the relevant assessment years relating to the assessee could not be treated as a perquisite within the meaning of Section 17(2) of the Act. High Court referred to the definition of 'perquisite' as given in Section 17(2) and observed :

> "We are in agreement with what has been stated by the Tribunal that section 17(2)(iv) has no application to any of these cases. The question is whether Section 17(2)(iii) will be attracted or not, and that turns on the further question whether the assessee can be said to have derived any benefit free of cost or at concessional rate. The further condition that is necessary for the application of this section is that this benefit must be derived by the person mentioned in sub-clauses (a), (b) or (c). It is said that the sub-clause applicable is sub-clause (a) which states that the benefit may be granted by a company to an employee who is a director thereof, and the assessees concerned were directors and it is not disputed before us that sub-clause (a) would apply."

High Court then held :

> "The point to be considered is whether the receipt of the amounts by the assessee or the grant of the amounts by the company without any interest would be a receipt of any benefit without any cost. Here the question is whether the non-liability to pay

> any interest would be a benefit and whether what has been determined is the cost of that benefit. But this question again is not one free from difficulty, because in a way it is mingled with the further, question whether the section intends to restrict the discretion of the right of a company or of any other employer to give monies to its or his employees by charging interest or by charging only nominal interest or even without charging interest. We have no doubt that this section is not intended to restrict the discretion of the right of the company to advance amounts to its employees with or without interest or at any specified rate of interest. But the question would still arise whether granting amounts of the company for the personal use of its employees without charging interest would be the grant of any benefit. Our answer here must be in the affirmative. It is well known that it is difficult, if not impossible, to borrow amounts for one's own use without having any liability to pay interest. Putting it positively, ordinarily borrowing can be had only by incurring an obligation to pay interest. What would be the amount of interest will be unless there are statutory provisions governing the matter, a matter of agreement between the lender and the borrower. But, if either due to magnanimity or with a view to help an employee any amounts are advanced by an employer to an employee without an obligation to pay any interest, we have no hesitation in coming to the conclusion that the employee would be deriving a benefit in that he gets the use of the monies belonging to the company or any other employer, without having any liability to pay interest. The cost of the benefit would depend upon what is fair, just and reasonable, as envisaged by rule 3(g) of the income-tax Rules."

In CIT v. S.S.M. Lingappan, (1981) 129 ITR 597 (Mad.) the question before the High Court was if the free use of the company's car by the director was a perquisite or benefit within the meaning of Section 2(24) of the Act and assessable to income of the assessee. The assessee was a HUF. Karta of the HUF was the director of a company and had obtained me benefits in the shape of the use of the company's assets, viz., motor car, telephone, etc. In the assessment of the company there was a disallowance of the expenditure relating to the above assets under Section 40(c) of the Act on the ground that the expenditure was excessive and unreasonable having regard to the legiti-mate business needs of the company. In the case of the assessee the Income-tax Officer took into account the possible extent of the use of the company's assets, viz., motor car, telephone, etc. and evaluated the benefits obtained by the assessee under Section 2(24)(iv) of the Act. Assessee contended that the amounts so evaluated could not be perquisites in the hands of the assessee. High Court referred to its earlier decision in the case of CIT v. C. Kulandaivelu Konar, (1975) 100 ITR 629 and held that even if a benefit had been conferred on the director unilaterally without the aid of any agreement between the parties a benefit could be taxed as a perquisite under Section 17(2)(iii) and (iv).

In CIT v. Vazir Sultan Tobacco Co. Ltd., (1988) 173 ITR 290 (AP) one of the questions before the High Court was "Whether, on the facts and in the circumstances of the case, the difference between the concessional rate of interest and the prevailing market rate of interest on the loans advanced to the employees was not a perquisite under section 40A(5)". The assessee was a public limited company. In answer to the question the Court said :

"So far as question is concerned, what is happening is that again with a view to keep its employees happy and satisfied, the assessee has been given loans to them at concessional rate of interest. The loans are given to employees to build their own houses. If they build the houses and live in them themselves, the rate of interest is 6% and if they let out the houses, the interest will be charged at 9% per annum. The Department says that the difference between the concessional rate of interest and the prevailing market rate of interest should be disallowed under section 40A(5) of the Act. On this question too, the Tribunal, following its earlier decision, held in favour of the assessee. This question has to be answered with reference to the language employed in sub-section (5) of Section 40A of the Act. In so far as it is relevant, the provision reads thus :

"40A(5)(a) Where the assessee -

(i) incurs any expenditure which results directly or indi-rectly in the payment of any salary to an employee or a former employee, or

(ii) incurs any expenditure which results directly or indi-rectly in the provision of any perquisite (whether convertible into money or not) to an employee or incurs directly or indi-rectly any expenditure or is entitled to any allowance in respect of any assets of the assessee used by an employee either wholly or partly for his own purposes or benefit.

then, subject to the provisions of clause (b), so much of such expenditure or allowance as is in excess of the limit speci-fied in respect thereof in clause (c) shall not be allowed as a deduction...."

It would be evident from a perusal of sub-section (5) that it contemplates disallowance of certain expenditure incurred by the assessee which it claims as a deduction. Certain ceilings are fixed in the case of the such expenditure. The assessee's contention is that it has not incurred any expenditure by giving the loans to its employees at a concessional rate of interest and, therefore, the said provision has no application. On the other hand, learned standing counsel for the Revenue says that if this money had not been lent to the employees at a concessional rate of interest, it would have earned interest at a higher rate had it been put in fixed deposit in a bank. But, this argument involves importing a fiction into sub-section (5) of section 40A of the Act. We must assume that this money, if not lent to the employees, would have been put in a fixed deposit or would have been invested in some other profitable manner and then say that the difference amount should be disallowed. We do not think that the language of sub-section (5) of Section 40A of the Act provides for or permits such a course. Sub-section (5) applies where an assessee claims a certain deduction saying that he has spent that money in providing, directly or indirectly, either as salary to an employee or in the provision of perquisite to an employee. Only then do the ceilings prescribed in the said sub-section come into play. It is true that in some cases this facility may be abused. We know public corporations like banks lending money to their own employees at practically no interest, say for example, one or two per cent, interest per annum, whereas those very banks lend to people at rates of interest ranging from 13% to 19% per annum. But the remedy for that must lie

elsewhere, either in the proper control of the public corporations or in the amendment of the Income-tax Act, as the case may be. As the provision of law of section 40A(5) of the Act now stands, it is not possible to answer the said question in the manner suggested by the Department. Accordingly, we answer question in the affirmative, i.e., in favour of the assessee and against the Revenue."

In CIT v. P.R.S. Oberoi, (1990) 183 ITR 103 (Cal.) the question before the court was whether the Appellate Tribunal was justified in deleting certain amounts from the total income of the assessee on the ground that the provisions of Section 2(24)(iv) of the Act were not attracted. In this case the assessee was a director of the Hotel Oberoi, a private limited company. He was maintaining running account with the company. During the assessment years in question the Income-tax Officer found that the assessee had over- drawn amounts over lakhs of rupees from his account in the company. Income- tax Officer further found that the company did not charge any interest on the overdrawn amounts from the assessee. He, therefore, held that the assessee got a benefit from the company in the shape of getting funds without any obligation to pay interest thereon and as the assessee was a director of the company he invoked the provisions of Section 2(24)(iv) of the Act and calculated certain sums as the value of the aforesaid benefit being interest calculated @ 12% per annum on the overdrawn amounts. Income- tax Officer, therefore, taxed the aforesaid sums under the head "other sources". Appellate Tribunal found that there was nothing to show that the company borrowed any money for making advance to the assessee and/or paid any interest on the overdrawn amount which, but for such payment, would have been paid by the assessee. The Tribunal also found that there was arrangement between the assessee and the said company not to charge interest on either side in terms of resolution of the Board of Directors and that in the past the assessee had substantial credit balances with the company on which the company never paid interest to the assessee. It was therefore, held by the High Court that the interest free loans obtained by the assessee from the company were not benefits or perquisites within the meaning of Section 2(24)(iv) of the Act. High Court noticed the amendments made by the 1984 Amendment by insertion of sub-clause (vi) in Section 17(2) and its omission by the Finance Act, 1985. Section 2(24)(iv), which has been invoked in this case also used the expression "the value of any benefit or perquisite" which corresponds to the expression "the value of any benefit or amenity" appearing in the definition of "perquisite" as contained in Section 17(2)(iii). Section 40A(5), Explanation 2(b) also seeks to include within the expression "perquisite" the value of any benefit or amenity granted or provided free of cost or at a concessional rate to the employee by the assessee. High Court, therefore, said that the grant of loan without charging any interest could not be considered as a benefit or a perquisite within the meaning of Section 2(24)(iv) of the Act.

In Indian Oxygen Ltd. v. CIT, (1994) 210 ITR 274 (Cal.) following its earlier decision in CIT v. P.R.S. Oberoi, (1990) 183 ITR 103 it was held that the grant of interest-free loans by the assessee to its employees did not amount to perquisite, benefit or amenity whether for the purposes of Section 17(2) and/or Section 40A(5) of the Act. The question before the court was whether notional interest calculated on interest-free loans granted by the assessee company to its employee could be taken as perquisites for the purposes of disallowance under Section 40A(5) of the Act. High Court said that the Section was admittedly applicable only where the assessee incurred expendi-ture which resulted directly or indirectly in the payment of any salary or in the provisions of any perquisite (whether

convertible into money or not) to its employees. It was nobody's case that in providing interest-free loans by the assessee to its employees any expenditure had been incurred by the assessee-company. High Court in its judgment, which was impugned in Civil Appeal No. 424 of 1999 had relied upon the decision of its own High Court in the case of Commissioner of Income Tax v. U.K. Vaidya, (1997) 224 ITR 186 (Kar.) and in P. Krishna Murthy v. Commissioner of Income Tax & Anr., (1997) 224 ITR 183 (Kar.). In the case of M.K. Vaidya High Court sought to distinguish the judgment now impugned before us in Civil Appeal No. 657 of 1994 (Commissioner of Income Tax v. V.M. Salgaocar and Brothers Pvt. Ltd., (1992) 198 ITR 738 stating that that decision had no bearing on the facts of the case before it because the Bench was concerned with Sections 36 and 40A(5) of the Act and it was a case where having borrowed large sums of moneys by paying interest at the rate of 15% per annum a part was obviously drawn by the directors without compensating the assessee-company, without paying any interest and the Bench in that case was not concerned with Section 17(2). High Court then said :

> "On the facts of the said case, where the company borrowed large sums of money by paying interest at 15 per cent and claiming it to be deductible expenditure, it will be too much of a generosity to say that the company could at the same tune advance to its directors monies without collecting any interest from them. The observations of the Bench while construing section 40A(5) in the said case were in the context of the facts of the said case."

We are of the view that distinction was not correctly drawn. Amend-ment made by the 1984 Amending Act was both to Section 17(2) and Section 40A(5). In the impugned judgment reference in fact had been made to inclusion of sub-clause (vi) in clause (2) of Section 17. Moreover, High Court in the impugned judgment did not consider the amendments made by the Amending Act, 1984 on the ground "it is difficult to see how this amendment can have any bearing upon the interpretation on the then existing provisions of the Act". We do not think this approach was also correct. An amending provision can certainly give guidance to interpretation of the existing provisions. The judgments of the Madras High Court, which were relied upon by the High Court in the impugned judgment were for the period prior to the 1984 amendment and the Madras High Court had no occasion to consider the impact of the amendments to Section 17(2) and Section 40A(5) of the Act.

In Commissioner of Income Tax v. M.K. Vaidya,(l997) 224 ITR 188, the question before the High Court was : "Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in rejecting the Revenue's ground that the difference in interest rate between Government loans and that on the loan obtained by the assessee should be treated as perquisite?" High Court answered the question in affirmative in favour of the assessee. High Court said that it was never intended to treat the interest free loan advance for house building purposes as a "perquisite" under Section 17(2)(iii). In this case the assessee was an employee of the company which advanced him certain amounts as loan free of interest for the purpose of house building. In the course of assessment proceedings of the assessee, the Assessing Officer held that the interest free loan was a benefit which should be valued as a "perquisite" under Section 17(2). Revenue contended that the interest free loan was a benefit which should be treated as a perquisite under Section 17(2)(iii) and for the purpose of computation, Rule 3(2) was attracted and the principle

underlying clause (vi) as inserted in Section 17(2) by the Taxation Laws Amendment Act, 1984 could be looked at for the purpose. Section 17(2)(iii) reads as under :

> " 'perquisite' includes -
>
> (iii) the value of any benefit or amenity granted or provided free of cost or at concessional rate in any of the following cases -
>
> (a) by a company to an employee who is a director thereof;
>
> (b) by a company to an employee being a person who has a substantial interest in the company;
>
> (c) by any employer (including a company) to an employee to whom the provisions of paragraphs (a) and (b) of this sub-clause do not apply and whose income under the head 'Salaries', (whether due from or paid or allowed by, one or more employ-ers), exclusive of the value of all benefits or amenities not provided for by way of monetary payment, exceeds eighteen thousand rupees."

While clauses (a) and (b) cover the special cases of those employed by a company, clause (c) covers all categories of employees (Governmental and non-Governmental), including other categories of company employees, pro- vided their salaried income is above Rs. 18,000. There is no income limit to attract the persons covered by clauses (a) and (b). In the case of clause (c), those whose annual income under the head "Salaries" (as stated therein) is below Rs. 18,000 are not covered. High Court after referring to clause (vi) as inserted in Section 17(2) by the 1984 Amendment Act, its omission by the Finance Act, 1985 and the two circulars of the CBDT, said that two inferences are inevitable : (1) In the year 1984, while enacting the Taxation Laws (Amendment) Act, 1984, Parliament thought that section 17(2)(iii) did not cover the cases of loans granted to employees for house building purposes. (2) Clause (vi), which was inserted, was omitted again to grant tax relief to the salaried taxpayers. In other words, salaried taxpayers were not to be burdened with the tax by including the value of the interest free loan or loan at a concessional rate of interest granted for house building purposes, to an employee, by his employer.

In P. Krishna Murthy v. Commissioner of Income Tax & Anr, (1997) 224 ITR 183 (Kar.) the assessee challenged refusal of the Assessing Authority to grant him exemption from computing taxation income of a certain amount being given as interest subsidy. The company of which the assessee was an employee reimbursed the assessee the interest paid on loan taken by him for building purposes. High Court following its earlier decision in M..K. Vaidya's case (1997) 224 ITR 186 held that the order of the Assessing Authority insofar as it related to the inclusion of interest subsidy amount as taxable income of the assessee was wrong and the High Court set aside the same. High Court noticed that the Division Bench in the earlier case had held that the legislature never intended to treat the interest as "perquisite" under Section 17(2)(iii) of the Act.

We quote with approval the following passage from the judgment of the Calcutta High Court in P.R.S. Oberoi's case (183 ITR 103) :

> "It would, therefore, appear that if the loan granted to an employee without charging any interest or by charging interest at a concessional rate amounted to a benefit for the purposes of section 17(2)(iii) of the Act, there was no need for Parliament to introduce, by the Taxation Laws (Amendment) Act, 1984, the new sub-clause (vi) in Section 17(2) of the Act. The omission of the said clause by the Finance Act, 1985 with effect from the date of its insertion, namely, April 1,1985, was also made with a view to give relief to salaried taxpayers. Similarly, it would appear that there was no need for Parliament to initially amend Section 40A(5) to provide that the amount of interest referred to in item (a) or item (b), as the case may be, in sub-clause (vi) in Section 17(2) of the Income-tax Act shall be regarded as a "perquisite" provided by the employer to his employee and, thereaf-ter, to omit the aforesaid provision with effect from the date of its insertion by the Finance Act, 1985. It would also appear that, without a specific provision which was sought to be introduced by sub-clause (vi) in section 17(2) of the Act and also sub-clause (vi) of Explanation 2((b) to Section 40A(5) of the Act, the grant of loan to the employee without charging any interest did not amount to any perquisite or benefit for the purposes of section 17(2) and/or section 40A(5) of the Act The intention of the Legislature seems to be very clear that the expression "benefit" and/or "perquisite" did not include the enjoy-ment of loan or credit, free of interest or at a concessional rate. This aspect has been recognised by the statute itself and to bring such items in the net of taxation, the law was amended by the Taxation Laws (Amendment) Act, 1984. By this amendment, as already indicated, a new sub-clause (vi) was inrersted in Section 17(2) and, similarly, another sub-clause (vi) was inserted in clause (b) of Explanation 2 to Section 40A(5). The effect of these amendments, which were made effective from April 1, 1985, was to ensure treatment and taxation as perquisite of the value of an amount calculated on a particular basis in a case where an employee receives loan for certain prescribed purposes either free of interest or at a rate which was lower than the specified rate. However, subsequently, the Finance Act, 1985, omitted the aforesaid amendments made by the Taxation Laws (Amendment) Act, 1984, with effect from the date of its insertion, namely, April 1, 1985, with a view to provide relief to salaried taxpayers. The very fact that the statute had to be amended at the first instance to bring the said item within the purview of the expression "perquisite" and it later sought to delete the same from the date of its insertion clearly shows that Parliament does not intend to treat interest-free loan or loan at a concessional rate as any benefit or perquisite granted or provided by the lender-company to the director or employee, as the case may be.
>
> If the loan granted to an employee without charging any interest or by charging interest at a concessional rate amounts to a benefit for the purposes of Section 17(2)(iii) of the Act, there was no need for Parliament to introduce, by the Taxation Laws (Amendment Act, 1984, the new sub-clause

(vi) in Section 17(2) of the Act. The subsequent omission of the said sub-

clause by the Finance Act of 1985 with effect from the date of its proposed insertion was also made with a view to give relief to salaried tax-payers. It is to be noticed that Explanation 2(b) to section 40A(5) of the Act defines a perquisite to mean, inter alia, any benefit or amenity granted or provided free of cost or at a concessional rate to the employee by the assessee. If the loan granted to an employee being a director or a person who has a substantial interest in the company or a relative of a director without charging or interest or at a concessional rate of interest constituted any benefit or amenity within the meaning of Section 40A(5), Explanation 2(b)(iii), there was no need for Parliament to introduce the amend-ment in Explanation 2(b) of Section 40A(5) of Act by introducing sub- clause (vi). Sub-clause (vi) which was introduced in Explanation 2(b) of section 40A(5) of the Act included within the meaning of the expression "perquisite" the amount treated as perquisite under Section 17(2)(vi) which also was introduced by the same Taxation Laws (Amendment) Act, 1984. In other words, a loan granted to an employee who is a director or who has a substantial interest in the company without charging any interest or at a concessional rate of interest did not amount to a benefit or amenity falling within clause (b)(iii) of Explanation 2 to section 40A(5) of the Act. The amendment and the immediate deletion thereof manifest clearly the intention of Parliament.

It is, therefore, evident that, without a specific provision which was sought to be introduced by sub-clause (vi) in Section 17(2) of the Act and also the sub-clause (vi) of Explanation 2(b) to Section 40A(5) of the Act, the grant of loan to the employee without charging any interest does not amount to any benefit for the purposes of Section 17(2) of the Act. The omission of sub-clause (vi) in Section 17(2) and also sub-clause (vi) of Explanation 2(b) to Section 40A(5) of the Act from the date of its proposed insertion also was to give relief to salaried taxpayers so that granting of loan to an employee without charging any interest would not be treated as benefit for the purposes of Section 17(2) of the Act. Section 17(2) of the Act, by an inclusive definition, sought to include loans given by an employer to its employee for purchase of a building or a site or a site with building or for purchase of a motor car without charging any interest or at a concessional rate, as perquisite. The word "includes" is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, it is a cardinal rule of interpretation that if, by an inclusive definition, the meaning of the word is to be enlarged, it would receive a strict interpretation. It is also cardinal rule a construction of a fiscal statute that, even if two views are possible, the view which is favourable to the assessee must be accepted while construing the provisions of a taxing statute. For the reasons aforesaid, the non-charging of interest on the amount overdrawn in the relevant year cannot be treated as a benefit for the purposes of section 17(2)(iii) of the Act."

Taxation Laws Amendment Act, 1984 which amended Sections 17(2) and 40A(5) by inserting clause (vi) in both the sections and its subsequent repeal by the Finance Act, 1985 is significant. By the 1984 Amendment Act, Parliament wanted to carve out a particular exception from otherwise exclusionary clauses for the purpose of computation of income tax. This provided a clear direction to interpret the provisions of Sections 17(2) and 40A(5) before insertion of clause (vi). The circulars of CBDT were also provided as to how Revenue itself understood the effect of the amendments and

what was the law before the Amending Act, 1984. High Court in the impugned judgment could not have brushed aside the consideration of the Amending Act, 1984 and its subsequent repeal by the Finance Act, 1985 by terming them of no consequence. High Court of Karnataka in the case of Commissioner of Income Tax v. M.K. Vaidya, (1997) 224 ITR 186 and the Calcutta High Court in the case of P. Krishna Murthy v. Commissioner of Income Tax & Anr., (1997) 224 ITR 183 have correctly understood and applied the provisions of the Amendment Act, 1984 and that of Finance Act, 1985 while interpreting the provisions of Section 17(2) and 40A(5) of the Act. As noted above, the Appellate Tribunal in CA No. 657 of 1994 held that there was no evidence presented by the Revenue to show that the borrowed funds were directly diverted for the benefit of the Directors. This finding of the Appellate Tribunal did not find favour with the High Court which said that it would be well-nigh impossible to expect proof from the Revenue that the monies that were advanced to directors were monies that were borrowed monies. High Court said that ordinarily the funds borrowed by a company would fall within the hotchpot and intermingle with its own funds. High Court appears to have gone beyond the finding of the Appellate Tribunal which was not permissible. In the later cases, Karnataka High Court itself relied on the provisions of the Amendment Act, 1984 and its repeal by the Finance Act, 4985 to interpret the provisions of Sections 17(2) and 40A(5). Distinguishing features which the High Court in the case of Commissioner of Income Tax v. M.K. Vaidya, (1997) 224 ITR 186 pointed out with reference to the impugned judgment (1992) 198 ITR 738 appear to us to be rather obscure. Interpretation of law has to be uniform.

Thus having regard to the dismissal of the appeal of the revenue in Civil Appeal No. 424 of 1999 and state of law as interpreted by us, particularly, keeping in view the amendment by the Taxation Laws (Amend-ment) Act, 1984 and its repeal by the Finance Act, 1985 and the circulars of the CBDT we answer the questions in affirmative, i.e., in favour of the assessee.

Accordingly Civil Appeal No. 657 of 1994 is allowed and Civil Appeal Nos. 4012-13 of 1998 dismissed. There shall, however, be no order as to costs.